



UNITED STATES OF AMERICA

COMMISSION

JUN 22 2015

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MENTAL BRIEF

Respondent ECOM Direct, Inc. (ECOMP) hereby files its Supplemental

ECOMP's May 29, 2015 Order

Summary

As explained in ECOMP's Supplemental Brief, ECOMP's attorney

is available below to discuss

as ECOMP continues to satisfy the burden

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surveys, and none between them and Dr. Stewart's study. Without valid and reliable surveys confirming any set rate, let alone the alleged implied rate claim, there is no evidence capable of upsetting the ALJ's well-reasoned decision that there is no implied rate claim.

A. No surveys in the record are causal or experimental.

To constitute a valid causal or experimental survey, a survey must have: “a well-defined independent variable (or treatment); a well-defined and sensitive dependent variable (a measure of outcome); a treatment group (that receives the treatment); a control or comparison group (that does not receive the treatment); random assignment of respondents to the treatment and control groups; identical measures of outcome for both the treatment and control groups; comparability in the treatment and control groups on all factors other than the presence or absence of the treatment, and a representative sample of a relevant population.” Exh. A (Stewart Affidavit) at ¶ 1; *see Cumberland Packing Corp. v. Monsanto Co.*, 32 F. Supp. 2d 561, 574 (E.D.N.Y. 1999) (explaining that “appropriate use of controls is crucial” for a survey to be “causal”); *Wells Fargo & Co v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 769 (E.D. Mich. 2003) (citing 3 J. McCarthy on Trademarks & Unfair Competition § 32:187 (4th ed. 2003) (explaining that surveys must include proper controls to make “causal inferences”)).

None of the surveys of record possess those requisite elements. Exh. A at ¶ 2. That is because all surveys of record were “designed as descriptive surveys with the objective of determining how consumers understand the meaning of the term ‘biodegradable’ in general and in specific contexts.” Exh. A at ¶ 5. The Commission earlier acknowledged that the APCO and Synovate surveys “may be faulted for lacking control groups...” RX 195 at 121 n.409.

Dr. Frederick's "survey"¹ was not causal with appropriate test and control groups. He lacked, *inter alia*, a well-defined and sensitive measure of outcome. Exh. A at ¶ 11. That

“Valid inferences about the generalizability of the findings of an experiment” are only appropriate where the “experiment is representative of what actually transpires in the marketplace.” Exh. A at ¶ 4. See also E. Deborah Jay, Ten Truths of False Advertising Surveys, 103 THE TRADEMARK REPORTER 1116, 1148 (2013) (explaining that “surveys have been discredited for showing test group respondents an advertisement that has a different ‘graphic representation’ from the challenged advertisement or an advertisement that is not the same as the challenged advertisement.”); *P&F Prods. V. Procter & Gamble Co.*, 845 F. Supp. 984, 996 (S.D.N.Y. 1994), aff’d 45 F.3d 709 (2d Cir. 1995). “Dr. Frederick’s survey makes no effort to replicate the information characteristics of the environment in which the ECM product is sold.” Exh. A at ¶ 4. Frederick admitted that he never saw an actual product containing ECM’s logo and that the images he used were fabricated actual images of marketed products. Frederick, Tr. 1265–66; ALJFF ¶¶ 443–47, 453. They thus fail to provide a true assessment of what transpires in the marketplace.

Moreover, Dr. Frederick’s survey is not valid because “the responses obtained from survey participants [do] not provide for qualifications and contingencies that would change the very meaning of respondents’ answers.” at ¶ 7. Without qualifications and contingencies, a surveyor cannot discern respondents’ true beliefs. Example “1 year” is not the same as “maybe 1 year, it depends.” Id. at ¶ 31. However, respondents to Frederick’s survey were not permitted to add the “it depends” or “maybe” to their answers. Frederick summarily dismissed qualified answers, refusing to code answers like “I don’t know,” but coding responses like “1

minority of consumers believes “biodegradable” means the product will decompose within one year after customary disposal. Exh. A at ¶ 10.

B. Dr. Stewart’s Descriptive Survey Shows that Complaint Counsel Did Not Meet Their Burden

The relative value of descriptive surveys compared to causal or experimental surveys “is highly dependent on the state of existing knowledge and the presenting research question.” Exh. A at ¶ 19; *see also Johnson & Johnson * Merck Consumer Pharms. Co. v. Smithkline Beecham Corp.*, 960 F.2d 294, 300 (2d Cir. 1992). To meet their burden, Complaint Counsel had to present evidence demonstrating, through closed-ended questions with appropriate controls or open-ended questions allowing respondents to answer in their own words, that a significant minority of consumers interpret the unqualified claim “biodegradable” to mean complete decomposition within one year after customary disposal. *See In the Matter of Telebrands Corp.*, 140 F.T.C. 278, *318 (2005). Complaint Counsel presented no such evidence.

Before a causal survey is appropriate, the surveyor must first know “the current state of consumer’s knowledge, understanding, beliefs, attitudes, and behavior.” Exh. A at ¶ 19. At trial, Dr. Stewart explained that:

When you’re exploring something that’s relatively new and unexplored, it’s desirable not to impose too much structure. What one wants to do is to understand the phenomena, understand consumers’ perceptions, understand consumers’ behavior. And in order to do that, you really have to give license to consumers to express their opinion.

Stewart, Tr. 2510. “For example, if a descriptive survey indicates that the majority of consumers understand that the rate of biodegradability depends on materials and environmental conditions,

any measure of consumer belief that is ultimately employed in a causal survey must reflect those contingencies. To do otherwise results in a biased and invalid research design.” Exh. A at ¶ 12.

Moreover, there must be an accepted scientific standard (a scientifically accepted time within which biodegradation of plastics occurs) before causal survey data would be reliable in this case. Exh. A. at ¶ 12. There is none. “Without such a standard there is no basis for concluding that some number of respondents have been misled by a test stimulus, such as the word ‘biodegradable,’ and there can be no valid basis for comparing the responses of survey participants in the test condition with the responses of survey participants in the control condition.” *Id.* A causal survey is premature given the limited understanding of consumer beliefs, and the lack of a scientifically accepted time within which biodegradation of plastics should occur.

Dr. Stewart therefore chose not to perform a causal study, performing instead a survey designed “to understand the perceptions of consumers with respect to biodegradability, what the meaning of the term was, complete with any contingencies, dependencies, context effects that they might bring to bear.” Stewart, Tr. 2531; RX 856 at 15. Only with that information can a surveyor properly design a causal survey, because without that information, the surveyor cannot know what controls would be appropriate. Exh. A at ¶ 18.

That critical point notwithstanding, Complaint Counsel theorizes that the simple use of the word “biodegradable” connotes the implied rate claim. When attempting to prove that an implied claim exists, “courts have widely recognized the need for consumer surveys to adjust for so-called ‘background noise,’ *i.e.*, extrinsic factors, pre-existing beliefs, general confusion or other factors, other than the stimulus at issue, that contribute to a survey's results.” *Wells Fargo*

2588002, *25 (S.D.N.Y. Sept. 6, 2006); *Pfizer, Inc. v. Miles, Inc.*, 868 F. Supp. 437, 447 (D. Conn. 1994); *Procter & Gamble Co. v. Ultreo, Inc.*, 574 F. Supp. 2d 339, 351 (S.D.N.Y. 2008); *SmithKline Beecham Consumer Healthcare L.P. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 2001 WL 588846, at *2 (S.D.N.Y. June 1, 2001), *aff'd*, 19 Fed. Appx. 17 (2d Cir. 2001). The *Wells Fargo* decision explained that:

[A] survey design must include a control group in order to account for the effects of “noise.” The control group functions as a baseline and provides a measure of the degree to which respondents are likely to give an answer not as a result of the thing at issue, but because of other factors, such as the survey's questions, the survey's procedures or some other potential influence on a respondent's answer such as pre-existing beliefs. By adding an appropriate control group, the survey expert can test exactly the influence of the stimulus. Had [the expert] used a control group, he might have been able to make a “causal inference” that was clear and unambiguous.

Id. at 768–69 (internal citations and quotations omitted).

The lack of causal data here means Complaint Counsel has not proven the existence of

Commission recognizes that because of pre-existing bias, control advertisements should be used...”

percentage of consumers who believe that an unlabeled plastic would biodegrade within one year, the Commission cannot reach any conclusion as to how many consumers were affected by the unqualified ECM biodegradable claim. Absent an appropriate baseline number and an appropriate open-ended question, nothing connects the belief that a product will biodegrade within one year to ECM's unqualified biodegradable claim.

Dr. Frederick's survey did not include those questions (he asked only one question per respondent). Almost all of his questions assumed a bias, that the word "biodegradable" connoted a rate or time for biodegradation.³ In fact, when respondents tried to articulate an answer with contingencies, e.g., that "it depends," Dr. Frederick refused to code those answers. ALJFF ¶¶ 371, 393. Frederick only coded answers that included *both* a numeric specification and temporal unit. ALJFF ¶ 392. His coding rendered his entire survey closed-ended by limiting response options to those that included a numeric specification and a temporal unit. RX 856 at P. 10 (explaining that closed-ended questions are those where respondents are "given a limited number of options for response"). Under FTC precedent, Frederick's survey cannot be used to prove the existence of an implied claim.

The only survey question in the record that allowed respondents "to articulate the central claim" in their own words was number 1 in Dr. Stewart's survey: "When you hear the word biodegradable, what does that mean to you?" RX 605 at 7. Although that question did not elicit "causal data," it is the type routinely relied upon by the Commission to determine whether an implied claim exists. *Telebrands*, 140 F.T.C. at *318; *Stouffer*, 1118 F.T.C. at *807. Therefore,

³ Of the 63 questions Frederick asked, 52 included "how long," "how much time," "how many months," "how many years," "period of time," "took longer than," "amount of time," "how much longer," "how much more quickly," "faster," "take longer," "more quickly," or a temporal unit and a numeric specification. CCX 860 at 27-45. The remaining 11 asked variants of the seemingly irrelevant question, "Will this product break down into elements found in nature?" CCX 860 at 37-43.

Dr. Stewart's question 1 is entitled to great weight when determining whether the term "biodegradable" implied to a significant minority of reasonable consumers complete decomposition into elements found in nature within one year after customary disposal. Fully 82% of respondents thought "biodegradable"—the *only* word at issue here—was "something about disintegration, decomposition or breakdown." Exh. A at ¶ 15. Just three percent (3%) equated the term "biodegradable" with a rate of biodegradation. RX 605 at 7.⁴

Question 4 of Dr. Stewart's survey asked: "If something is degradable, how long do you think it would take for it to decompose or decay?" Exh. A at ¶ 15. That question cannot be used to prove the existence of an implied claim because it was not an open-ended question that "allow[ed] survey participants themselves to articulate the central claim of the ad." *Telebrands*, 140 F.T.C. at *318. That question required an answer with a length of time, even though most respondents had already stated that the word "biodegradable" did not connote a rate or time. That question contrasts with the open-ended questions the Commission relies upon to find an implied claim. *See Stouffer*, 1118 F.T.C. at *807 (giving weight to the question: "What point or points does the ad [] make about the product?"); 118 F.T.C. at *807; *Telebrands*, 140 F.T.C. at *448 ("what does the Ab Force commercial say, show, or imply about Ab Force?").

C. The degree of convergence among surveys in the record cannot be quantified

There is no precedent supporting the proposition that flawed surveys which share “similar” results can collectively validate results of any one of those flawed surveys. ALJID at 211–12. Dr. Frederick premises his convergence validity theory, for which there is no foundation in the statistics literature, on the assumption that his Google survey somehow cures the APCO and Synovate surveys.⁵ *Id.* at 211. “However, the Google survey is itself so seriously flawed that no valid conclusions can be drawn from it.” ALJID at 211; *see also* ALJID at § II.D.4.b.iv. As the ALJ explained, “it defies logic to contend that three flawed surveys can somehow rehabilitate one another and create probative weight that otherwise does not exist, on the ground that the results are ‘fairly similar.’” *Id.*

Dr. Stewart explains: “It is not possible to

results from the sharing of biased results: all

EXHIBIT A

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

In the Matter of

**ECM BioFilms, Inc.,
a corporation, also d/b/a
Enviroplastics International,**

Respondent.

Docket No. 9358

PUBLIC DOCUMENT

**DECLARATION OF DR. DAVID W. STEWART IN SUPPORT OF RESPONDENT'S
SUPPLEMENTAL BRIEF**

1. I am David W. Stewart and I have previously provided an expert report, deposition testimony, and trial testimony in the matter of the Federal Trade Commission v. ECM BioFilms, Inc. My prior expert report included statements of my qualifications and described and provided the results of a survey of consumers' understanding of the meaning of the term biodegradable. My earlier report also included a copy of my *curriculum vitae*.

2. I have been asked by counsel for ECM Biofilms to provide responses to the following three questions posed by the Federal Trade Commission. Below I present each question and immediately thereafter my response.

A. Can the survey evidence in the record be interpreted as causal or experimental surveys with appropriate test and control groups? Would it be appropriate to do so? If so, please explain what inferences can be drawn from such an interpretation in light of relevant legal authority and statistical methods. If not, please explain why not.

3. None of the surveys offered in the present matter may be properly interpreted as a causal or experimental survey with appropriate test and control groups. In order to constitute a valid causal or experimental survey, a survey must have the following elements: a well-defined independent variable (or treatment); a well-defined and sensitive dependent variable (a measure of outcome); a treatment group (that receives the treatment); a control or comparison group (that does not receive the treatment); random assignment of respondents to the treatment and control groups; identical measures of outcome for both the treatment and control groups; comparability in the treatment and control gr

plastics in particular may interact with the content of any label to produce the response of a survey participant. For example, a respondent might believe that all plastic biodegrades but that a plastic bag or container that is labeled as biodegradable will degrade more rapidly than a bag or container that is not so labeled. On the other hand, another respondent may believe that the color green is associated with environmentally friendly products and base their response on the color rather than the wording. Such interactions would be particularly problematic when survey respondents differ in their prior beliefs, as is clearly the case based on both the Frederick and Stewart data. The design of Dr. Frederick's survey allowed only one question per respondent and did not permit follow-up questions that would provide a means for examining such interaction effects. Similarly, valid inferences about the generalizability of the findings of an experiment are contingent on whether what is manipulated in the experiment is representative of what actually transpires in the marketplace.³ Dr. Frederick's survey makes no effort to replicate the information characteristics of the environment in which the ECM product is sold. There are threats to statistical conclusion validity and external validity, which include failure to use reliable measures and random heterogeneity among respondents.⁴ In the case of the Frederick survey, the only measures that are used are time estimates that are insensitive to respondents' understanding of the contingent nature of such time estimates. Measures that do not provide for

of the direction of causality, that is, whether the stimuli are responsible for any observed beliefs or whether pre-existing beliefs drive the observed results.

5. The APCO, Synovate, Frederick, and Stewart surveys were all designed as descriptive surveys with the objective of determining how consumers understand the meaning of the term “biodegradable” in general and in specific contexts. Such an objective is consistent with the use of descriptive surveys. Appropriately designed descriptive surveys can provide insights about how consumers understand and use terms in the context of marketplace decisions or other contexts.⁶

6. In the present matter the complainant appears to suggest that a portion of Professor Frederick’s survey represents a causal design. That conclusion is in error. The Frederick survey design suffers from all of the following problems: a failure to provide measures or stimuli that account for pre-existing beliefs, contingent responses, and heterogeneity among respondents, and a failure to provide representation of a reasonable facsimile of market conditions. Any effort to use any portion of the Frederick survey to make causal inferences is, thus, invalid. Complainant also appears to have some difficulty identifying exactly what constitutes the test condition. Professor Frederick originally compared responses of questions

Frederick's survey.

it reduces the denominator in the percentages that he reports, which has the effect of inflating the percentages he reports. Much like the APCO and Synovate surveys, Professor Frederick's survey(s) sought to force fit survey respondents into pre-determined categories while ignoring evidence that many respondents had more nuanced opinions or no opinion at all.

10. Finally, even assuming, arguendo, that a portion of Professor Frederick's survey can be interpreted as a causal design and suffers no other flaws, his results are inconsistent with the conclusion that the presence of the ECM logo and the term biodegradable on a plastic product creates any appreciable false or misleading beliefs. I

and control groups; identical measures of outcome for both the treatment and control groups; and comparability in the treatment and control groups on all factors other than the presence or absence of the treatment.

12. Like the APCO, Synovate, and Frederick surveys, my survey is not a causal or experimental survey. At this point, a causal study on the issues present in this litigation would be infeasible and improper. There is no generally accepted scientific standard establishing an expected time within which biodegradation of plastics will occur.¹⁴ Such a standard is a necessary precondition to the design of a valid causal or experimental survey with test and control groups. Without such a standard there is no basis for concluding that some number of respondents have been misled by a test stimulus, such as the word “biodegradable,” and there can be no valid basis for comparing the responses of survey participants in the test condition with the responses of survey participants in the control condition. Even if differences exist between respondents in a test and a control condition, the absence of any standard for determining what response(s) are indicative of a false belief, makes comparisons between the groups meaningless. Indeed, a descriptive survey would be a necessary step for informing the design of a causal study because a descriptive survey would provide a baseline for what consumers believe in the absence of any specific marketing communications. For example, if a descriptive survey indicates that the majority of consumers understand that the rate of biodegradability depends on materials and environmental conditions (as respondents to my survey revealed), any measure of consumer belief that is ultimately employed in a causal survey must reflect those contingencies. To do otherwise results in a biased and invalid research design.

13. The absence of a scientific standard against which to evaluate the truth or falsity of consumer beliefs, coupled with little history of prior research on public perception of

¹⁴Initial Decision at pp. 224–34.

15. In response to my question “when you hear the term ‘biodegradable’ what does that mean to you,” respondents offered a range of responses but 82% of the respondents mentioned something about disintegration, decomposition or breakdown. Twenty-six percent of the respondents mentioned something about safety but the majority of those also mentioned something about breaking down or decomposition.¹⁸ Thus there is a general understanding of biodegradability, at least at a conceptual level, that it means disintegration, decomposition or breakdown. Such understanding is important, because without it, subsequent answers to more specific questions must be treated with caution. When respondents in my survey were asked “if something is degradable, how long do you think it would take for it to decompose or decay?” this question elicited a very wide range of responses though the most common answer, offered by 39% of the respondents was that it depends on the material or type of product. No other single response was offered by more than 6% of the respondents. However, even among these other responses there are statements related to differences in materials or context: 6% stated that paper degrades faster, 6% stated that plastic does not degrade or takes a long time to degrade, 5% indicated that it depends on conditions or how

contrast, 24% of the respondents offered answers of one year or longer. Fourteen percent of the responses gave a time frame of five years or more and 7% answered ten or more years.

16. The survey results make very clear that the vast majority of consumers have an understanding that the process of biodegradability is highly varied and that it is not always, or even often, a rapid process. Consistent with this conclusion, when survey respondents were directly asked whether they thought there were differences in the amount of time it takes for different types of products to biodegrade, decompose or decay, 98% of the respondents answered “yes.” The reasons respondents gave for this belief included the type or size of material, the context, and the environment. These results offer unambiguous evidence that consumers’ common understanding of the meaning of biodegradability recognizes significant time variance in the decomposition process. There is little evidence that consumer understanding of the term biodegradability is restricted to decomposition processes that occur within one year or less. This is a very important finding because it demonstrates that any effort to arbitrarily establish a single, hard, date certain criterion for consumers’ understanding of a claim on biodegradability, as Dr. Frederick attempts to do, is inconsistent with consumer understanding and necessarily interjects bias. Thus, neither scientific evidence nor consumer perceptions are consistent with the criterion for deception apparently adopted by Dr. Frederick. That fact alone invalidates any conclusion(s)

demonstrate otherwise – 98% of respondents believe that there is variation in the amount of time required for a material to biodegrade.

17. In contrast to the results of the APCO, Synovate, and Frederick surveys, my survey offers a picture of knowledgeable consumers with very sophisticated views of what biodegradation means. Plastic is just one more ty

assertion is not the same as f

causal study.²¹ To prove that ECM, through the use of the word “biodegradable,” is making the implied claim, Complaint Counsel needed to offer a valid causal survey. No survey in the record is a valid causal survey. Consequently, no reliable evidence exists that ECM was responsible

claims made by ECM Biofilms. Thus, my survey makes clear that two of three criteria required for a finding of deception are not present: (1) a false belief that is (2) attributable to actions of the marketer.²⁴ At the same time, it is also quite clear based on the results of my survey that consumers understand that there is no absolute definition for biodegradability and no set rate or time period within which products can be expected to biodegrade.

22. As explained above, none of the surveys in this record can be interpreted as causal or experimental surveys. Furthermore, only my su

