

ANNOTATED PROPOSED ORDER

ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

ANNOTATED PROPOSED ORDER

- A. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, *i.e.*, simulate, the physical conditions found in landfills, where most trash is disposed.⁴
- B. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:
 - i. assure the entire product will (1) completely decompose into elements found in nature⁵ in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into elements found in nature at the rate and to the extent stated in the representation; and
 - ii. replicate, *i.e.*, simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

For example, results from ASTM (American Society for Testing and Materials) International D5511-12, *Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions*, or any prior version thereof, are not competent and reliable scientific evidence supporting unqualified claims, or claims of outcomes beyond the parameters and results of the actual test performed.⁶

Stipulated Order for Permanent Injunction and Civil Penalty Judgment, No. 13-cv-01510, at 5 (D.D.C. Oct. 1, 2013) (regarding “biodegradable” claims; the new order employed the same definition of “competent and reliable scientific evidence” as proposed here). The Commission employed similar variants in earlier orders. *Pure Bamboo, LLC*, No. C-4274, 2009 FTC LEXIS 231, *5-6 (Dec. 15, 2009) (consent) (bamboo fiber, environmentally friendly, degradable, or anti-microbial claims for textile products); *Kmart Corp.*, No. C-4263, 2009 FTC LEXIS 144, *3-4, (July 15, 2009) (consent) (degradable claims for paper products or disposable tableware products or packages); *Lentek Int’l, Inc.*, 135 F.T.C. 311, 340-42 (2003) (consent) (certain claims for air cleaning

ANNOTATED PROPOSED ORDER

5. “Customary disposal” means any disposal method whereby respondent’s products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.⁷
6. “Degradable” includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.⁸
7. “Landfill” means a municipal solid waste landfill that receives household waste. “Landfill” does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.⁹
8. “Means and instrumentalities” shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any product, package, or service, in or affecting commerce.¹⁰
9. Unless otherwise specified, “respondent” shall mean ECM BioFilms, Inc., a corporation, and its successors and assigns.

I.

IT IS ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service, in or affecting commerce, shall not represent, in any manner, directly or indirectly, expressly or by implication:

⁷ The evidence establishes that a majority of consumers understand that a plastic product labelled “biodegradable” will biodegrade in a landfill. FOF ¶ 311.

⁸ This definition matches the language in *The Green Guides*, 16 C.F.R. § 260.8(a).

⁹ Only 2% of landfills are permitted by the Environmental Protection Agency as “bioreactors.” FOF ¶ 434. Even accepting the testimony of ECM’s expert that 15%-20% of landfills take some measures to enhance biodegradation, the overwhelming majority of landfills do not take such steps. (Tolaymat, Tr. 338; Barlaz, Tr. 2200-2). Accordingly—even crediting ECM’s testimony—most products customarily disposed of in landfills will not go to landfills with bioreactor-like features.

¹⁰ See, e.g., *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922) (“That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law.”); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) (explaining that “with respect to those instances where petitioner did not contribute to the misleading act, it is settled that one who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act”) (quotations, alternations, and citations omitted); *FTC v. Five Star Auto Club, Inc.*, No. CIV-99-1693, 2000 U.S. Dist. LEXIS 10548, *9 (S.D.N.Y. June 9, 2000) (enjoining defendants “from providing to others the means and instrumentalities with which to make, expressly or by implication, orally or in writing, any false or misleading representation or omission of material fact”).

ANNOTATED PROPOSED ORDER

A. T

ANNOTATED PROPOSED ORDER

and such representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.¹⁴

- B. That any such product, package, or service offers any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.¹⁵

II.

IT IS FURTHER ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service in or affecting commerce, shall not provide to others the means and

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ANNOTATED PROPOSED ORDER

III.

IT IS FURTHER ORDERED that respondent shall, for five (5) years¹⁷ after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

- A. All advertisements, labeling, packaging and promotional materials containing the representations specified in Parts I and II;
- B. All materials that were relied upon in disseminating the representations specified in Parts I and II;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this order obtained pursuant to Part IV.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order.¹⁸ Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after ~~date of service~~ the effective date of this order,¹⁹ and to future

ANNOTATED PROPOSED ORDER

personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order,²⁰ including, but not limited to, a dissolution, assignment,

ANNOTATED PROPOSED ORDER

ANNOTATED PROPOSED ORDER

IN WITNESS WHEREOF, the Federal Trade Commission has issued this complaint against respondent and has caused it to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this _____ day of _____, 2014.

By the Commission.

Donald S. Clark
Secretary

SEAL

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2014, I caused a true and correct copy of the foregoing to be served as follows: