

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

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

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|                                      |   |                        |
|--------------------------------------|---|------------------------|
| <b>In the Matter of</b>              | ) |                        |
|                                      | ) |                        |
|                                      | ) | <b>Docket No. 9358</b> |
| <b>ECM BioFilms, Inc.,</b>           | ) |                        |
| <b>a corporation, also d/b/a</b>     | ) |                        |
| <b>Enviroplastics International,</b> | ) | <b>PUBLIC DOCUMENT</b> |
|                                      | ) |                        |
| <b>Respondent.</b>                   | ) |                        |
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**RECORD REFERENCES & ABBREVIATIONS**

- x ALJID or ID – Initial Decision of the Administrative Law Judge
- x ALJFF – The Administrative Law Judge’s Findings of Fact
- x CCX – Complaint Counsel’s Exhibit
- x RX – Respondent’s Exhibit
- x JX – Joint Exhibit
- x Tr. – Transcript of Testimony before the Administrative Law Judge
- x Dep. – Transcript of Deposition
- x CCPB—Complaint Counsel’s Pre-Trial Brief
- x CCB – Complaint Counsel’s Post-Trial Brief
- x CCRB – Complaint Counsel’s Post-Trial Reply Brief
- x CCFF – Complaint Counsel’s Proposed Findings of Fact
- x CCRRFF – Complaint Counsel’s Reply to Respondent’s Proposed Findings of Fact
- x CCOB – Complaint Counsel’s Opening Brief
- x CCAB – Complaint Counsel’s Answering Brief
- x RPB – Respondent’s Pre-Trial Brief
- x RB – Respondent’s Post-Trial Brief
- x RRB – Respondent’s Reply to Complaint Counsel’s Post-Trial Brief
- x RFF – Respondent’s Proposed Findings of Fact
- x RPCL – Respondent’s Proposed Conclusions of Law
- x RRCCFF – Respondent’s Reply to Complaint Counsel’s Proposed Findings of Fact
- x ROB – Respondent’s Opening Brief
- x RAB – Respondent’s Answering Brief

- x “ECM Plastic” – A plastic manufactured through heat molding to contain ECM’s proprietary additive dispersed equally throughout, which additive causes plastics to biodegrade
- x “Biodegradable Claim” - ECM’s express claim that ECM Plastic is biodegradable and/or that tests prove that ECM Plastic is biodegradable
- x “Implied One Year Claim” – Complaint Counsel’s charge that ECM’s claim that ECM

**I.**



Similarly, Complaint Counsel fail to rebut ECM's *ultra vires* argument. If Complaint Counsel's proposed order is adopted, it would effectively prevent

While express claims are presumed material, a respondent can counter that presumption

“





Biodegradable Claim that motivated sales, not the Rate Claim.<sup>4</sup> Indeed, as of 2013, ECM permanently discontinued making the Rate Claim. ALJFF ¶259.

**2. The Materiality of ECM's Unqualified "Biodegradable" Claim Is Irrelevant to the Materiality of ECM's "Rate Claim" 2013**





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concerning those files. RFF ¶30. Without requisite testimonial foundations, nothing beyond speculation exists to suggest that a customer was in fact influenced at all by the Rate Claim.

c) **That ECM Customers Conveyed the Naked Biodegradable Claim Without the Rate Claim Supports the Conclusion that Rate Was Immaterial**

Complaint Counsel argue that the Rate Claim was material because several ECM customers repeated the Rate Claim in commerce. CCAB at 10–12. But Complaint Counsel dispose

relative obscurity compared to the other claims.<sup>11</sup> Therefore, the presence of the Rate Claim in an extreme minority of ECM customer advertisements does not prove that the claim was material.

The fact that the vast majority of ECM customers removed the Rate Claim is affirmative evidence that the claim was not material. In those instances, *see e.g.*, RX 00–RX 34, ECM customers omitted the Rate Claim and advertised the intrinsic biodegradability of the products. If the Rate Claim was indeed “important,” the overwhelming majority of ECM customers would not have removed it from their marketing. CCAB at 14 (explaining that in order to be material, a claim must be “important”).

#### **4. Evidence Affirmatively Proves that the Rate Claim Was Immaterial**

In its Opening Brief, ECM provided nine separate lines of evidence proving the Rate Claim immaterial. ROB at 21–39. Complaint Counsel’s arguments against those lines of evidence are based on conjecture, void of record support.

First, Complaint Counsel misconstrue Dr. Stewart’s testimony. Dr. Stewart did not testify that there is a “lack of consumer consensus about biodegradability.” CCAB at 12. To the

CCX 500 (highlighting the fact that the company is “switch[ing] to Biodegradable Plastic Bags” with the Rate Claim ~~at (ing) 4~~ ~~nl((ods)-5( )TJ3.93 --0.00418.050.002 Tw at)-6((M)-5( cu) (M)-5e4(r)-1(t~~



at 767. Further, even if certain ECM customers “were not sophisticated in biodegradation,” CCAB at 14, we may not leap to the conclusion that they made their purchases based on the Rate Claim, particularly in the absence of any supporting evidence. Rather, those customers, all of whom are sophisticated business entities, carefully considered the evidence and circumstances (over the span of at least six months) before deciding to purchase the ECM additive and did not simply take ECM’s “word for it.” In short, ECM’s Plastic Company Purchasers were highly knowledgeable in the field of plastics and skeptical of biodegradability claims, even conducting independent testing of the products before purchase and use. *See* RB at Part III.F.2;

Complaint Counsel have ignored the argument that content in the Green Guides requiring claim qualification led ECM's customers to be concerned with the rate of biodegradation. ROB at 34–36. The Green Guides coerced industry, including ECM, to include a specific rate qualifier in advertising biodegradable plastics. 16 C.F.R. § 260.8. The Green Guides made clear that a product cannot be “biodegradable” unless it would decompose into elements found in nature within a “short period of time” after the product was discarded. ROB at 34–36. To be sure, a rate as broad as 9 months to 5 years is, in effect, no assurance of a specific rate at all. That, when combined with ECM's statements that ultimate rates for individual plastics were dependent on environmental conditions, reveal that the Plastic Company Purchaser had no basis to conclude that its specific plastic would biodegrade by any set time. Sinclair, Tr. 769; Sullivan, Tr. 711; RX 135. Indeed, the fact that there is no generally accepted ASTM method for identifying rates of biodegradation cuts against any presumption that the industry deemed rate scientifically discernible or material to a purchase. ALJFF ¶¶712–13.

#### **B. A Broad Remedial Order Is Not Warranted**

Competent and reliable scientific evidence from over twenty (20) anaerobic gas evolution tests prove that ECM's technology renders conventional plastics biodegradable. ALJFF ¶¶1043–1465. Well-qualified experts support that conclusion. ALJID at 246–85. The ALJ found all ECM claims listed in the Complaint fully substantiated except for the Rate Claim. ALJID at 245–86. The ALJ based that decision on competent and reliable scientific evidence, most of which Complaint Counsel's experts never evaluated.

The one claim found wanting—the Rate Claim—had no provable influence on purchases, and injured no consumers or customers. *Supra* at Part II.A; RB at 167–88; RRB at 134–57; ROB

at 18–39; ALJID at 300–01 at nn.58–59. As explained above, Dr. Stewart’s survey and nine separate lines of record evidence confirm the absence of materiality and thus compelled





¶¶1471, 1480–81. No chain of custody data or fact witness sponsor was presented to establish that ECM’s requirements for manufacture were satisfied. Dr. Michel had no knowledge of how the plastic he tested was manufactured. ALJFF ¶¶1472–74.

**2. Given the ALJ’s Findings, This Case Is Not in the Public Interest**

ECM’s Biodegradable Claims were supported by competent and reliable scientific evidence. ALJID at 262–85. The ALJ found, however, that ECM’s permanently discontinued Rate Claim was not substantiated. ALJID at 245–46. Concerning that claim, ECM explained that “mere deception” is alone not grounds to satisfy the public interest standard in an FTC proceeding. ROB at 39–43; *Klesner*, 280 U.S. at 27 (explaining that the “requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived”). Because no evidence demonstrates that Plastic Company Purchasers or consumers were injured by the rate claim, an order against ECM is not in the public interest.<sup>14</sup> Indeed, the ALJ found that Complaint Counsel had produced no evidence of injury and, on that basis, the ALJ held a broad remedial order unwarranted. ALJID at 300 (“the absence of any proof of such consumer harm in this case militates against a broad remedial order”).

Complaint Counsel argue that a remedy against ECM’s Biodegradable Claim is in the public interest. *See* CCAB at 25–27. The argument omits its essential predicate. Whether an action against ECM’s Biodegradable Claim is within the public interest is irrelevant because

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<sup>14</sup> Complaint Counsel offered no proposed findings of fact that establish any consumer injury. *See generally* CCFF. Complaint Counsel cited no reliable documentation showing consumers (or customers) actually paid more for ECM plastics. The exhibits Complaint Counsel cites on page 25 of their Answering Brief do not stand for the proposition cited and provide no reliable basis (other than rank speculation) to conclude that end-consumers paid more for ECM plastics. Finally, even if that evidence existed, there remains none that ECM customers paid more for ECM plastic because of the Rate Claim, as opposed to the Biodegradable Claim—a claim found supported by the ALJ.

ECM proved its Biodegradable Claim substantiated, supported by competent and reliable scientific evidence.

Moreover, Complaint Counsel ignore the fact that ECM permanently discontinued the Rate Claim in 2013, and no longer uses that claim in marketing. ALJFF ¶259. No facts or law support Complaint Counsel's alleged "high likelihood of actual deception" stemming from the discontinued advertising claim.<sup>15</sup>

Complaint Counsel also misunderstand the import of scientific testimony in public interest and materiality analysis. Landfill expert Dr. Morton Barlaz testified that rapidly degrading landfill waste contributes to greenhouse gas emissions, making it more deleterious to the environment than slowly degrading waste. RB at 90–91. While the ALJ found ECM's Rate Claim deceptive, the competent and reliable scientific evidence proved that ECM's plastics were biodegradable in landfills where untreated plastics were not, ALJID at 262–85, and that ECM plastics

whole record, the facts show that if consumers were fully informed about the science of biodegradation, they should logically prefer that the product take longer than a year to biodegrade so that methane emissions are reduced. Barlaz, Tr. 2285–87.

No evidence shows the Rate Claim

biodegradation claims, even when, as here,



CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2015, one original and twelve copies of Respondent ECM

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