UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

07 07 2015

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

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

COMPLAINT COUNSEL'S RESPONSE
TO ECM'S SUPPLEMENTAL BRIEF

In essence, ECM's response to the Commission's first two questions is that because no survey in the record is perfect, Complaint Counsel has not carried its burden of proving that it is more likely than not that ECM made the deceptive implied claim.

This argument fails for two reasons. First, as discussed below, Dr. Frederick's methodologically-sound experimental survey demonstrates that an unqualified biodegradable claim causes a significant minority of consumers to expect reasonably rapid breakdown. Second, Dr. Frederick's survey does not stand alone: as explained in our June 22, 2015 Answer to the Commission's Questions, intent evidence, natural experimental evidence, and observational evidence all support its conclusions.

Finally, in response to the Commission's last question, ECM characterizes convergent validity as Dr. Frederick's creation. To the contrary, survey researchers, courts, and academics routinely use this analytic tool.

ARGUMENT

I. ECM's Criticisms of the Experimental Evidence Are Unavailing.

Confronted with compelling experimental evidence, ECM attempts to dismiss Dr. Frederick's study by attacking its methodology.[1] Resp. Br. at 1-6. Each attack fails because, as Dr. Frederick explains in the attached declaration, it misstates key facts about his study or incorrectly assumes that anything short of perfection invalidates the entire study.[2]

A. Dr. Frederick Ruled Out Alternative Explanations.

First, ECM argues that Dr. Frederick's studies did not have "appropriate test and control

the claim: it caused at least a significant minority of consumers to perceive one-year or five-year breakdown claims. Id. ¶ 31.[3]

B. Dr. Frederick Reasonably Approximated the Marketplace.

Second, ECM argues that Dr. Frederick should have replicated the marketplace in which ECM products are sold. Resp. Br. at 4. Tellingly, ECM neglects to describe that environment—because there is no such readily-replicable marketplace. ECM tells customers that they can make a biodegradable claim in a variety of ways, on a variety of products—i.e., with ECM's logo, with any type of custom logo, in any color/font/design, on any kind of plastic product, sold in any environment. See CC App. Br. at 4-5 (describing how ECM makes and passes on claims). And ECM's customers do in fact make unqualified biodegradable claims in a wide variety of styles, products, and markets. See id. at 5 (citing examples of ECM customer products ranging from bags to cutlery to Frisbees bearing unqualified biodegradable claims); CC Answering Br. at 11 n. 9 (same). Because of this huge variation, precise marketplace replication is simply not possible.

Despite this unusual circumstance, Dr. Frederick was able to account for the variation by asking about ECM's logo (questions 3H-3K), other biodegradable logos (questions 3D-3G'), and biodegradable claims in text (questions 3A-3C). Frederick Decl. ¶ 8. In addition, he asked about the most common types of plastic items containing ECM's product: products, packages, bags, containers, and bottles. Id. Thus, although Dr. Frederick did not replicate every

[3] ECM argues that the styling of the claim (e.g., green font) may have had an effect on respondents distinct from the content of the claim ("biodegradable"). Resp. Br. at 3. Styling does matter. See infra at

imaginable biodegradable claim, his questions are sufficiently representative of the ECM marketplace to draw the key causal inference: biodegradable claims cause perception of short breakdown timeframes. Id. ¶¶ 8, 31.

Significantly,

effects of many common contingencies (e.g., disposal environment), and concluded that few had a substantial effect on respondents' beliefs about time. Frederick Opening Decl. ¶ 8.

Ultimately, ECM's argument is no more than a distraction from the central issue. Whether consumers have varied beliefs (an obvious point) is not at issue; what matters is whether a significant minority of consumers perceive short breakdown times for plastic advertised as biodegradable. Unlike Dr. Stewart, Dr. Frederick specifically asked this question and analyzed the verbatim responses for this specific information. Id. ¶ 25. Dr. Frederick's coding of responses for time was thus not only appropriate but, indeed, essential to answer the relevant question in this case. See id. ¶ 21-24; see also CC App. Br. at 24-26 (explaining the propriety and desirability of Dr. Frederick's "bright-line" rule for coding time-related answers).

D. Dr. Frederick's Questions Were Not Leading.

Fourth, ECM argues that questions 3J and 3K were "leading," because they stated that the illegible logo (or nearly illegible, depending on computer screen) bore the symbol "ECM biodegradable." Resp. Br. at 5. According to ECM, this clarification "over-emphasiz[ed] the term 'biodegradable.'" I l o. 6(M)1(,)2(0.262(is)1(c)6(la)6(r)5(if)5(ic)6(a)6(tio)2(n[((, de)d 1.92 0 m[(()3

breakdown—providing further evidence that the claim causes consumers to expect rapid breakdown. Id.[5]

E. Dr. Frederick's Causal Study Built on Descriptive Studies.

Next, ECM argues that "there must be an accepted scientific standard (a scientifically accepted time within which biodegradation of plastics occurs) before causal survey data would be reliable," because without a standard, "'there can be no valid basis'" for comparing responses to test and control questions. Resp. Br. at 7 (quoting Stewart Decl. ¶ 12). According to ECM, any causal study was "premature given the limited understanding of consumer beliefs . . . ." Id.

This argument also readily fails, for three reasons. First, and most obviously, an "accepted scientific standard" is neither legally relevant to understanding consumer perception, nor is it useful to interpreting causal data (which simply involves comparing conditions, Frederick Decl. ¶ 4, n. 12). Second, contrary to ECM's argument, the evidence does provide a well-developed understanding of consumers' beliefs about biodegradability. Dr. Frederick's is not the only study in evidence. Two observational studies—APCO and Synovate—preceded his study and provided the very baseline understanding of consumer beliefs that ECM now claims is lacking. Id. ¶ 30. Third, Dr. Frederick's causal study was not "premature." To the contrary, it was quite timely, as the most straightforward way to answer the central causal question in this case: what is the effect of a biodegradable claim on consumers' perception of breakdown? Id. The causal evidence (bolstered by intent and observational evidence) answers that question: the claim causes a substantial fraction to expect rapid breakdown.

[5] Even if (incorrectly) only questions 3H and 3I and their controls were considered, the deltas (15-19% for five years), still meet the "significant minority" threshold. And even if this series of questions were disregarded entirely, there is still abundant evidence that consumers perceive the one- (or five-) year claim. See Frederick Opening Decl. ¶ 11 (comparing 3D-3G' with 3N, which shows 34-41% deltas for one year and 49-58% deltas for five years); id. ¶ 15 (comparing Synovate #8 and 19, with delta of 54% for five years).

F. Questions About Time Were Necessary to Probe the Central Issue.

Finally, ECM argues that Dr. Frederick's questions "assumed a bias, that the word 'biodegradable' connoted a rate or time for biodegradation." Resp. Br. at 10. Asking about time did not bias the results. Frederick Decl. ¶¶ 11-15. As Complaint Counsel discussed in its appeal brief, biodegradation is a process,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2015, I caused a true and correct copy of the foregoing to be served as follows:

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ATTACHMENT A

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

DECLARATION OF DR. SHANE FREDERICK IN
SUPPORT OF COMPLAINT COUNSEL'S RESPONSE TO
RESPONDENT'S SUPPLEMENTAL BRIEF

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the following is true and correct:

1. I am over 18 years of age, and I am a citizen of the United States. I previously prepared a declaration in support of Complaint Counsel's responses to questions presented by the Commission.

2. I have personal knowledge of the facts set forth in this declaration, which are responsive to Respondent's Supplemental Brief and the Declaration of Dr. Stewart in Support of Respondent's Brief (Stewart Decl.).

I. SUMMARY

3. ECM and Dr. Stewart assail my reports with a jumble of unsubstantiated and illogical critiques. For the reasons I explain below, their strident criticisms have no merit. They do not undercut the validity of the experimental evidence, nor the

straightforwardly entails: that biodegradable claims made about things that are intuitively regarded as biodegradable (like plastic) can cause a substantial fraction of consumers to believe that those things will biodegrade in as little as a year.

II. FREDERICK'S GCS STUDY IS VALID EXPERIMENTAL RESEARCH.

a. Frederick's Study Meets All Criterion for Experimental Research

4. Dr. Stewart states that none of the surveys in the record satisfies the elements necessary for valid experimental surveys. Stewart Decl. ¶ 13. This is false. As I explained in my previous declaration, my GCS studies are classic experimental surveys. See, e.g., Frederick Opening Decl. ¶¶ 3-4. They unambiguously meet all of Dr. Stewart's listed criteria.

i. A well-defined independent variable (or treatment): The independent variables are clearly defined—they are the aspects of the question I manipulated, such as the term used to refer to the process (i.e., biodegrade, decompose, degrade), the choice of would vs. should, the presence or absence of various biodegradable claims, and so on.

ii. A well-defined and sensitive dependent variable (a measure of outcome): The dependent variable is also clearly defined—it is consumers' perceptions of the amount of time required for something to biodegrade, or their judgment of whether it would break down completely to elements found in nature.

iii. A treatment group (that receives the treatment) and a control or comparison group (that does not receive the treatment): The control group is obvious. For

most comparisons discussed, the control group is the group not exposed to a biodegradable claim and the treatment group is the group who was.[1]

iv. Random assignment of respondents to the treatment and control groups: The sample receiving each question was a random selection from the relevant population of respondents (Internet users on sites that host GSI).[2]

v. Identical measures of outcome for both the treatment and control groups: This criterion appears redundant with (iii), above, since "measures of outcome" is the same as dependent variable. And, of course, this was identical for those in the test condition and control condition.

vi. Comparable [illegible]

can see what did or did not vary between treatment and control conditions simply by reviewing the questions presented in my report

vii. A representative sample of a relevant population: The relevant population here is all Americans who might buy or influence the

This condition can be compared with other conditions to determine how various manipulations affect responses, including:

- the presence of this biodegradable label (compare with 3N)
- the specific type of label that was used (compare with 3D, 3E, & 3F)
- aspects of question wording (compare with 3G)
- specification of water bottle vs. generic product (compare with 3B) or package (compare with 3C)

Because the conditions are presented to random samples of the same population, they of course permit causal inferences. Use of single question experiments is extremely common, as can be verified by examining any journal in marketing, consumer behavior, judgment and decision making or experimental psychology. For instance, in a past study from ongoing research (Frederick, Read, Bartels & LeBoeuf, 2015) respondents were randomly assigned to receive one of two different versions of a single question, shown below:

Condition "A": Which would you prefer? (check one)
____$3400 in 1 month OR ____$3800 in 2 months

Condition "B": Which would you prefer? (check one)
____$3400 when you are 1 month older OR ____$3800 when you are 2 months older

We found that people are much more likely to choose the larger reward in Condition B than Condition A (83% vs. 57%, respectively). From this, we conclude that personal references to time reduces the degree to which people discount the future. No additional questions are needed to draw this conclusion (though additional studies can obviously provide further insight into the scope and limits of this effect). Of course, this personal example was just illustrative. There are literally thousands (quite possibly tens of thousands) of peer reviewed published articles using single question studies comparable to those I used in my GCS research.

7. GCS is not inherently limited to asking a single question. Had I thought it essential (or even especially useful), I could have created a multiple question survey.[4] Significantly, the absence of these unspecified (and unnecessary) questions does not invalidate the inferences that can be drawn by comparing the results between the various conditions that involved one question surveys.

c. The Studies Have Ecological Validity (i.e., they replicate actual marketplace conditions).

8. Dr. Stewart suggests that my studies are not "representative of what actually transpires in the marketplace."[5] Stewart Decl. ¶ 4. However, my understanding from Complaint Counsel is that ECM's customers made "biodegradable" advertising claims on a variety of products and in a variety of ways. It would not have been feasible to replicate every permutation of every biodegradable claim. However, along with testing the effects of biodegradable claims generally (questions (1A)-(1K); (3A)-(3C)), I used several versions of biodegradable logos (questions (3D)-(3G')), including, in some cases, ECM's logo specifically. Moreover, I asked about three of the most common types of plastic products using ECM's additive bags, containe

d. Frederick's Study Asked Appropriate Test and Control Questions

9. Dr. Stewart proposes a number of other alleged "threats" to the validity of the inferences that may be properly drawn from my experimental test.[7] None withstand scrutiny.

how long something will take to biodegrade when that something is specified, but those expectations are not influenced by an explicit claim that the product in question is biodegradable.

13. The first non-screening question from Dr. Stewart's survey asks: "When you hear the term biodegradable, what does that mean to you?" Dr. Stewart claims than only 3%[8] explicitly mention the words "time" or "rate" and suggests that a correspondingly small percentage would have any expectations about how much time it would take for a product with a biodegradable label to biodegrade. This makes no sense. It is analogous to claiming that only 7% of people have an expectation of how long it would take an ice cube to melt if only 7% happened to use the word time or rate when asked, "When you hear the term melt, what does that mean to you?"

14. To press this point further, suppose a fertilizer was marketed as soluble, but with no specific temporal claim. A farmer purchases it and dumps it in a bucket of water. It does not dissolve; the pellets remain on the bottom of the bucket. The farmer complains to the company. The company responds that its use of the word soluble did not imply that the product would dissolve in any particular period of time, and adds: "We asked you what term soluble meant to you, and you never used the word time or rate in your definition; you just mumbled something about water and dissolve." Obviously, this is a ludicrous defense.

15. The Synovate study found (Question 24) that the information customers reported they would most like to see on packages making biodegradable claims was a specification of the time required for biodegradation. The best and most straightforward way to investigate consumer's understanding about biodegradation times is to actually ask them about biodegradation

[8] Though it is beside the point, this calculation is incorrect: more than 12% in APCO and 35% in Dr. Stewart's study mentioned time.

17. As discussed in my prior declaration, by comparing two conditions, one can evaluate the net effect of whatever thing or things differed between them. In many studies with the same population of subjects, which permits many comparisons. Any set of three conditions permits three comparisons: A vs. B, B vs. C, and A vs. C.[12] The two triplets at issue here are 3O, 3H, and 3J (the Tupperware container) and 3P, 3K, and 3L (the plastic bag)—are reproduced below

(3H)

(3J)

(3P)

(3K)

Stewart, Tr. 2669-2670, in which Dr. Stewart explains that survey research literature on the "I don't know" responses finds that preventing respondents from saying I don't know does not change the distribution of responses. As I explained in my prior report and my testimony at trial, I imposed a bright-line coding rule that allowed me to summarize the data without introducing bias. (See e.g., Kassarjian, 1977; Kolbe & Burnett, 1991.) Moreover, as I discussed at trial, there is no compelling reason why the exclusion of these people would bias the data in any particular direction.[16]

22. I did not in fact, treat uncoded responses as "invalid." For instance, the response "it depends" could reflect very little knowledge (and the corresponding reluctance to render an estimate that might be very inaccurate), very much knowledge (and hence the desire to be asked a more precise question), or just individual differences in respondents' willingness to provide estimates about things for which they have some uncertainty. Though I consider the response "valid," it cannot be expressed as a number, and, thus, these respondents are necessarily excluded from numeric summaries. Importantly, however, there is no good reason to conclude that those who say "it depends" or "I don't know" actually have systematically different beliefs from the rest of the population.

23. Dr. Stewart wrongly concludes that by not coding the "it depends" and "don't know" responses, I inflated the percentages of those who hold the belief that biodegradation will occur within a year. This is mistaken logic. Percentages are not inflated, because uncoded responses are removed from the numerator as well as from the denominator. Again, a simple

[16] Since Dr. Stewart makes so much of the fact that some of the answers to open-ended questions were left uncoded (for various reasons I explain in my report), I should point out that for surveys 1I, 1J, and 1K, which involve over 5300 respondents in total, 100% of the responses are coded (as indicated by the "

hypothetical example is helpful

If you saw this label on a plastic water bottle, how long would it take to decompose?

That respondent typed in "7 months" and nothing more. Now suppose the respondent was not just permitted, but entreated to "qualify" his or her answer. I cannot even construct an example of what the respondent could say next that would mean the respondent had not been misled if a plastic water bottle bearing that label actually took 3000 years to biodegrade. Dr. Stewart also fails to provide a single example explaining just how the qualifications and contingencies that are present (because respondents provided them) or absent (because they were not prompted assiduously enough to provide them) would do that. Essentially, Dr. Stewart is urging the Commission to accept that even if large fractions of consumers expect that biodegradable plastics will biodegrade within a few years, consumers cannot be misled by those biodegradable claims because scientists disagree whether it actually will take 3000 years or 4000 years. See Stewart Decl. ¶ 12. This makes no sense.

27. Dr. Stewart repeatedly extols his survey because it encouraged respondents to give "qualifications and contingencies" to their responses by asking appropriate follow up questions."[20] But examining Dr. Stewart's data yields a rather unflattering portrait of the value of these probes. First, the probes appeared to be at the discretion of the interviewer and were

[20] Dr. Stewart asks a vague question and then relies on the resulting confusion in support of his position that respondents have a nuanced understanding of biodegradation that requires the specification of "contingencies and qualifications." Or that they don't, depending on whatever point he is attempting to make at that time. Dr. Stewart vacillates in how he characterizes consumers' state of knowledge, variably saying that they possess "very sophisticated views of what biodegradation means" (Stewart Decl. ¶ 17) to suggesting that they have "an array of incorrect beliefs" (Stewart Decl. ¶ 21) and "little or no knowledge" (Stewart Decl. ¶ 25).

The only explanation for the frequent and large differences between control and treatment groups (averaging 28% for one year and 42% for five years[23]) is that biodegradable claims cause this change in belief.[24] The data are simply not compatible with any other interpretation

32. Of course, you can sometimes learn more about respondents' beliefs by asking them additional questions. But it does not follow that such questions are required to draw valid conclusions, or even that additional questions are always especially useful. If consumers react to the presence of the word "biodegradable," it is obviously because they have prior beliefs about what that word means. And, of course these prior beliefs interact with manipulations. For instance, verbatim responses from both my studies and Dr. Stewart's confirm that some people disbelieve biodegradable claims. Obviously, somebody who disbelieves a claim may disregard it, and that person's responses will not be affected by the (disregarded) claim. That is one sort of interaction effect. There is nothing sinister or problematic about these interaction effects or variations in belief in general. Indeed, I would be highly suspicious of a survey that found that

[23] 28% and 42% are the average differences between the treatment group (biodegradable claim) and the control group (no biodegradable claim) with regard to the proportion of respondents who expect very rapid (1 year) or rapid (5 years) biodegradation times, respectively. The average is computed across all of the comparisons presented in Appendix C of Frederick's Opening Declaration. (These figures reference only the surveys in which respondents provided a numeric estimate, not the surveys involving binary (YES or NO) responses as to whether the depicted product would completely break down.)

[24] The presence of an explicit biodegradable claim significantly increases the fraction of consumers who believe that a specific product will biodegrade within one year.

- For a plastic bag, that number is increased by 25%.
- For a plastic container, that number is increased by 22%.
- For a plastic water bottle, that number is increased by over 34%.

The presence of an explicit biodegradable claim significantly increases the fraction of consumers who believe that the product will biodegrade within five years.

- For a plastic bag, that number is increased by 32%.
- For a plastic container, that number is increased by 35%.
- For a plastic water bottle, that number is increased by over 49%.

caseid	OEQ4
100122	I saw a show about this sometime but I forgot it. I honestly truly don't know. (remember a bottle was so longe ivery. (p) no, I think so
100147	

caseid	OEQ4
100271	I don't know. (p) 5 years or less.
100277	Depends (p) What it's made of. A biodegradable chip bag will take 6 months biodegrade and a paper bag will take 6 weeks, if the worms get too it. (p) no
100279	I don't have a clue (p) I'm sure it varies (p) Nope
100285	Should be almost instantly (p) A few hours. (p) No.
100301	I don't know, I really don't know. I remember reading about it, but I don't remember. (P) Never thought about it. (P) No.
100317	I wouldn't have any idea. (P) No...I think It would be up to the product you're using. (P) No.
100333	I really don't know. (P) I guess it depends on what it is. Like cardboard, paper plastics in 5-10 years. maybe. I don't know.
100344	I know that certain items have certain spans of time to decay. I know some h long periods of time. (P) Even though it's biodegradable. (P) for example diapers, even thought it's biodegradable, even thought diapers are biodegradable it takes a long time. I think it depends on the components of the item.
100347	It depends on the product, and what's in it. I think the spectrum can vary wid (P) Like in the tens of years.
100350	Uh, I really can't give you an answer on that, some longer, some short. (P) A y
100384	Well probably according to what product it is, if its a paper item it should be shredded and in some instances flushed in the sanitary systems. (p) With the plastics that i don't know. (P) the liquids like water breaks it down, makes it dissipate. (P) That's it.
100393	It would depend on the product. (P) That be it. Basically it would depend on t product and how fast it degrades.
100397	Depends on what it is. (P) Like I said depends on with. Leaves are shorter than plastic. I would need to know what it was.

caseid	OEQ4
100596	I KNOW THAT VARIES WITH THE TYPE OF PRODUCTBECAUSE EVEN IF IT ISN'T NECESSARILY BIODEGRADABLE WILL EVENTUALLY BREAK DOWN BUT TAKE A LOT LONGER THAN SOMETHING THAT IS BIODEGRADABLE WHICH WOULDN'T TAKE AS LONG. WHICH IS WHY SOMETHING IS CALLED BIODEGRADABLE. IT SHOULD BREAK DOWN IN A RELATIVELY SHORT AMOUNT OF TIME OR ENOUGH TIME SO THAT IT DOESN'T START TO POSE ANY REAL THREAT OR HARM. (P) IF I HAD TO GUESS I WOULD SAY 20 YEARS. BUT IM NOT SURE I CANT REALLY ANSWER THAT. EVERY PRODUCT I'M SURE HAS A DIFFERENT TIME FRAME FOR IT TO BREAK DOWN.
100598	I'm not sure. (P) A few months.
100624	I keep my jars for 5 years to 10 years then I reuse them again. (P) You migh something to last 5 years(E)-1(AK)(i)-15tTm ( )1 re ightAK12 18 0 Td [(H)-10-Tb1(YP)-6(E ID

caseid	OEQ4
100762	No idea I assume the difference would be the product is and different materials. (p) I don't, the difference could be a month versus a year. (p) No.
100796	It depends on, if it's solid or liquid. (P) Solid takes longer, not exactly sure how long.
100843	I don't know. paper would take a longer time and food will probably decompose faster. (P) I don't know, anywhere from six months to six year, depends on the item.
100846	Umm...thirty years. (P) Well I want to change that, I'd say a year. (P) No.
100867	Depends on the product (p) They're all different, depending on material, what it is and what it's made of (p) no
100879	Depends on how it's packaged (p) Depends on how it was handled after it was (p) No.
100885	Depends on the product like a carton of milk to a loaf of bread (p) Maybe 2 weeks for both. (p) No.
100910	It depends (p) on what its made out of.
100935	I have no idea. (P) Umm, probably ten years or so.
100967	It depends on what it is. (P) Well, food takes a little bit of time, like days or w and paper just takes a little longer. It just depends on what it is. (P) No.
100981	I think it varies in the material. I think some things can take up to 100 days, i suppose it could be longer as well (p) In my experience the cloth dngsrien Tc -0.30.002 Tw 1

Notice of Electronic Service

I hereby certify that on July 07, 2015, I filed an electronic copy of the foregoing Complaint Counsel's Respons to ECM's Supplemental Brief, with:

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I hereby certify that on July 07, 2015, I served via E-Service an electronic copy of the foregoing Complaint Counsel's Response to ECM's Supplemental Brief, upon:

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