

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

ORIGINAL

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



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

**RESPONDENT ECM BIOFILMS' BRIEF ON APPEAL FROM THE INITIAL  
DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE D. MICHAEL CHAPPELL**

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**RECORD REFERENCES & ABBREVIATIONS**

ALJID – Initial Decision of the Administrative Law Judge

ALJFF – The Administrative Law Judge’s Findings of Fact

CCX – Complaint Counsel’s Exhibit

RX – Respondent’s Exhibit

JX – Joint Exhibit

Tr. – Transcript of Testimony before the Administrative Law Judge

Dep. – Transcript of Deposition

CCB – Complaint Counsel’s Post-Trial Brief

CCRB – Complaint Counsel’s Post-Trial Reply Brief

CCFF – Complaint Counsel’s Proposed Findings of Fact

CCRRFF – Complaint Counsel’s Reply to Respondent’s Proposed Findings of Fact

RPB – Respondent’s Pre-Trial Brief

RB – Respondent’s Post-Trial Brief

RRB – Respondent’s Reply to Complaint Counsel’s Post-Trial Brief

RFF – Respondent’s Proposed Findings of Fact

RRCCFF – Respondent’s Reply to Complaint Counsel’s Proposed Findings of Fact

“ECM Plastic” – A plastic properly manufactured through heat molding to contain ECM’s proprietary additive equally dispersed through the plastic, which additive causes plastics to biodegrade

“Biodegradable Claim” - ECM’s claim that ECM Plastic is biodegradable and/or that tests prove that ECM Plastic is biodegradable

“Rate Claim” - ECM’s claim that ECM Plastic is biodegradable in 9 months to 5 years and/or that tests prove that ECM Plastic is biodegradable in 9 months to 5 years

“One Year Rule” – Statement in the Green Guide, 16 CFR § 260.8(c), stating that “[i]t is deceptive to make an unqualified degradable claim for items entering the solid waste stream if the items do not completely decompose within one year after customary disposal.”

“End-Use Consumer” – A member of the general public exposed to ECM claims in the marketplace

“Plastic Company Purchaser” – Those companies to which ECM solicits business, sells its product, or sold its product

## I. STATEMENT OF THE CASE

### A. Summary of Argument

On an ample record proving the biodegradability of ECM Plastics, consisting of 22 independent, generally accepted, and complementary, gas evolution tests; hundreds of peer reviewed scientific journal articles; and the uncontroverted expert opinion of three leading experts, an environmental scientist (Dr. Ranajit Sahu); a microbiologist (Dr. Ryan Burnette); and a landfill scientist (Dr. Morton Barlaz), who each confirmed the intrinsic biodegradability of ECM Plastics, the ALJ found competent and reliable scientific evidence that ECM Plastics are intrinsically biodegradable. ALJFF ¶¶122–43, 915, 1043–1496; ALJID at 7, 262–84; RX 853 (Barlaz, Rep.), RX 854 (Burnette, Rep.), RX 855 (Sahu, Rep.).

Until 2012, ECM also claimed that under the right environmental conditions ECM Plastics would biodegrade within “9 Months to 5 Years” (the “Rate Claim”). Of the claims challenged, that one alone did the ALJ find deceptive. As explained *infra*, the ALJ erred as a matter of law by imposing a Rate Claim remedial remedy and lacked requisite record support for his materiality findings.

The ALJ erred as a matter of law by presuming the materiality element satisfied by a finding of mere misleadingness. Mere misleadingness is not enough. ALJID at 288–91; *In re Novartis Corp.*, 127 F.T.C. 580, 691 (1999) (explaining that “materiality turns upon whether those consumers who have drawn the claim from the advertisement and have been misled by it are also **likely to have their conduct affected by the misrepresentation**”) (emphasis added). If a claim is misleading but no evidence exists to support the conclusion that it affected the consumer’s decision to purchase the product, then the claim is not actionable under the precedent, and it cannot give rise to a remedial order. *F.T.C. v. NHS Sys., Inc.*, 936 F. Supp. 2d

520, 531 (E.D. Pa. 2013); *see also* *FTC v. Royal Milling Co.*, 288 U.S. 212, 216 (1933); *FTC v. Klesner*, 280 U.S. 19, 27 (1929) (mere deception cannot give rise to a remedial order).

The ALJ cites to four lines of circumstantial evidence to support his materiality finding. ALJID at 288–91. He reasons: (1) that ECM made the rate claim “in a variety of marketing materials” and would not have done so unless the claim was likely to have an effect on customers’ purchasing decisions; (2) a few ECM customers asked questions about the rate claim; (3) ECM provided customers with marketing materials that included the Rate Claim, and ostensibly encouraged customers to use that material in marketing ECM plastics; and (4) some ECM customers used the Rate Claim in their own advertising. *Id.* Based on that reasoning, the ALJ found materiality. *Id.* at 288.

That reasoning is legally insufficient and factually unsound. The testimonial record cited does not establish that any of the four “customers,” whose deposition testimony the ALJ relied upon exclusively, made a purchasing decision based on the Rate Claim. Moreover, the first, third and fourth lines of evidence denoted above do not establish materiality; that evidence establishes only that the Rate Claim was made in commerce. It is a condition precedent to materiality that the claim in issue appear in commerce but that is the beginning of the analysis, not the end. Respondents can disprove the materiality of a claim appearing in commerce “either with arguments pertaining to the content of the ad itself or with extrinsic evidence.” *In the Matter of Thompson Med. Co., Inc.*, 104 F.T.C. 648, at \*60 n. 45 (1984).

The second line of evidence cited by the ALJ—that “customers” of ECM inquired about the Rate Claim—is not supported by record evidence. Three of the four inquirers cited were never ECM “customers.” The citations listed by the ALJ reveal that only one of the four actually bought the ECM product. ALJID 288–291; CCX 234; CCX 235. As to the one, the evidence

does not support the conclusion that the inquiring party factored the Rate Claim into its eventual purchasing decision. Ergo, in substance, the evidence does not support the proposition cited by the ALJ. Moreover, ECM qualified the Rate Claim during the pre-purchase negotiation with that sole customer, thus eliminating any doubt that the Rate Claim, as opposed to the environment, governed the period within which biodegradation would take place for that party's specific plastic product. ALJFF ¶1502; CCX 423 at 9 (ECM explaining that biodegradation rate "depends on the exact conditions at the site of disposal" and that ECM Plastic will biodegrade "in some period greater than a year"). The record cited by the ALJ is thus devoid of requisite facts to undergird his materiality finding.

In addition to the fact that the evidence the ALJ cited does not support a conclusion of materiality, multiple independent yet complementary articles of evidence rebut the presumption of materiality. Direct survey evidence revealed that the Biodegradation Claim, not the Rate Claim, was material to End-Use Consumers. ALJID at 219–20. Additional evidence of Plastic Company Purchasers' sophistication, the actual reports of tests performed on the ECM Plastic, the industry standard gas evolution tests themselves (which predict environmental biodegradation but decidedly do not predict rate of biodegradation), and the length and content of ECM's pre-purchase negotiations and contracting (including therein qualifications revealing rate to be dependent in each case on variable environmental conditions at the site of disposal) all militate against a finding of materiality.

The science of biodegradation known to the industry also militates against a finding of materiality. The moment when the process of biodegradation of a plastic is completed is unpredictable because it is governed by numerous variable environmental factors, a scientific fact that prevents the industry standard setting body, the American Society for Testing and

Materials (ASTM), from designing tests that predict biodegradation rate. ALJFF ¶¶ 712–13, 731 (gas evolution are “designed to reveal intrinsic biodegradability”). Indeed, rate unpredictability is not only itself industry dogma but is also perceived by the general public with the survey evidence confirming that consumers have no preconceived notion as to how much time any particular biodegradable plastic will take to break down in nature. ALJFF ¶¶ 715, 948–954; RFF ¶¶ 310–11, 320, 357–59, 377–84, 421, 439, 445, 465–68, 476, 492–95, 520–22, 543–44, 553, 562, 579, 595; CCX 819 (Sinclair, Dep. at 242:4–11, 290:8–291:17); RX 856 (Stewart, Rep. at 24–28) .

The ALJ’s other findings support the conclusion that rate was not material. The “rate” of biodegradation of plastics in landfills is “a matter of scientific judgment” and “no one test can support a rate of biodegradation.” ALJFF ¶712. “[T]here is not a uniformly utilized method to extrapolate rate data as measured at laboratory-scale to field-scale landfills,” and Complaint Counsel’s experts were unable to provide any evidence or testimony that predicts or projects biodegradability “rates” of any plastic in landfills. ALJID at 240. The science in this field, the ASTM industry standard, and each company’s understanding of the durability of its own plastic product all combine to support educated awareness that rate of biodegradation for any specific plastic is dependent on unpredictable environmental variables.

The essential question for industry (including actual ECM customers) is whether a plastic is intrinsically biodegradable, not how long a plastic will take to break down into elements found in nature. ALJID at 277. If intrinsically biodegradable, the plastics will biodegrade whenever ambient environmental conditions favor biotic activity. *Id.* at 278. That is as true of ECM’s biodegradable plastic as it is for a tree trunk, a banana peel, or an orange peel. ALJFF ¶¶ 687–688; ALJDID at 277–78, 284–85.

Moreover, the record reveals that ECM offered its Rate Claim precisely because the FTC demanded specification of rate in the 1996 Green Guides. Sinclair, Tr. 768–69; CCX 819–CCX 820 (Sinclair, Dep. at 188, 322–23). In 2012, ECM discontinued use of the Rate Claim following FTC issuance of its Revised Green Guides. ECM did not suffer a provable loss of business as a result. Sinclair, Tr. 774–75, 919 (“we’ve had a lot of customers and potential customers come to us after we stopped using [the Rate Claim] nearly three years ago”).

The FTC, through the 1996 Green Guides, compelled disclosure of “rate” despite the fact that “rate” of biodegradation cannot be measured for materials like biodegradable plastics, which ordinarily biodegrade over longer periods than rapidly degrading “compostable” technologies. ALJID at 239–40. The evidence confirms that disclosure of specific rates is itself misleading, as the unrebutted evidence establishes that no set “rate” can be calculated given environmental variability. ALJFF ¶¶676–96; 712; ALJID at 239. Through its 1996 Green Guides, the FTC induced industry to adopt specific rate qualifiers without a scientific foundation establishing specific rates to be determinable. The ALJ found no evidence that ECM deliberately, intentionally or willfully misled customers. *See* ALJID at 307.

Moreover, no evidence of harm or injury attends the Rate Claim. To the contrary, uncontroverted expert testimony establishes that, based on the potential for unrecovered methane production, slower biodegrading substances in a landfill are *better* for the environment than rapidly degrading materials. Thus, the ECM product serves the goal of aiding the environment better than if the product caused all plastics to biodegrade within 9 months to 5 years. Barlaz, Tr. 2284–90; RX 843 (Barlaz, Rep. at 12). The ALJ ignored that salient fact.

Complaint Counsel introduced no evidence that the Rate Claim likely affected End-Use Consumers’ or Plastic Company Purchasers’ decisions to buy or to use an ECM Plastic. To be

sure, it could not for End-Use Consumers, because there is not one shred of record evidence that any End-Use Consumer ever purchased an ECM Plastic bearing a Rate Claim. ALJID at 300 at n. 58; ALJ ID at 300–01 at n. 59.

Based on the totality of record evidence germane to materiality, the Rate Claim is not material as that term has been defined in precedent. ECM is at worst liable for mere misrepresentation in association with the Rate Claim, which alone is insufficient to support the Commission’s “public interest” standard requisite to adoption of a remedial order. *Spiegel, Inc. v. F.T.C.*, 494 F.2d 59, 65 (7th Cir. 1974) (Pell, J., dissenting) (explaining that “FTC conceded the correctness of the general rule that detriment to the public interest must be shown”); *Royal Milling*, 288 U.S. at 216 (“mere misrepresentation and confusion or deception of purchasers” is insufficient for FTC action). The FTC’s enabling statute requires that remedial orders further a specific and substantial public interest, and the correction or prevention of immaterial “mere misrepresentation” does not do so. *See Fed. Trade Comm’n v. Raladam Co.*, 283 U.S. 643, 646–47 (1931) (“the power of the Commission to take steps looking to the issue of an order to desist depends upon the existence of three distinct prerequisites .... [and, in particular] (3) that a proceeding by the Commission to prevent the use of the methods appears to be in the interest of the public”); *Thomas v. Fed. Trade Comm’n*, 116 F.2d 347, 349 (10th Cir. 1940) (“A proceeding by the Commission to prevent the use of ... deceptive acts ... must appear to be in interest of the public”); *Arnold Stone Co. v. FTC*, 49 F.2d 1017, 1019 (5th Cir. 1931) (the “Commission is authorized to act only in the public interest, and to justify it in filing a complaint that public interest must be specific and substantial”).

For the foregoing reasons, the ALJ’s recommended remedial order should be rejected as contradicted by the totality of record evidence which shows no materiality; all other conclusions

reached by the ALJ with the exception of those preserved for appeal herein should be affirmed as legally sound and backed by the overwhelming weight of record evidence.

## B. Background

Since 1996, the Commission has presumed as agency dogma that unqualified “biodegradable” claims are deceptive for plastics in landfills, supposing no such product would biodegrade at all.<sup>1</sup> Indeed, in 2009, FTC agents publicly explained that nothing is “biodegradable” under the FTC’s strict interpretation of that claim:

That raises the question: Is anything biodegradable? After all, virtually everything that Americans consume ends up in a landfill, incinerator or recycling bin.

Mr. Davis of the F.T.C. raised doubts. “Maybe a piece of produce could be labeled biodegradable if it’s customarily disposed of through composting,” he said, “but the statistics show that most household trash goes to landfills. So **even a piece of produce** might not ‘biodegrade’ in a reasonable period of time, he explained.”<sup>2</sup>

In its 1996 Green Guides, the FTC explained that a company could not lawfully represent, either directly or by implication, that a product or package is biodegradable unless the company had “competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, *i.e.*, decompose into elements found in nature within a reasonably short period of time after customary disposal.”<sup>3</sup> FTC promulgated that guidance without any consumer survey evidence demonstrating whether consumers presume any particular

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<sup>1</sup> See, e.g., *Guides for the Use of Environmental Marketing Claims*, 16 CFR § 260.7(b) (Oct. 11, 1996).

<sup>2</sup> Kate Galbraith, *FTC Sends Stern Warning on ‘Biodegradable’ Marketing Claims*, N.Y. TIMES, June 11, 2009, (emphasis added), available at [http://green.blogs.nytimes.com/2009/06/11/ftc-sends-stern-warning-on-biodegradable-marketing-claims/?pagewanted=print&\\_r=0](http://green.blogs.nytimes.com/2009/06/11/ftc-sends-stern-warning-on-biodegradable-marketing-claims/?pagewanted=print&_r=0).

<sup>3</sup> *Guides*, *supra* note 1.

period of time to be associated with an unqualified biodegradable claim. In addition, the FTC issued its Guides without any evidence that “rate” of biodegradation could be scientifically and reliably established. Based on the overwhelming weight of the scientific evidence in this case, the ECM additive did not fit the FTC mold. Rather, the ALJ rightfully held that the competent and reliable scientific evidence of record proved that the ECM Plastic is intrinsically biodegradable, and he also held, based on the uncontroverted record, that the “rate” of biodegradation cannot be demonstrated through generally accepted scientific methods. ALJID at 239–40. The credible and reliable survey evidence of record confirmed that consumers do not interpret the claim that a product is biodegradable to mean that it biodegrades within a year or within any specific time. ALJID at 216–17.

The concept of a “reasonably short period of time” in the 1996 Green Guides remained unspecified until 2012 when the Commission published the One Year Rule in 16 C.F.R. § 260.8(c):

It is deceptive to make an unqualified degradable claim for items entering the solid waste stream if the items do not completely decompose within one year after customary disposal. Unqualified degradable claims for items that are customarily disposed in landfills, incinerators, and recycling facilities are deceptive because these locations do not present conditions in which complete decomposition will occur within one year.

In 2011, at the behest (lobbying) of ECM competitors (compostable product manufacturers<sup>4</sup>) Complaint Counsel began investigating ECM BioFilms for alleged deceptive

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<sup>4</sup> The Biodegradable Products Institute (“BPI”) has a long and extensive history of lobbying the FTC to adopt the position ultimately taken in the 2012 Green Guides and to take action against ECM. RX 171; RX 172; RX 175 at 13, 19, 27–28; RX 177 at 4–5, 7; RX 178 (a PowerPoint presentation presented by Mojo to FTC titled “FTC Discussion”) at 4–24; RX 721; RX 745. “The BPI is a multi-stakeholder trade association, involving people and companies that produce, use or recover compostable products. The BPI strongly supports the recovery of organic material via composting ...” RX 171 at 1. Steven Mojo is the executive director of BPI. *Id.* Mojo has been in communication for a number of years with the FTC encouraging the

“biodegradable” claims. Complaint Counsel filed its Complaint on October 29, 2013, and contracted with the scientific consultants it used in this case (Drs. McCarthy, Michel, and Tolaymat) at least two years prior to that date. RFF ¶¶2717; Michel, Tr. 1920; RX 841 (McCarthy, Dep. 193:6–7). Complaint Counsel’s “experts” McCarthy and Michel had well established financial ties to ECM’s competitors, the compostable products industry. ALJFF ¶¶109, 121, 659–670; RFF ¶¶1398–1448; RB at 80–81<sup>5</sup>. McCarthy stood to benefit financially from a decision against ECM. ALJFF ¶670. McCarthy is the recipient of royalties from Metabolix, Inc., a company whose compostable products are made under patents developed by McCarthy; a company that competes directly with ECM in the plastics market; and the primary source of financial support for McCarthy’s center at UMass Lowell. ALJFF ¶¶ 666–70. Indeed, Metabolix, Inc. specifically lobbied FTC to act against ECM. RX 211.

Not one expert witness for Complaint Counsel reviewed any of the over 30 gas evolution tests revealing ECM Plastics to be biodegradable—even by the time of the hearing. Tolaymat, Tr. 316–17; McCarthy, Tr. 654; Michel, Tr. 2966–67. Each testified without relying upon the peer reviewed scientific literature on the subject of plastics biodegradability. One, Dr. McCarthy, “collaborated” with Complaint Counsel on the content of his expert report, relied on

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agency to act against ECM. For example, On April 22, 2008, Mojo encouraged FTC to “keep [ECM] in mind for [FTC’s] future deliberations.” RX 175 at 28. In addition, Mojo forwarded to FTC “ECM documents” for review. *Id.* at 13. Mojo has also provided his own commentary directly to FTC on ECM’s comments to the Green guides. RX 177 at 8; RX 721.

One important member of the BPI is Metabolix, Inc. RX 171 at 1. Metabolix, Inc. is the exclusive licensee of a biodegradable polymer covered by Dr. McCarthy’s ‘199 patent from which Dr. McCarthy has received about \$28,000.00 in royalties. ALJFF ¶¶ 666–67, 669–70. Dr. McCarthy acknowledged that Metabolix, Inc. competes directly with ECM’s technology for market share. ALJFF ¶¶668, 670. Like the BPI, Metabolix, Inc. has also directly lobbied the FTC to take action against ECM, as early as 2008. RX 211. Dr. McCarthy has performed certifications for the BPI, earning thousands of dollars. McCarthy, Tr. 564–66. Another member of the BPI is DuPont, for whom Dr. Michel has consulted. ALJFF ¶121. Indeed, Dr. Michel and BPI have worked together since at least 2008. RX 164–RX 168.

<sup>5</sup> See also *supra*, note 4.

Complaint Counsel's complete drafting of the penultimate definition of "biodegradation" in his expert report (at footnote 1 therein), and under cross examination dissembled, asking if he might be permitted to abandon the definition Complaint Counsel had given him. ALJFF ¶¶634, 638; ALJID at 226–29. The other, Dr. Michel, admitted on cross examination that he never evaluated the ECM plastic he supposedly tested to determine if it actually contained the ECM additive or if it was properly manufactured with that additive; received the test plastic from an ECM competitor, not from ECM; never determined why the test results were inconclusive; was required to send his report concerning the results to the company sponsor of his test for editing and approval before publication; and withheld the company's involvement from Elsevier, the publisher of the report, in violation of that publication's conflicts of interest policy. ALJFF ¶¶1466–67, 1471–96; ALJID at 254–55.

### C. Summary of Proceedings

This case has been marred by Complaint Counsel's abuses of process, one resulting in an Order of Sanction by the ALJ.<sup>6</sup> The administrative trial in this case began on August 5, 2014, and concluded on August 29, 2014. The hearing record closed on September 4, 2014. ALJID at 3. Over 1,760 exhibits were admitted into evidence. Twenty-nine witnesses testified, either live or by deposition, resulting in 3,006 pages of trial transcripts. *Id.* The parties' findings of fact, replies thereto, post-trial briefs, and reply briefs total 1,782 pages. *Id.*

Complaint Counsel introduced the deposition testimony of 16 fact witnesses, but called no fact witness at trial. ALJFF ¶¶1–2. Due to financial constraints, ECM went unrepresented or

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<sup>6</sup> See Order Granting in Part and Denying in Part Respondent's Motion for Sanctions (Mar. 21, 2014).

had counsel appear telephonically at 14 of Complaint Counsel's 16 pre-hearing fact witness depositions. ALJFF ¶2.

#### **D. Statement of Facts Relevant to the Issues Submitted**

##### **1. The Green Guides' Biodegradation Definition Does Not Apply to ECM's Technology**

Since 1992, FTC staff has through consent orders enforced the Green Guides definition of biodegradation, 16 CFR § 260.8, against companies that have made biodegradable claims; no enforcement action reached litigation until the ECM case. *See, e.g., In the Matter of Kmart Corp.*, 2009 WL 1701437 (F.T.C. June 9, 2009) (consent order); *In the Matter of Dyna-E Int'l, Inc.*, 2009 WL 2810351 (F.T.C. May 20, 2009) (consent order); *In re Ex-Cell-O Corp.*, 82 F.T.C. 36 (1973) (consent order); *In re N. Am. Plastics Corp.*, No. 902-3184, 1993 WL 766976 (Jan. 14, 1993) (consent order); *In re Matter of N. Am. Plastics Corp., et al.*, 118 F.T.C. 632 (Sep. 7, 1994) (consent order); *In re Matter of BPI Env'tl, Inc.*, No. 902-3225, 1992 WL 696753 (May 5, 1992) (consent order); *In re Matter of RMED Int'l, Inc., et al.*, 115 F.T.C. 572 (May 14, 1992) (consent order).

At trial, Complaint Counsel based its entire argument on anachronistic scientific theories that it has changed little, if at all, over the past four decades. The scientific evidence in this case contradicted that dogma. It included 22 state-of-the-art, positive gas evolution tests and the opinion of three leading scientific experts (environmental scientist Dr. Ranajit Sahu; microbiologist Dr. Ryan Burnette; and landfill scientist Dr. Morton Barlaz) who each reviewed those tests; were versed in the peer reviewed evidence germane to the tests and to plastics biodegradation; and gave detailed explanations of the mechanisms of action present, concluding

to a man that the ECM additive causes plastics to biodegrade. ALJFF ¶¶122–143, 870–1447<sup>7</sup>; ALJID at 230–32, 246–52, 262–80, 284–85; *see generally* RX 853 (Barlaz, Rep.), RX 854 (Burnette, Rep.), RX 855 (Sahu, Rep.). Speculative assertions, contrary to the science, predominated in the testimonies of Complaint Counsel’s experts<sup>8</sup>; the successful impeachment of two of them at hearing, Drs. McCarthy and Michel (McCarthy, Tr. 480–81, 496, 500–09, 526–27, 536–40, 542–43, 545–55, 559–67, 569–92, 632–33, 639–40, 651–54, 662–64, 669–71; Michel, Tr. 2905–06, 2908–12, 2916–17, 2929–30, 2941–53), left the agency bereft of a scientific case and caused the evidentiary record to favor ECM overwhelmingly, as reflected in the ALJ’s findings and conclusions. *See generally* ALJFF ¶¶325–556, 566–1496, ALJID at 173–75, 178–285.

## 2. ECM and Plastic Company Purchasers

ECM is a small Ohio-based corporation, started by Patrick Riley of Micro-Tech Research, Inc. in 1998. ALJFF ¶¶152, 154. ECM has six employees and one product, its additive, which it sells exclusively to companies that manufacture plastics, companies that have plastics manufactured for them, and to some distributors who sell the additive to plastic manufacturers (“Plastic Company Purchasers”). ALJFF ¶164. ECM does not advertise, promote or sell its product to End-Use Consumers. ALJFF ¶172. Its entire advertising budget is

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<sup>7</sup> *See* ALJFF ¶894 (“Dr. Sahu based his opinion on a thorough review of peer-reviewed literature published since the 1950s, as well as between 30 to 40 different tests”), ALJFF ¶895 (“Dr. Burnette’s research revealed that peer-reviewed publications demonstrate that there are organisms that make an enzyme that can degrade plastics”), ALJFF ¶¶1011–35, 1280, 1285, 1299, 1303, 1325, 1375, 1380; ALJID at 263–67 (Dr. Barlaz concluded without equivocation that the statistically significant, independent gas evolution tests of ECM Plastics prove the additive to be biodegradable).

<sup>8</sup> *See, e.g.*, ALJFF ¶900 (“Dr. McCarthy does not provide support for the proposition in his expert report that there is ‘overwhelming scientific consensus that conventional plastics are not biodegradable after customary disposal,’ and has acknowledged that there are peer-reviewed scientific publications that conclude that conventional plastics are biodegradable”).

approximately \$12,000.00 per year. ALJFF ¶209. Moreover, the record contains no evidence that any End-Use Consumer ever purchased an ECM Plastic because of the Rate Claim; rather the record reveals such products to have been given away at retail. ALJID at 300 at n. 58.

Plastic Company Purchasers engage in a negotiation with ECM for between 6 months and 2 years before making a single purchase. ALJFF ¶222. During that time, they receive scientific literature concerning the additive's biodegradability, verify that addition of the additive will not alter finished plastic composition or product utility, determine the economic feasibility of adding the additive, and receive free samples from ECM for product testing, including testing for biodegradability. ALJFF ¶¶216–21, 225–30, 277. Indeed, all gas evolution tests moved into evidence by ECM were not tests performed by or at the behest of ECM but rather at the behest of Plastic Company Purchasers that critically evaluated whether the ECM additive caused their plastics to biodegrade before ever making a purchase. RB at 118–21; RFF ¶¶35, 477, 1606, 2133, 2145, 2150, 2155, 2162, 2169, 2176, 2218, 2242, 2260, 2285, 2304, 2323, 2347, 2364, 2457, 2478, 2507, 2524, 2534, 2550, 2559, 2581, 2603, 2616, 2627, 2640, 2650. In addition, ECM provided Plastic Company Purchasers with information on the ECM additive, including tests evidencing biodegradation. ALJFF ¶¶225, 227, 277. The ECM tests included a wide range of independent testing data. RFF ¶¶439, 465, 520, 683, 2707. As such, ECM customers were fully apprised of the capabilities and limitations of ECM Plastics before they purchased, manufactured, sold, and marketed them.

The so-called biodegradation “rate,” the speed within which biodegradation reaches completion, is governed by many variable environmental factors that defy exact prediction, as evidenced by the fact that the industry's standard setting body, ASTM, has never adopted a test that can predict the rate of biodegradation. ALJFF ¶¶ 712-13, 715, 731, 948–954; RFF ¶¶310–

11, 320, 357–59, 377–84, 421, 439, 445, 465–68, 476, 492–95, 520–22, 543–44, 553, 562, 579, 595; CCX 819 (Sinclair, Dep. at 242:4–11, 290:8–291:17). The plastic biodegradation “rate” in landfills is “a matter of scientific judgment” and “no one test can support a rate of biodegradation.” ALJFF ¶712. “[T]here is not a uniformly utilized method to extrapolate rate data as measured at laboratory-scale to field-scale landfills.” ALJFF ¶713.

Each expert in the case testified that he could not predict biodegradability “rates” in landfills. ALJID at 240. The science in this field, the ASTM industry standard, and the industry understanding of plastics durability all support the conclusion that plastic biodegradation rates are unpredictable in the environment, including in landfills. The essential question for industry, including actual ECM customers, is whether the end plastic is intrinsically biodegradable, not when it will completely break down into elements in nature. ALJID at 263, 277. If intrinsically biodegradable, the plastic will break down at a speed entirely dependent upon multiple, ever changing environmental factors. ALJID at 278.

### **3. The Sophistication of Plastic Company Purchasers**

ECM’s Plastic Company Purchasers are usually larger than ECM with its six employees. RFF ¶394. Some have entire regulatory departments. RFF ¶424. Most have revenues that dwarf ECM’s, exceeding them multiple times over.<sup>9</sup> RFF ¶¶452–54, 489, 568. The Plastic Company Purchasers have the resources to conduct their own testing, albeit an ASTM D5511 gas evolution test (which the ALJ determined “can provide competent and reliable scientific evidence of biodegradability of plastics in a landfill,” ALJID at 245) is relatively cheap, usually starting at around \$2,000. RX 873 (Ullman, Dep. at 73); RX 876 (Poth, Dep. at 14).

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<sup>9</sup> CCX 820 (Sullivan, Dep. at 96–97) (Discussing CCX 749 and CCX 750 which show ECM annual revenue from 2009 to 2013 to range between two million and three and a half million dollars).

Furthermore, Plastic Company Purchasers have shown sophistication by “shopping around” within the additive market. RFF ¶¶412. They have performed biodegradability tests not only of ECM Plastics, but also of competing products. *Id.* Others, such as Down To Earth Organic and Natural, investigated ECM and its additive for nearly a year before deciding to purchase. RFF ¶¶492–96. Moreover, through industry standard setting bodies, like ASTM, industry is aware of the fact that rate is indeterminate because of multiple environmental variables. ALJFF ¶¶ 715, 948–954; RFF ¶¶310–11, 320, 357–59, 377–84, 421, 439, 445, 465–68, 476, 492–95, 520–22, 543–44, 553, 562, 579, 595; CCX 819 (Sinclair, Dep. at 242:4–11, 290:8–291:17). Plastic Company Purchasers discussed with ECM the fact of environmental variability. ALJFF ¶¶214–15, 225, 227–28. The Plastic Company Purchasers were largely sophisticated in their understanding of plastics and plastics durability, as evidenced by the lengthy pre-purchase periods of evaluation of ECM Plastics, product sampling for critical independent testing, and product testing for feasibility in their own corporate labs or in independent scientific labs. RFF ¶¶307, 354–55, 393, 401–12. ECM customers have thus demonstrated that they viewed ECM’s advertising claims with a skeptical eye, demanding evidence and conducting their own tests before purchasing. RB at 177–84; RRB at 134–40. Moreover, of the minority of Plastic Company Purchasers who included the Rate Claim on their finished products (only 7 out of 300 were identified at hearing, ALJFF ¶¶ 286, 292–93, 1512; ALJID at 289), the evidence reveals nearly all were led to believe they must do so by the FTC’s 1996 Green Guides, which between 1996 and 2012 called for specific rate qualification of plastics biodegradation claims.<sup>10</sup>

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<sup>10</sup> *Guides*, supra note 1.

#### 4. ECM's Rate Claim Was Not Material

The ALJ did not find the Rate Claim material to any End-Use Consumer, instead finding that claim material only to the Plastic Company Purchasers of the ECM additive. ALJID at 291, at n. 55. Testimonial evidence at trial contradicts the ALJ's limited materiality finding (limited in the sense that it applies not to End-Use Consumers but only to Plastic Company Purchasers). RFF ¶¶ 320–22, 328–33, 335–36, 338, 341, 343–45, 357–59, 387, 431. ECM's Sinclair and Sullivan each testified at trial, as did representatives of Plastic Company Purchasers in deposition, that the Rate Claim was not the reason why ECM's product was purchased. CCX 800 (Ringley, Dep. at 17–18, 32, 35); CCX 801 (Kizer, Dep. at 19–22, 30); (CCX 809 Sandry, Dep. at 13–15, 19, 28, 72–73, 75); CCX 810 (Blood, Dep. at 15, 18–19, 28, 197–99); CCX 812 (Gormly, Dep. at 14–15, 23, 46–50); CCX 817 (Bean, Dep. at 19, 27); CCX 822 (Samuels, Dep. at 12–13, 22, 27–28); CCX 802 (Leiti, Dep. at 47, 49–50); CCX 804 (Collins, Dep. at 15); CCX 803 (Santana, Dep. at 43, 45–46). Rather, intrinsic biodegradability was the reason. RRB at 136–40; RFF ¶¶ 321, 359, 431, 605–725.

Moreover, the ALJ correctly found that “ECM's Customers are motivated to produce biodegradable plastics to meet what they perceived to be their customers' demand for such products.” ALJFF ¶1503. That demand was predicated upon the desire to: be “green,” be environmentally sensitive, seek products that are biodegradable, prevent pollution, find an environmentally friendly and economical alternative to purely plastic bags, and convey a message of biodegradability. ALJFF ¶¶1503–06, 1512. None of the motivating factors articulated involved or concerned the Rate Claim.

### **5. The Survey Evidence Rebutts the Presumption of Rate Claim Materiality**

The ALJ found that Dr. David Stewart's survey was reliable and comported with well-established principles of survey evidence. ALJFF ¶¶503–45. Dr. Stewart's survey found that a remarkable 98% of respondents identified the rate of biodegradability to vary based on multiple factors. ALJFF ¶550. Instead of *rate* of biodegradability, Dr. Stewart's survey found that whether a product is *inherently* biodegradable was the factor important to consumers—indeed, 71% of respondents to his survey indicated that biodegradability is important to them. ALJFF ¶547.

Thus, the only credible survey data in the case, that of Dr. Stewart, establishes that consumers do not have an expectation that plastics labeled biodegradable will break down into elements in nature within any set period of time, including the period of a year or of nine months to five years. *See* ALJID at 213-220.

### **6. There Is No Evidence of Harm or Injury, Only Evidence of Environmental Benefit**

There is no evidence establishing or even indicating the presence of economic, physical, or environmental harm or injury resulting from any of ECM's claims, including the Rate Claim. There is no evidence that any Plastic Company Purchaser bought the ECM additive over a competing additive because of the Rate Claim. Moreover, there is no evidence that the ECM additive has, or is capable of, causing physical harm. Further, landfill expert Dr. Morton Barlaz testified that unlike rapidly biodegrading compostable plastics, slowly degrading products, such as ECM Plastics, are actually better for the environment because they do not contribute to greenhouse gas emissions as do those that biodegrade within a year or within five years. (Barlaz, Tr. 2285–87).

## **II. SPECIFICATION OF QUESTIONS INTENDED TO BE URGED**

ECM BioFilms raises the following questions on appeal:

1. Whether the ALJ erred in finding that ECM BioFilms' discontinued Rate Claim violated Section 5 of the FTC Act with regard to Plastic Company Purchasers, despite the lack of evidence to support, and the presence of evidence rebutting, the conclusion that the Rate Claim influenced Plastic Company Purchasers' decisions, and which did not cause injury or harm to the public or industry.
2. Whether the ALJ erred by imposing a remedial order against ECM BioFilms for violation of the FTC Act allegedly caused by the Rate Claim.
3. Whether the Commission, acting through Complaint Counsel, violated ECM's administrative, statutory, and constitutional rights through this enforcement action.

## **III. ARGUMENT**

### **A. Complaint Counsel Failed to Meet Its Burden of Proof to Show the Rate Claim Material to Purchasing Decisions**

No credible or reliable evidence suggests that the Rate Claim was material to a purchasing decision, but multiple independent yet complementary articles of evidence confirm that the Rate Claim did not likely affect or influence purchasing decisions. The ALJ therefore erred by holding the Rate Claim material. ALJD ID at 288–91; RFF ¶¶605–725; RB at 167–88; RRB at 134–57. Concerning the Rate Claim, the ALJ's discussion of "materiality" hinged solely on evidence that the Rate Claim existed and on a mistaken inference derived from 4 inapposite citations. ALJID at 288–91. Because Complaint Counsel failed to prove that the Rate Claim was material, and the totality of record evidence rebuts any presumption of materiality, the Commission should reject the remedial order recommended by the ALJ.

## 1. Materiality Standard

When an express claim is found, a rebuttable presumption of materiality arises. *Kraft, Inc. v. FTC*, 970 F.3d 311, 322–23 (7th Cir. 1992). That presumption can be rebutted with extrinsic evidence. *In the Matter of POM Wonderful LLC*, 2012 WL 23400406 (F.T.C. May 17, 2012).

As the discussion below and record cites elucidate, multiple independent and complementary record facts rebut materiality, proving the utter lack of record evidence of reliance to be but one of several factors militating against a finding of materiality. ALJFF ¶¶214–15, 225, 227–28, 715, 948–54, 1503–06, 1512; RFF ¶¶307, 310–11, 320–22, 328–33, 335–36, 338, 341, 343–45, 354–55, 357–59, 377–84, 387, 393–94, 401–12, 421, 424, 431, 439, 445, 452–54, 465–68, 476, 489, 492–96, 520–22, 534–44, 553, 562, 568, 579, 595, 605–725; CCX: 800, 810, 817, 822, 802, 803.

“Materiality” is an essential, independent element in an FTC deceptive advertising case. “To establish that an act or practice is deceptive under Section 5, the FTC must demonstrate that the representation was material.” *NHS Sys.*, 936 F. Supp. 2d at 531 (citations omitted). The FTC applies a presumption of materiality to “(1) express claims; (2) implied claims where there is evidence that the seller intended to make the claim; and (3) claims that significantly involve health, safety, or other areas with which reasonable consumers would be concerned.” *Id.* The first situation applies “[w]here the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false,” and, in such a circumstance, “materiality will be presumed because the manufacturer intended the information or omission to have an effect.” *Matter of Cliffdale Assoc., Inc.*, 103 F.T.C. 110, at \*49 (1984). The third situation can apply when the advertisement concerns information that

pertains to the “central characteristics of the product.” *In re Kraft, Inc.*, 114 F.T.C. 40, at \*52 (1991) (citations omitted).

While “the very existence of the claim ordinarily is sufficient evidence for [the Commission] to conclude it is material,” respondent can counter a presumption of materiality “either with arguments pertaining to the content of the ad itself or with extrinsic evidence.”

*Thompson Medical*, 104 F.T.C. 648 at \*60 at n. 45; *see also Pom Wonderful*, 2012 WL 2340406 (F.T.C. May 17, 2012). As explained in *POM Wonderful* and *Novartis*:

Respondent can present evidence that tends to disprove the predicate fact from which the presumption springs (*e.g.*, that the claim did *not* involve a health issue) or evidence directly contradicting the initial presumption of materiality. This is not a high hurdle.

*Pom Wonderful*, 2012 WL 2340406 at \*235. Once the respondent rebuts the presumption of materiality, “the fact finder next proceeds to weigh all of the evidence presented by the parties on the issue.” *Id.* The FTC is limited “by the bounds of reason” when inferring that deceptive claims “constitute a material factor in a purchaser’s decision to buy.” *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 391 (1965).

“Materiality turns upon whether those consumers who have drawn the claim from the advertisement and have been misled by it are also **likely to have their conduct affected by the misrepresentation.**” *Novartis Corp.*, 127 F.T.C. at 691 (emphasis added). To be “material,” the act or practice must *likely affect the consumer’s conduct or decision* with regard to a product or service.” *Cliffdale*, 103 F.T.C. 110 at \*45 (emphasis added). “In other words, [information that is material] is information that is *important* to consumers.” *Id.* at \*49 (emphasis added). As the Seventh Circuit stated, “[a] claim is considered material if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product.” *Kraft*, 970 F.2d at 322 (internal quotations and citations omitted).

The absence of evidence of reliance weighs heavily against a finding of materiality. *See F.T.C. v. Wash Data Res.*, 856 F. Supp. 2d 1247, 1272 (M.D. Fla. 2010) (“a representation is material if likely relied upon by a reasonable prospective purchaser”).

It was incumbent upon Complaint Counsel to prove by a preponderance of the evidence that the Rate Claim likely affected consumer purchasing decisions. *Pom Wonderful*, 2012 WL 2340406, at \*235. “Preponderance of evidence, of course, involves probabilities, rather than mere possibilities. If two possibilities can be inferred from the evidence, neither one can be said to have been proved by the preponderance of the evidence required to sustain the necessary burden of proof.” *Aluminum Co. of Am. v. Preferred Metal Prods.*, 37 F.R.D. 218, 221 (D.N.J. 1965) (citing *McNamara v. U.S.*, 199 F. Supp. 879 (D.D.C. 1961)). Logically that requires at least some evidence revealing that consumers altered their purchasing decisions based on the Rate Claim, or considered the claim “important” in the making of a purchase decision. Complaint Counsel utterly failed to meet that standard of proof, certainly not doing so by a preponderance of the evidence. Complaint Counsel presented no fact witnesses and no other reliable evidence at hearing revealing an alteration in either End-Use Consumer or Plastic Company Purchaser decisions based on the Rate Claim.

## **2. “Proof” of Materiality**

The ALJ found no evidence that the Rate Claim was material to End-Use Consumers. ALJID at 288–91. The ALJ instead relied on four lines of circumstantial evidence to intuit that the Rate Claim was important to Plastic Company Purchasers: (1) that ECM had made the Rate Claim “in a variety of marketing materials” and, according to the ALJ, it would not have made the claim unless likely to have an effect on customer purchasing decisions; (2) a few representatives of companies (only one of which ultimately bought the ECM product) asked

questions about the Rate Claim; (3) ECM provided Plastic Company Purchasers with marketing materials that included the Rate Claim, and encouraged them to use the marketing materials; and (4) 7 Plastic Company Purchasers out of 300 placed the Rate Claim in their own advertising. ALJID at 288–91. Based on that evidence, and without regard to more numerous and weighty countervailing evidence in the record, the ALJ concluded that the “Respondent would not promote the ECM Additive with these claims unless it was likely to have an effect on purchasing decisions of its customers.” ALJID at 288.

Of the evidence the ALJ cited concerning materiality, the facts only show that only 7 of its 300 customers placed the Rate Claim, derived from ECM marketing materials, on products at retail; that proof just barely satisfies the first element in a Section 5 deceptive advertising action: the existence of claims. *NHS Sys.*, 936 F. Supp. 2d at 531; ALJID at 289; ALJFF ¶¶286, 292–93, 1512. If that evidence constitutes evidence of materiality, then, in effect, the ALJ creates an irrebuttable presumption of materiality based solely on the existence of the Rate Claim in commerce. That is not the law. *Novartis*, 127 F.T.C. at 691. Rather, the burden of proof requires evidence that a purchasing decision was likely affected by the Rate Claim. *Id.*; *see also Kraft*, 970 F.2d at 322; *F.T.C. v. Colgate-Palmolive*, 380 U.S. at 391 (1965).

There is no record evidence that a consumer ever purchased a plastic containing the ECM Rate Claim. The evidence cited by the ALJ of materiality—that four company representatives inquired about the Rate Claim—is insufficient because it is not linked to a decision to purchase and, thus, not demonstrated to have likely affected a purchase. ALJID 288–291; CCX 234; CCX 235; ALJFF ¶1502.

Out of hundreds of thousands of pages containing correspondence by or with ECM customers and out of a universe of 300 Plastic Company Purchasers, the ALJ cited four company

interactions (reflected in a single sentence attributed to each company) as containing evidence that ECM customers “asked questions about the claim that ECM Plastics would biodegrade in 9 months to 5 years.” ALJFF ¶1502. That there are only four such party queries out of a universe of 300 proves the opposite, that the matter was not material, but the evidence cited is itself incompetent. Two of the four communications cited by the ALJ are ECM database communication logs (which are abbreviated summaries by ECM employees of interactions with potential customers—not the actual record of the communication). CCX 400; CCX 423; Sinclair, Tr. 858; Chappell, Tr. 856.

In one of the database logs cited by the ALJ (CCX 423), an ECM employee with the initials “ML” noted that on October 3, 2013, Dave Mattair from Westchem, Inc. sent an e-mail asking whether complete biodegradation could be said to occur within 5 years. Without any sponsoring witness to answer at trial or context surrounding that correspondence, the ALJ could not have known whether the Rate Claim influenced Westchem’s decision-making, and Complaint Counsel produced no evidence that would aid the Court in understanding how or why that company later decided to purchase the ECM technology.

In the second database log cited by the ALJ, an ECM employee with the initials “JS” noted that Terry Gerhardt from PakSher had sent an e-mail to “Jeanie” asking what percentage of the ECM additive to use to meet the stated degradation timeline of 9 months to 5 years. CCX 234. Again, without a sponsoring witness or context it cannot be known what Terry Gerhardt intended by his or her query, whether the correspondence was accurately logged, or whether the prospective customer was concerned at all about rate as opposed to the amount of ECM additive that would need to be purchased to make the product “biodegradable” generally. Of critical

import, PakSher never bought the ECM additive; it was never an ECM customer, so the ALJ erred by referring to PakSher as a consumer of the product. CCX 234; CCX 235.

Beyond those scant two database summaries, the ALJ cited two e-mail messages as evidence that ECM “customers” inquired about the Rate Claim. ALJID at 288–89. One message, CCX 269, once again void of context and without a sponsoring witness, contains a Geneva representative’s query, “[w]hat determines 9 months vs 5 years as it is such a variance?” CCX 269. But Geneva Watch Group never became an ECM customer; there is no evidence that it ever made a purchase; so here again the ALJ erred by referring to Geneva Watch Group as a consumer of the product. CCX 234; CCX 235.

The ALJ cited CCX 300, an e-mail correspondence between ECM and Williams Industries. ALJID 288; ALJFF 1502. Williams’ representative asked whether ECM recommended that its customers test “the end-users’ product to ensure that they biodegrade in less than 5 years?” Without context and a sponsoring witness, that statement provided no indication of Williams Industries’ perception of the Rate Claim and, in any event, here too Williams Industries never actually purchased the ECM additive; the ALJ erred by referring to Williams as a consumer of the product. CCX 234; CCX 235.

The ALJ erred by construing these four limited pieces of correspondence (three from companies that never purchased the ECM additive) out of context and without sponsoring witnesses to be proof in and of themselves that a purchasing decision had been altered by the Rate Claim and to be proof characteristic of all Plastic Company Purchasers of the ECM additive. The interactions cited are too limited and too superficial to draw a penultimate conclusion as to the state of mind of the parties and, particularly, as to whether the Rate Claim factored into any decision to purchase the ECM product, let alone to all such decisions by all

other Plastic Company Purchasers. The evidence does not rise to the level of materiality. The single sentences excerpted from three companies that never became purchasers certainly cannot be deemed evidence of an effect on a purchasing decision. CCX 234; CCX 235; CCX 423 at 9; CCX 300 at 1; CCX 269 at 1; CCX 400 at 4. The single sentence from one company that ultimately did become an ECM customer is not proof that the actual decision to purchase was influenced by or predicated on the Rate Claim when it is simply a question without more and no fact witness was ever called to elucidate meaning. Extrapolating that correspondence to the universe of actual and potential customers is factually unsupportable, particularly when the record confirms that ECM and its customers would negotiate and discuss the technology and variable environmental conditions affecting biodegradability for months or years before opening accounts. ALJFF ¶¶211–221.

No customer testified, and no document evidences, that any customer deemed the Rate Claim a factor affecting an ultimate decision to purchase the additive. RFF ¶¶508–11, 534–37, 613–16, 633–35, 642–46, 644–46, 653–56, 673–76, 689–92, 700–03, 720–23. No evidence shows that but for the Rate Claim a purchase would not have been made or that once ECM informed customers by email dated October 5, 2012, that the Rate Claim could not be made, ALJFF ¶262; RX 35–77, any chose on that basis to discontinue ordering the additive; rather, ECM acquired new customers after it ceased making the Rate Claim. *See id.*; Sinclair, Tr. 774–75, 919 (“We’ve had a lot of customers and potential customers come to us after we stopped using [the Rate Claim] nearly three years ago”).

**a. Survey Evidence Rebuts Materiality**

The ALJ failed to take into account the survey evidence on public identification of bases for purchasing or using biodegradable plastics. Survey expert Dr. David Stewart asked 400

randomly selected participants about the Rate Claim and biodegradable claims generally in a well-designed, blinded telephone interview survey. RX 602 at 19–21; ALJFF ¶498. The participants overwhelmingly explained their understanding that multiple environmental factors affect rate. RX 856 (Stewart, Rep. at 26).

Dr. Stewart designed his survey “to determine how representative consumers who purchase products made from or packaged in plastic perceive the meaning of the term ‘biodegradability.’” ALJFF ¶501. His objective was to understand consumer perception of the term “biodegradable” complete with any contingencies, dependencies, or context that consumers might bring to bear. ALJFF ¶502. Dr. Stewart designed and conducted his survey under accepted principles of survey research, as articulated in the *Manual for Complex Litigation*. ALJFF 542.

Question 5c of Dr. Stewart’s survey asked consumers to indicate what the following claims meant to them:

- Plastic products made with ECM additives:
- Fully biodegrade in 9 months to 5 years
- Fully biodegrade when disposed of in a biodegrading environment,  
either
- Anaerobically or aerobically in landfills

RX 602, at 21. Consumers’ responses expressed a lack of understanding, confusion, skepticism or disbelief, and just restatements of the claims. RX 856, at 26. Dr. Stewart therefore concluded that “[t]his general lack of understanding, confusion, and skepticism make it highly unlikely that these claims would be material to end use consumers even if these claims were directed to and

reached them.” RX 856, 26. Instead, what is material, to 71% of the respondents, is the fact that a product is unqualifiedly biodegradable. ALJFF ¶1507.

In Question 4, Dr. Stewart asked, “If something is biodegradable, how long do you think it would take for it to decompose or decay?” ALJFF ¶548. That question elicited a very wide range of responses, with 39% saying that it depends on the material or type of product. ALJFF ¶¶548–49. In total, 68% of respondents gave answers that indicate recognition of differences in the rate of decomposition dependent upon the type of material and/or context. *Id.* Furthermore, 98% of respondents responded that there are differences in the amount of time it takes for different types of products to biodegrade. ALJFF ¶550. According to Dr. Stewart’s survey, consumers interpret the term “biodegradable” to mean the process by which a product breaks down or decays; consumers understand that the time for that process varies depending on the materials involved; and that the process of biodegradability is not always, or even often, a rapid one. ALJFF ¶554. Those responses place no emphasis on a specific “rate.”

Dr. Stewart’s survey reveals that End-Use Consumers have no universal benchmark for biodegradation rate from which they can assess whether any particular speed within which something biodegrades ought to be viewed as good or bad. If the Rate Claim is not material to End-Use Consumers, then logic suggests that the Rate Claim is not material to intermediary manufacturers and distributors who provide product to those End-Use Consumers. There is, thus, no basis to conclude that the Rate Claim induced consumer purchases, a factual predicate essential for materiality. *In re Kraft, Inc.*, 114 F.T.C. 40, at \*68 (1991). The affirmative evidence that consumers are not induced to purchase biodegradable plastics based on articulated rates exceeds a mere absence of evidence and rebuts any presumption of materiality based on the Rate Claim.

**b. Lengthy Pre-Purchase Negotiations Rebut Materiality**

During lengthy negotiations and exchanges of information, actual ECM customers were apprised that biodegradation rates varied based on environmental factors and each who tested the product received independent validation of that fact due to the absence of rate prediction in ASTM tests. ALJFF ¶¶248, 254, 1043–1447; RFF ¶¶ 296, 307, 310–12, 320, 355, 377–79, 384, 405–07, 410–11, 427.

ECM engages in six month to two year negotiations with Plastic Company Purchasers before a purchase is made. ALJFF ¶¶222, 231; RFF ¶¶384, 388, 414, 458. No company purchases an ECM product on impulse or based on labeling or advertising alone. ALJFF ¶¶206–31. ECM opens “accounts” after Plastic Company Purchasers negotiate with ECM, test the ECM product, run sample batches, and investigate competing technologies. *Id.*

The information cited in the Complaint is a minor subset of information given by ECM to prospective customers. *See* Complaint, at Exhibits 1A–4; *Removatron Int’l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989) (claims should not be taken “apart from ... context”). During prolonged, complex negotiations, prospects regularly inquired in detail about ECM’s product, manufacturing processes, and scientific studies; and ECM responded through live presentations, telephone calls, and emails. ALJFF 225–27; RFF ¶¶ 420–21, 423, 426. ECM customers often sampled the ECM additive and tested their plastic products infused with the additive, all before purchasing. ALJFF ¶¶216–17, 219–21; RFF ¶¶ 401-04. Indeed, the 29 positive gas evolution biodegradation tests in evidence, RFF ¶¶2129–2706; RB at 118–22, are independent, critical evaluations of the ECM additive by Plastic Company Purchasers that wished to determine before purchase if the additive would cause their plastics to biodegrade. The industry that chose to perform these ASTM gas evolution tests understood that the tests do not reveal rate.

**c. Plastic Company Purchasers' Sophistication Rebutts Materiality**

The sophistication of the Plastic Company Purchasers reveals them not likely to have been affected or influenced by the Rate Claim in making a purchase. ALJFF ¶¶206–233; RFF 296–604. Complaint Counsel collected hundreds of thousands of pages containing correspondence with ECM customers, including discussions between ECM and its customers. *See* RPB, at 96–97. ECM was compelled to produce more than 115,000 pages of email correspondence (and notes of correspondence) with its customers. *Id.* Complaint Counsel subpoenaed more than 50 ECM customers or potential customers for information, including correspondence concerning the Rate Claim. Complaint Counsel deposed ECM actual and potential customers in various locations nationwide. ALJFF ¶1. Despite that mass of documentary and testimonial evidence, Complaint Counsel was unable to produce any direct evidence that customers actually predicated a purchase based on the Rate Claim. Moreover, even after ECM informed all of its customers on October 5, 2012 that ECM no longer endorsed the Rate Claim, there is no evidence that a single customer ceased purchasing the additive on that basis, but there is evidence that ECM attracted new customers. ALJFF ¶262; RX 35–77; Sinclair, Tr. 774–75, 919.

ECM's customers, plastics manufacturers and buyers for same, are well informed, intelligent purchasers, savvy in the field of plastics, not naïve about basic environmental variables that affect durability of their products or about biodegradation of them after disposal. They understand, even more so than the general public, the variable ambient environmental conditions that affect biodegradability in varying environmental conditions. *Perini Corp. v. Perini Constr.*, 915 F.2d 121, 128 (4th Cir.1990); *Oreck v. U.S. Floor Sys., Inc.*, 803 F.2d 166, 173 (5th Cir. 1986) (“because these persons are buying [vacuums and extraction machines] for

professional and institutional purposes at a cost in the thousands of dollars, they are virtually certain to be informed, deliberative buyers”).<sup>11</sup>

**d. Testimonial and Documentary Evidence Rebutts Materiality**

ECM’s officers testified that ECM customers purchased the additive because it rendered plastic containing the ECM additive intrinsically biodegradable as defined by ASTM and scientific standards, RFF ¶¶320, 321, 341, 357, 358, 359, 387, 431, because it was a cost-effective alternative to bioplastics, RFF ¶¶322, 328, 330, 333, 336, 338, 345, 387, and because it did not alter plastic properties needed to assure utility in the market. RFF ¶¶329, 331, 332, 335, 341, 343–45.

The deposition testimony supports the conclusion that ECM customers did not care about biodegradation rate, so long as the product was inherently “biodegradable.” For example, ECM customers testified that they were never concerned with how long it would take an ECM amended plastic to biodegrade (CCX 800 (Ringley, Dep. at 32)); (CCX 801 (Kizer, Dep. at 22)), and repeatedly explained that their sole interest was in producing a “biodegradable” product (CCX 800 (Ringley, Dep. at 17)); (CCX 809 (Sandry, Dep. at 13–14, 75)); (CCX 810 (Blood, Dep. at 15, 197)); (CCX 812 (Gormly, Dep. at 14–15, 46)); (CCX 817 (Bean, Dep. at 19, 17)); (CCX 822 (Samuels, Dep. at 22, 28)); (CCX 801 (Kizer, Dep. at 21)); (CCX 802 (Leiti, Dep. at 47, 49–50)); (CCX 804 (Collins, Dep. at 15)). ECM customers and others in the supply chain desired biodegradable products because they wanted to be viewed as “green” or “environmentally friendly.” CCX 800 (Ringley, Dep. at 18); CCX 801 (Kizer, Dep. at 19, 20, 30); (CCX 803 Santana, Dep. at 43, 45–46); CCX 809 (Sandry, Dep. at 15, 19, 28, 72–73); CCX

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<sup>11</sup> See also ECM’s Proposed Conclusions of Law ¶¶ 43–58 (explaining that increases in customer sophistication are associated with a commensurate decrease in the risk of confusion or deception, and therefore, the sophisticated purchaser requires less protection).

810 (Blood, Dep. at 15, 18–19, 28); CCX 812 (Gormly, Dep. at 15); CCX 822 (Samuels, Dep. at 12–13); CCX 822 (Samuels, Dep. at 28). Those customers understood that ECM could not guarantee biodegradation within any specific time frame for their specific plastic, but, rather, ECM had only promised intrinsic biodegradability. CCX 801 (Kizer, Dep. at 22); CCX 809 (Sandry, Dep. at 73, 75); CCX 810 (Blood, Dep. at 198–99); CCX 812 (Gormly, Dep. at 23, 48–50); CCX 822 (Samuels, Dep. at 27–28).

Note well that despite 11 depositions of ECM customers (a subset of the 300 total, ALJFF ¶167), Complaint Counsel could marshal no evidence in the testimonial record that a single one was actually influenced in its purchasing decision by the Rate Claim. Complaint Counsel did not call a single fact witness, leaving its argument for materiality to rest entirely on speculation. A finding of “materiality” is therefore contrary to fact and is arbitrary and capricious in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A).

Moreover, in correspondence with ECM, customers explained that they made purchasing decisions on a number of practical factors other than rate. For example, ECM customers based their purchasing decisions on the type and quality of the additive’s ingredients, on the fact that the additive made plastics environmentally friendly in a general sense, on the fact that the additive is safe for use for holding food products, on the ease of integrating it into the manufacturing process, and on the fact that it would not alter the shelf life of plastic (meaning that biodegradation would take place only after the plastic was discarded). RX 126; RX 128–30; RX 133.

Customers were also interested in a “biodegradable” product that could work with their manufacturing systems, because the plastic had to serve its intended purposes. RFF ¶340.

Smaller companies in particular were most concerned about the functionality of plastics in commerce and the manufacturing processes. Island Plastic Bags explained:

Q: And in the email David Hong is stating that he was experimenting with ECM plastic for over a year.

A: So what we—what I believe he was doing was—and we didn't, like, test it or anything, what we were doing is seeing if we could actually run it through our machines, because it could—you know, ECM at that time said it's biodegradable, but it doesn't do us any good if we can't use it through our machines. So what we were doing was putting the additive inside of our plastics to see if it could actually run through our extruders and then be cut and sealed as plastic bags.

RFF ¶340.

As further evidence that rate of biodegradation was not material to ECM's customers, ECM distributed a "Comparison Chart" to customers that listed the most important characteristics that distinguished the ECM additive from competing technologies. *See* CCX 12. The chart documented all significant industry concerns: recyclability; biodegradability in certain environments; storage conditions and shelf performance; processing requirements; and environmental concerns. *Id.* Noticeably absent from the chart is any mention of rate of biodegradation. *Id.*

The ALJ correctly found that "ECM's Customers are motivated to produce biodegradable plastics to meet what they perceived to be their customers' demand for such products." ALJFF ¶1503. Those customer demands do not include biodegradation rate; rather, they include making "green" products, adopting an environmentally sensitive approach, marketing 'biodegradable' products, limiting pollution, offering environmentally friendly but economically feasible alternatives to conventional plastic bags, and conveying a message of "biodegradability." ALJFF ¶1503–06, 12. Significantly, no evidence suggests biodegradation rate was material to customers.

Therefore, the evidence affirmatively shows that the Rate Claim did not factor into Plastic Company Purchasers' decisions of whether to buy the ECM additive.

**e. Exclusion of Rate Claims from Products and Marketing Rebutts Materiality**

The ALJ determined that ECM's Rate Claim was material, in part, because 7 customers [out of 300] included the claim on their products; but the record failed to show any of those products to have been sold at retail. ALJFF ¶¶ 286, 292–93, 1512; ALJID at 288–91. The overwhelming majority of ECM's customers excluded the Rate Claim from their products and marketing content.<sup>12</sup> The ALJ did not give any countervailing weight, let alone dispositive weight, to that fact: that fully 98%, 293 customers, chose *not* to repeat the Rate Claim, which evidence more credibly and affirmatively proves that the claim did not affect Plastic Company Purchasers' purchasing decisions.

Almost invariably, by the time the products reached End-Use Consumers, the only claim witnessed was an unqualified “biodegradable” claim, which is the only claim ECM has in its certificate of biodegradability. ALJFF ¶¶ 266–76; RFF ¶319. That certificate lacks any reference to rate of biodegradation. Complaint Counsel visited ECM's offices in Ohio to photograph consumer goods containing the ECM additive. They photographed approximately fifty such products and, with very few exceptions, every product included the generalized “biodegradable” claim without reference to, or reliance on, the rate of biodegradation.<sup>13</sup>

If the rate claim was material and important to purchasing decisions, then Plastic Company Purchasers would be expected to pass that information along in commerce routinely

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<sup>12</sup> All of the following exhibits represent photos of the actual consumer goods that are eventually labeled “biodegradable,” but without any reference to rate of biodegradation: RX: 00, 02–03, 14–17, 22, 26, 28–30, 315; CCX: 30–32, 36, 39, 43, 46–47, 49–50, 52, 59–60, 63–66, 79, 97–101, 103–104, 107, 109–136, 138–140, 142–151.

<sup>13</sup> *Supra* note 12.

and conspicuously. They did not. The appearance of the Rate Claim was the rare exception, not the rule. When passed along, it did not appear on any product sold at retail. It was not material to a purchase.

**f. The 1996 Green Guides Coerced Industry Into Including Rate Claims**

Beginning in 1996, the FTC “Green Guides” prohibited a company from representing, either directly or by implication, that a product or package is biodegradable unless the company had “competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, *i.e.*, decompose into elements found in nature within a reasonably short period of time after customary disposal.”<sup>14</sup> The 1996 Green Guides also stated that biodegradable claims “should be qualified to the extent necessary to avoid consumer deception about: ... (2) the rate and extent of degradation.”<sup>15</sup> At that time, the FTC made clear, through a Green Guides’ example that a company could label a product “biodegradable” only if the company had competent and reliable evidence that the product would decompose into elements found in nature within a short period of time after the product was discarded.<sup>16</sup>

Through those 1996 Green Guides, the FTC effectively coerced industry, including ECM, into including “rate” qualifiers in the advertising of biodegradable plastics. Although no evidence existed that rate was important to consumers or customers, thereafter the industry perceived articulation of rate to be FTC’s expectation. FTC used the Green Guides to prosecute companies selling products labeled “biodegradable.” *See* 75 Fed. Reg. at 63556 n.42. For example, FTC prosecuted Dyna-E International, Kmart Corporation, and Tender Corporation, alleging that they sold products labeled “biodegradable” that would not biodegrade *within a*

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<sup>14</sup> *Guides*, supra note 1.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

*reasonably short period of time. Id.* (emphasis added). Then, in 2012, the FTC revised the Green Guides to clarify that by “reasonably short period of time” it meant within one year after customary disposal. RX 347 at 16 CFR § 260.8(c).

The evidence proves that ECM customers are, in fact, only concerned with marketing a “biodegradable” claim and, so, to the extent an extreme minority considered placing the Rate Claim on their products, it was to satisfy FTC. Sinclair, Tr. 770–771, 775; RFF ¶¶431, 725; RX 105; RX 107; RX 112–113; RX 117; RX 140; RX 871 (Blood, Dep. at 193). Were it not for the 1996 Green Guides, there is no evidence that any ECM customer would have cared about the rate of biodegradation at all. *Id.*; RFF ¶¶605–725.

ECM’s customers concerned about FTC’s requirements in the Green Guides tried to tailor their advertising content according to those policies. RFF ¶¶424–25; RX 35–RX 77; RX 871 (Blood, Dep. 193:10–21). Indeed, Dr. Stewart’s pilot survey of ECM customers concluded that those customers are “knowledgeable, at least some of them, of particular standards or of the Green Guides ...” Stewart, Tr. 2590. Additionally, documentary evidence shows that ECM customers keep abreast of regulatory requirements. RX 98; RX 116; RX 119.

The record is replete with evidence showing that no person or entity, apart from the FTC itself, was concerned with the pace of biodegradation in landfills. After the FTC revised its Green Guides in 2012, ECM abandoned its Rate Claim and began informing customers that the product would biodegrade “in some period greater than one year.” ALJFF ¶¶251–59. That statement was a direct attempt to comply with the new Green Guides. *Id.* Industry knew that “rate” was highly variable and impossible to predict with accuracy. So using best efforts to follow the Guides, companies approximated the rate based on all methods of disposal (back yard, compost, dumps, landfills), or calculated rate based on estimates. Sinclair, Tr. 754–56, 769–70.

The FTC must have actual evidence that the claim is an *important* reason for consumer purchasing decisions. *See, e.g., F.T.C. v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 529 (S.D.N.Y. 2000) (finding materiality not merely because claims were made, but also because “consumers’ applications, declarations and complaints all evidence[d] the fact that the [claims] were the reason why” the consumers purchased the product). That evidence is entirely lacking here.

**g. Consumers Did Not Purchase ECM Plastics or Care About Rate**

As the ALJ found, there is no record evidence that an End-Use Consumer ever purchased an ECM Plastic because of the Rate Claim. ALJID at 300 at n. 58. The record evidence confirms that many products containing the ECM additive were given away at retail. *Id.*; *see also id.* at n. 59. Thus, the Rate Claim did not affect a consumer purchase decision.

Furthermore, the Rate Claim applies only to a product after it is discarded. Consequently it has no utility to the consumer. In other words, the consumer, whether it be a Plastic Company Purchaser or an End-Use Consumer, purchases the product containing the ECM additive with principal concern for its utility in the market, not its durability after it is discarded. Once the product is thrown away, the consumer abandons its interest in the product and the rate at which the product thereafter biodegrades is of no consequence.

**h. The Rate Claim Is Scientifically Immaterial**

Based on extensive competent and reliable scientific evidence of record, the ALJ correctly found that the definition of biodegradation does not involve a stated “rate” of biodegradation. ALJFF ¶¶676–96. Biodegradation is a process, and it means the breakdown of an article through biological means, using biota such as bacteria or fungi or other naturally occurring microorganisms. ALJFF ¶681. The biodegradability of a product describes an

intrinsic property of the material, much like its color, weight or density. ALJFF ¶¶686.

Complaint Counsel's own experts explained that biodegradation is: (1) the conversion of organic matter through the action of bacteria and fungi into more elementary components or elements; and/or (2) the mineralization of materials as a result of the action of naturally-occurring microorganisms such as bacteria and fungi. ALJFF ¶¶693–94. Scientists do not define “biodegradation” by reference to rate, only by reference to biological processes which proceed on their own variable time schedule. ALJFF ¶¶633–703; ALJID at 224–234 (“biodegradation is defined as the biological process by which microorganisms such as bacteria and fungi use the carbon found in organic materials as a food source”). A tree trunk, a banana peel, an orange peel, and paper are generally accepted to be biodegradable, although none reliably breaks down into elements within nature within one year of customary disposal. ALJFF ¶¶673; ALJID at 229.

The ALJ correctly found based on credible and reliable testimony that the definition of biodegradation has no relation to “rate” of biodegradation. ALJFF ¶¶633–96. He also concluded “that there is presently no single test that can substantiate the precise rate of biodegradation of plastics in a landfill.” ALJID at 312; *see also* ALJFF ¶¶712. Because scientists agree that whether something is inherently biodegradable is independent of any specific rate within which the substance biodegrades, generally accepted ASTM tests predictive of biodegradation in a landfill evaluate whether the plastic biodegrades not whether it will do so in any specific time. ALJFF ¶¶676–96; 712; ALJID t 239. For example, if scientists cannot prove a specific “rate” of biodegradation for cellulose (which they cannot), they nevertheless still regard cellulose as intrinsically “biodegradable” without regard to rate because the process of biodegradation is known to take place on cellulose.

If scientists are unconcerned with biodegradation rate, then, by extension, industry dependent upon biodegradation science has little reason to be concerned with rate. So the fact that rate is scientifically unknowable supports the conclusion that a Rate Claim is immaterial. That conclusion is logically reinforced by the fact that many industry members and customers have staff or employees who are aware of the ASTM industry standards, are part of the scientific community or actually participate in the ASTM. RFF ¶¶416–18.

**i. The Rate Claim Is Immaterial in the Absence of Injury**

The ALJ erred by finding the Rate Claim material in the absence of any injury to customers or consumers. ALJID at 288–91. “A finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique.” *Cliffdale Associates*, 103 F.T.C. 110 at \*50. Injury exists if consumers would have chosen differently but for the deception. *Id.* If different choices are likely, the claim is material, and injury is likely as well. *Id.* “Thus, Injury and materiality are different names for the same concept.” *Id.*, at \*50. So, without injury there can be no materiality.

“Injury to consumers can take many forms.” *Id.* However, for injury to exist, there necessarily must be a “choice... regarding the product.” *Id.* at \*49. Here, no evidence shows that any ECM customer chose to purchase the ECM product over a competing product because of the Rate Claim. If anything, the Rate Claim emphasizes a difference beneficial to ECM’s competitors, the compostable industry, because those, if any, who found rate to be material would be more apt to choose a compostable product guaranteed to biodegrade in less than a year than a biodegradable plastic. ALJID at 254, 286.

Because injury and materiality are “different names for the same concept,” the complete absence of an injury is highly persuasive evidence that a claim is not material. *Cliffdale Associates*, 103 F.T.C. 110 at \*50.

### **B. A Remedial Order Is Not in the Public Interest**

A proceeding by the Commission to prevent the use of unfair methods or unfair or deceptive acts or practices must be in the public interest. *Spiegel*, 494 F.2d at 62; *Thomas*, 116 F.2d at 349; *Arnold Stone*, 49 F.2d at 1019. The “mere misrepresentation and confusion or deception of purchasers” is insufficient for FTC action. *Royal Milling*, 288 U.S. at 216; *Scientific Mfg. Co. v. Fed. Trade Comm'n*, 124 F.2d 640, 643 (3d Cir. 1941) (explaining that the “presence of the public interest was essential to an exercise of the Commission’s jurisdiction”). Courts in determining whether FTC action was appropriate have examined whether the deceptive statement resulted in prejudice or injury to the public. *See S. Buchsbaum & Co. v. Fed. Trade Comm'n*, 160 F.2d 121, 123–24 (7th Cir. 1947). Thus, in *Buchsbaum*, the Court held that an FTC proceeding was not in the “public interest” because the “Commission made no finding that the deception . . . had ever resulted in or had any tendency to result in detriment to the purchasing public.” *Id.* Nothing in the *Buchsbaum* record supported the “conclusion that the acts and practices are all to the prejudice and injury of the public.” *Id.* Congress crafted the FTC’s jurisdiction to reach “acts or practices which injuriously affect the general public . . .” *See Am. Fin. Servs. Ass’n v. FTC*, 767 F.2d 957, 966-67 (D.C. Cir. 1987) (quoting H.R. Rep. No. 1613, 75th Cong., 1st Sess. 3 (1937)); *Royal Milling*, 288 U.S. at 216-17; *see also Klesner*, 80 U.S. at 30 (explaining that “any time . . . it,” it appears that the proceeding is not in the public interest, “the Commission should dismiss the complaint”).

Concerning the Rate Claim, the ALJ held that simply protecting ECM's customers "from deception is in the public interest." ALJID at 299. In so holding, the ALJ did not satisfy the "public interest" test. The ALJ did not place any weight, let alone dispositive weight, on the lack of evidence of injury or harm. The ALJ stated that "[a] case affects the 'public interest' where there is deception of the public." *Id.* (citing *Koch v. FTC*, 206 F.2d 311, 319 (6th Cir. 1953)). That conflated the "public interest" requirement with mere deception. Other cases have made clear that "mere deception" is inadequate to satisfy the public interest test. *Royal Milling*, 288 U.S. at 216; *Klesner*, 280 U.S. at 27 (the public interest "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"). Moreover, the *Koch* decision focused on whether the Commission had established actual deception of consumers. *See Koch*, 206 F.2d at 319. The Court thus found persuasive the fact that physician experts introduced hundreds of case studies showing that the challenged therapy did not work. *See id.* Logically, deceptive claims concerning therapeutic efficacy are likely to cause injury to the public, particularly for those patients who relied on the therapies. That same analysis does not apply in the ECM case and, accordingly, the ALJ's assessment of the public interest test was unduly truncated and legally erroneous.

If the ALJ is correct that mere deceptiveness is sufficient to trigger FTC remedial orders, the "public interest" test is illusory. Here the evidence offered against ECM demonstrates that, at worst, ECM's Rate Claim was a case of mere deception without injury of any kind. The ALJ found that "the absence of any proof of ... consumer harm . . . militates against a broad remedial order." ALJID at 300 (noting that Complaint Counsel introduced no consumer testimony in the case). Rightly so, but it equally militates against a remedial order of any kind. There was "no

evidence that consumers would make, or did make, purchasing decisions based, in whole or in part, on the properties of bags provided to them by stores.” *Id.* As the ALJ explained:

Complaint Counsel did not present evidence that any end-use consumers (as opposed to commercial enterprises) purchased any ECM Plastic based, in whole or in part, on any claim made by ECM. There is no record evidence that any such end-use consumers “purchased” the grocery bags, shopping bags, restaurant bags, disposable dinnerware, packaging materials, or shipping materials that comprise many of the product which, based on the customer deposition testimony, are manufactured using ECM Additive.

ALJID at 300 at n.58 (internal citations omitted); *see also id.* at 307 n.64 (acknowledging “Respondent’s cessation of the offending practice and the absence of proof that any ordinary end-use consumer purchased any ECM Plastic containing the offending claims”). Put simply, there is no record proof showing that the Rate Claim had any impact whatsoever injurious to the public, to Plastic Company Purchasers, or to downstream corporate customers.

In *Arnold Stone*, the Court held that FTC action was not in the public interest because the FTC had failed to show that a stone company’s use of the word “stone” deceived sophisticated customers, even though the “stone” products sold were actually made of composite materials like concrete. *Arnold Stone*, 49 F.2d at 1018–19. Significant to this case, the Court explained that “none of the words employed by the petitioner to describe any of its manufactured products or materials had the effect of misleading or deceiving architects, contractors, or builders who were the only classes of persons to whom petitioner sold or offered to sell any such products or materials.” *Id.* The Court continued, “[t]he sum and substance of all the evidence was that the words ‘cast stone’ were understood by petitioner’s prospective customers and by its competitors to mean just such a product as petitioner manufactured and sold.” *Id.* So too, here, ECM’s sophisticated plastics customers, who are the only ones to which ECM sells its additive, were seeking “biodegradable” plastics, and that is exactly what they received. RFF ¶¶606–09, 620–

25, 636–37, 647, 657–58, 661–62, 677–79, 694–95, 704, 706, 712–14. There is no evidence that ECM’s customers desired any specific rate of biodegradation, or that biodegradation rate (even if changed) would have influenced their purchasing decisions. RFF ¶¶605–609, 613–16, 620–25, 633–35, 644–46, 653–56, 664–65, 673–76, 689–92, 700-03, 707, 710, 717–23.

Underlying this entire discussion is the fact that a more *slowly* biodegrading product is actually *better* for the environment than a product that would disappear within, say, five years. Barlaz, Tr. 2287–90. ECM’s expert Dr. Barlaz testified without challenge that the “rate” of biodegradation in landfills is scientifically irrelevant. *See* Barlaz, Tr. 2283–84; RX 853 (Barlaz, Rep. at 12). Because the residence of waste in a landfill is for an indefinite time, if a material is biodegradable, then it would not matter from a landfill science perspective if that material biodegrades within ten years or many more years. *See Id.* Products that rapidly biodegrade in landfills do present environmental hazards, however, because the methane released during that short and rapid biodegradation is not captured by landfill operators, contributing to the more pressing environmental concern over greenhouse gas emissions. *See* Barlaz, Tr. 2284–85. The ALJ avoided that significant (and uncontroverted) point.

The EPA’s Landfill Methane Outreach Program (LMPO) has an express mission to reduce greenhouse gases emitted from landfills for this reason. *See* RFF ¶2877; RX 967 (noting that landfills remain one of the largest man-made sources for methane emissions on the planet). Dr. Barlaz thus explained that a product which biodegrades within a few years will have almost no methane captured and, thus, will produce deleterious environmental consequences. *See* Barlaz, Tr. 2285-86. “[T]here must be a showing that the acts and practices sought to be proscribed are detrimental to the public interest in order to satisfy the statutory requirement that the proceeding be in the public interest.” *S. Buchsbaum*, 160 F. 2d at 123–24. Here, if the Rate

Claim was deceptive, and the product took longer than “9 months to 5 years” to biodegrade, the biodegradable plastic would have a salutary effect on the environment because its greenhouse gas emissions would be captured in landfills. This is the definitional standard of “mere deception,” a claim without any injurious consequence—the very type of deception that fails the public interest standard without more.

### C. The One Year Rule Is *Ultra Vires* Agency Action

Government action is *ultra vires* if the agency or other government entity “is not doing the business [Congress] empowered [it] to do . . .” *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot., Dep't of Homeland Sec.*, 698 F.3d 171, 179 (4th Cir. 2012) (quoting *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949)). “An *ultra vires* act is one performed without any authority to act...” *Sahaviriya Steel Industries Public Co. Ltd. v. U.S.*, 601 F. Supp. 2d 1355, 1366 (C.I.T. 2009). The Administrative Procedure Act (APA) deems agency action void if “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” *See* 5 U.S.C. § 706(2)(C).

The Environmental Protection Agency (EPA) is tasked with establishing regulation and policy implementing the laws of Congress concerning the environment. *See* 42 U.S.C. § 6901. Under the Resource Conservation and Recovery Act (RCRA), Congress delegated exclusively to EPA the task of managing solid waste disposal. *See, e.g.*, 42 U.S.C. § 6901. Congress passed RCRA, in part, to address the “ever-mounting increase ... of the mass material discarded by the purchaser of ... products.” 42 U.S.C. § 6901(a)(1). Moreover, concerning energy, Congress explained that “solid waste represents a potential source of solid fuel, oil, or gas that can be converted into energy.” 42 U.S.C. § 6901(d)(1). In this case, Complaint Counsel has urged, but

the ALJ has properly rejected, application of the One Year Rule to ECM's claims. The One Year Rule, if applied, creates national environmental policy by coercing ECM and all similarly situated in the plastics industry to abandon production of biodegradable plastics that biodegrade over periods greater than a year. If plastics that biodegrade over many years' time may not be labeled biodegradable, market incentives for paying higher costs associated with producing those plastics disappear, causing landfills to receive either non-biodegradable plastics or rapidly biodegrading plastics, both of which harm the environment. That shift from slowly to non-biodegradable or rapidly biodegrading plastics interferes with EPA's initiative to collect methane produced at landfills.

Dr. Barlaz credibly testified that more slowly degrading products, such as biodegradable plastics, are environmentally preferable to rapidly biodegrading substances. The former release collectible methane, while the latter do not, thus contributing to greenhouse gas emissions and global warming. RX 967, at 3 (noting that the EPA's mission is to collect methane produced at landfills); Barlaz, Tr. 2285–90 (explaining that landfills cannot capture methane produced by rapidly degrading products).

#### **D. The Remedial Order Violates ECM's Due Process Rights**

ECM hereby renews and restates the objections set forth more fully in briefing before the Administrative Law Judge, including ECM's Post-Trial Brief and Reply to Complaint Counsel's Post-Trial Brief. *See* RB at 211–219; RRB at 189–201.

The ALJ improperly admitted Complaint Counsel's Rebuttal Expert Testimony and excluded ECM's Expert Rebuttal Witness. Complaint Counsel called Dr. Frederick Michel to testify as a rebuttal expert. Although having been aware of Dr. Michel's study of ECM plastic

since FTC contracted with him in 2012, Complaint Counsel improperly withheld that information from discovery responses and did not list Dr. Michel as a witness on any of its proposed witness lists, thus denying Respondent required advance notice.<sup>17</sup> Moreover, the ALJ sanctioned Complaint Counsel when, despite advance awareness of an article by Michel and discovery requests requiring its production to Respondent, Complaint Counsel withheld the article until the deposition of ECM's principal whereupon they foisted it upon him, endeavoring to benefit from the surprise tactic.<sup>18</sup> The record was made concerning that impropriety at the deposition itself. CCX 819 (Sinclair, Dep. at 371:13–376:24). Judge Chappell sanctioned Complaint Counsel but failed to exclude the evidence and Michel from the trial.<sup>19</sup> Despite having five (5) distinct opportunities to list Dr. Michel as a witness under the ALJ's various scheduling orders, Complaint Counsel never listed him as testifying in any capacity (as a fact witness or otherwise).<sup>20</sup> In fact, Complaint Counsel secured a stipulated agreement with ECM's counsel to preclude Dr. Michel's deposition on the basis that he would not be called as a fact witness (while simultaneously not listing him as an expert witness), an act of legerdemain.<sup>21</sup>

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<sup>17</sup> See Respondent's Memorandum in Support of Respondent's Combined Motion for Sanctions, to Exclude Complaint Counsel's Concealed Expert Rebuttal Witness, and for Leave to Include Surrebuttal Expert (July 9, 2014), at 5–7.

<sup>18</sup> See Order, *supra* note 6.

<sup>19</sup> *Id.*

<sup>20</sup> See Memorandum, *supra* note 17, at 4–7. Parties to an FTC administrative action are required to “serve each other with a list of experts they intend to call as witnesses at the hearing not later than 1 day after the close of fact discovery, meaning the close of discovery except for depositions and other discovery permitted under §3.24(a)(4), and discovery for purposes of authenticity and admissibility of exhibits.” 16 C.F.R. § 3.31A(a). Therefore, any expert not designated in the expert witness list is not permitted to testify at the evidentiary hearing, and cannot be later designated a rebuttal expert. See *In the Matter of POM Wonderful*, 2011 WL 1429882, at n. 1 (F.T.C. Apr. 5, 2011) (Chappell, A.L.J.) (“*an expert must first be designated and provide an expert report in order to be allowed to testify*”) (emphasis added, citing Rule 3.31A(b)); 16 C.F.R. § 3.31A(b) (“No party may call an expert witness at the hearing unless he or she has been *listed ...*”).

<sup>21</sup> *Id.* at Exhibit I.

Meanwhile, Complaint Counsel took a number of actions in attempting to bolster Dr. Michel's anticipated testimony, including taking the deposition of Elsevier, the company that staffed the reviewer for Dr. Michel's article. CCX 808. Complaint Counsel then identified Dr. Michel as a rebuttal witness one day before the deadline to conduct expert depositions lapsed.<sup>22</sup> Despite ECM's motion to exclude Dr. Michel as a rebuttal witness in light of the foregoing history, the ALJ allowed his testimony.<sup>23</sup> The testimony offered in Dr. Michel's "rebuttal" report was information that could have, and should have, been presented in Complaint Counsel's affirmative case; it did not qualify as rebuttal.<sup>24</sup> ECM moved to exclude the testimony on that basis, but that motion too was denied.<sup>25</sup> In the end, on the stand, Michel dissembled during cross-examination, revealing that the "ECM plastic" he tested came from an ECM competitor, had no chain of custody to validate proper manufacture, and was not independently evaluated by him to determine that indeed it contained the ECM additive. ALJFF ¶¶1467, 1471–75, 1479–81. The study Michel performed showed that the test plastic and the control biodegraded for a time and then plateaued prematurely, the telltale sign that the inoculum failed, rather than the test article. ALJFF ¶¶800–07, 1476; ALJID at 255; CCX 164. Michel further admitted that he was contractually required by the source of the plastic to have that source, ECM competitor Myers Industries<sup>26</sup>, review and approve his article; that he had it reviewed by Myers; and that he submitted it for publication without revealing Myers' involvement, in violation of Elsevier's

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<sup>22</sup> See *id.* at Exh. R, Exh. S; Third Revised Scheduling Order (May 22, 2014).

<sup>23</sup> See Order on Respondent's Combined Motion for Sanctions, to Exclude Expert Witness, and for Leave (July 23, 2014).

<sup>24</sup> See Respondent's Opposition to Complaint Counsel's Motion for Leave to Call Rebuttal Fact Witnesses After Complaint Counsel Rested its Case and Opposition to Complaint Counsel's Call of Dr. Michel as a Rebuttal Expert Witness (Aug. 26, 2014), at 17–19.

<sup>25</sup> See Order Denying Complaint Counsel's Motion for Leave to Call Rebuttal Fact Witnesses and Respondent's Request to Bar Rebuttal Expert Witness (Sep. 5, 2014), at 5–6.

<sup>26</sup> In total, Myers Industries has paid Dr. Michel approximately \$40,000–\$50,000 for research. ALJFF ¶1479.

conflicts of interest policy. ALJFF ¶¶1467, 1485–96. Dr. Michel also admitted that, in addition to Myers Industries, he has worked for many other ECM competitors. ALJFF ¶¶120–21.

Michel’s own testimony confirmed that his study lacked scientific integrity, resulting in the ALJ giving it no weight. ALJID at 255.

On February 28, 2014, ECM issued a subpoena to non-party Dr. Frederick Michel.<sup>27</sup> On March 14, 2014, FTC contacted Dr. Michel and urged him not to respond to that subpoena.<sup>28</sup> Upon discovery of the interference, ECM moved for sanctions, it being a fundamental principle that no party to an action may interfere ex parte with response to a duly issued subpoena.<sup>29</sup> Despite the unlawful interference with the subpoena, in violation of the District of Columbia Rules of Professional Responsibility, the ALJ refused to impose sanctions or compel production.<sup>30</sup> The evidence requested by ECM was delayed for weeks as a result of this unlawful tactic.

Application of the rules in a way that permits surprise rebuttal witnesses (who have not previously been identified) violates Due Process. ECM was not entitled to file surreptitious expert reports as a matter of course, *and* ECM’s expert testimony was limited at the hearing to what experts wrote in their original and only expert reports. Chappell, Tr. 624, 1107, 1775. Accordingly, the prospect of a “new” witness left ECM incapable of addressing the material raised by that new witness. In fact, Dr. Michel’s testimony was not fair rebuttal, because it was not limited to “that which is precisely directed to rebutting *new matter or new theories* presented

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<sup>27</sup> See ECM Biofilm’s Motion to Sanction Complaint Counsel for Unauthorized Intentional Dissuasion of Response to Subpoena *Duces Tecum* (Mar. 25, 2014), at Exh. RX-E.

<sup>28</sup> *Id.* at Exh. RX-B.

<sup>29</sup> See *id.*, at 8–9 (citing federal case law demonstrating that Complaint Counsel’s ex parte interference with a non-party witness is *per se* sanctionable and violates the Rules of Professional Responsibility that all licensed attorneys must abide by).

<sup>30</sup> See Order Denying Respondent’s Motion for Sanctions for Unauthorized Dissuasion of Response to Subpoena *Duces Tecum* (Apr. 9, 2014).

by the defendant's case-in-chief." *Bowman v. Gen. Motors Co.*, 427 F. Supp. 234, 240 (E.D. Pa. 1977) (emphasis added). Literally all of Dr. Michel's testimony covered areas of scientific dispute that Complaint Counsel knew of months before trial, before expert witness lists were due; all of the issues to which he testified were calculated to bolster Complaint Counsel's initial expert testimony or address factual issues (e.g., scientific studies) that should have been part of Complaint Counsel's affirmative case.

In this case, the surprise witness actually resulted in an absurdity in the administrative process, as ECM was afforded less than two full days from the time Dr. Michel was first identified as a witness until the purported close of all discovery, meaning that ECM had to seek leave of court just to depose Dr. Michel after the hearing began.

At the same time, the ALJ erroneously denied ECM an opportunity to present a surrebuttal expert of its own, Dr. Steven Grossman, who would have responded to false and scientifically incorrect statements made by Complaint Counsel's lead expert Dr. McCarthy during his hearing testimony that he, Grossman, heard in the court room. RX 971, ¶¶5–20. Grossman would have testified that McCarthy knowingly gave false testimony, including testimony directly contrary to his own writings and statements concerning the subjects under investigation. *Id.* This case concerned the credibility of expert opinion and, yet, ECM was not afforded an equitable opportunity to rebut expert testimony when the rebuttal witness was in the trial room and was prepared to speak directly to the testimony given live. Dr. Grossman's proffered testimony involved an exceptional situation. Dr. Grossman is a polymer engineer and teaches in the very same department as Dr. McCarthy at UMass Lowell. *Id.* at ¶ 2. He knows well McCarthy, McCarthy's writings, and McCarthy's extensive financial connections to ECM's competitors. Dr. Grossman, if permitted to testify, would have explained that Dr. McCarthy's

scientific positions were entirely without merit, in conflict with Dr. McCarthy's own writings, research, and patent, and incompetent with respect to basic science. *See generally* RX 971. The relative importance of that crucial testimony renders the denial of same a material violation of rights, as this case may now be determined without the benefit of Dr. Grossman's testimony concerning Dr. McCarthy, Complaint Counsel's lead witness.<sup>31</sup> That denial is particularly egregious where the Commission exercises authority to review the record de novo, including Dr. McCarthy's testimony.

Indeed, the ALJ denied ECM's motion for leave to present Dr. Grossman's testimony in pertinent part on a miscalculation of the motion due date. On July 23, 2014, Judge Chappell ruled that "Respondent did not file its request for surrebuttal within 5 days after service of Complaint Counsel's rebuttal report."<sup>32</sup> He further explained that "[b]ecause Complaint Counsel served Dr. Michel's report on June 30, 2014, Respondent was required to seek leave no later than July 7, 2014. Respondent's request was filed on July 9, 2014, and is therefore untimely."<sup>33</sup> Preliminarily, given the stakes to ECM (whether it must go out of business), denial of a motion as "untimely" without any evidence of prejudice in the record is an abuse of discretion and clearly erroneous. In point of fact, however, ECM's motion was timely and, so, the ALJ erred. Complaint Counsel emailed ECM with Dr. Michel's report on June 30, 2014 at 11:46 PM but did not complete service of Dr. Michel's exhibits and supporting information until the following day,

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<sup>31</sup> Outright disqualification of an expert is rare and should involve an assessment of the public interest in permitting the expert to testify. *Koch Refining Co. v. Jennifer L. Boudreau M/V*, 85 F.3d 1178, 1181–82 (5th Cir. 1996).

<sup>32</sup> *See* Order, *supra* note 23, at 4.

<sup>33</sup> *Id.*

July 1, 2015.<sup>34</sup> Rule 3.31A(a) states that a respondent “may file a motion not later than 5 days after the deadline for service of complaint counsel’s rebuttal reports...” *See* 16 CFR § 3.31A(a). Rule 4.3(a) governs the relevant computation of time, and the ALJ’s order excluding Dr. Grossman made no mention of that rule. *See* 16 CFR § 4.3(a). The rule states that the applicable time period “shall begin with the first business day following that on which the act, event, or development initiating such period of time shall have occurred.” *Id.* The measuring period thus began on July 2nd, the day after Complaint Counsel served respondent with all parts of Dr. Michel’s report. Furthermore, Rule 4.3(a) states that when the time period is seven days or less (here under Rule 3.31A the period was five days), “the Saturdays, Sundays, *and holidays shall be excluded* from the computation.” *Id.* (emphasis added). Counting from July 2, 2014, and excluding the July 4th holiday and weekends, the deadline to file ECM’s motion for leave to call Dr. Grossman was July 9, 2014, the very day ECM filed its motion. Thus, the ALJ erred by (1) beginning ECM’s computation of time from July 1st, the same day that Complaint Counsel completed service; (2) crediting Complaint Counsel with a “timely” service of Dr. Michel’s report on June 30 when in fact the service was untimely effectuated on July 1; and (3) failing to exclude the July 4th holiday in computing the due date for ECM’s motion.

In addition, Complaint Counsel failed to produce documents responsive to ECM’s requests of considerable import in this action. For example, this Court sanctioned Complaint Counsel for failing to disclose a document to ECM that was later used against ECM’s principals in deposition through a planned “gotcha” moment.<sup>35</sup> That document, which Complaint Counsel

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<sup>34</sup> The decision to credit Complaint Counsel’s near-midnight filing of an expert report as “timely” filed on June 30 is therefore erroneous because the complete submission was not actually served on Respondent’s counsel until the following day, July 1, 2015.

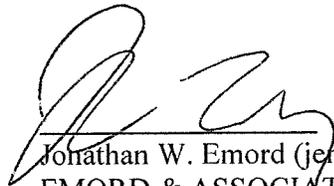
<sup>35</sup> *See* Order, *supra* note 6.

deemed “a damaging, peer-reviewed study,”<sup>36</sup> was Dr. Michel’s analysis of several competing biodegradable technologies, which, after hearing the evidence, the ALJ found to have no “significant weight on the issue of whether Complaint Counsel has met its burden of proving its charge that Respondent’s claims are false.” ALJID at 255.

#### IV. CONCLUSION

For the foregoing reasons, the Commission should find the Rate Claim not material, should find the ALJ’s recommended remedial order unfounded and not in the public interest, and should reject the ALJ’s recommended remedial order in its entirety. The Commission should further dismiss the Complaint and close this matter, taking no action against Respondent ECM BioFilms on the issues set forth in the Complaint.

Respectfully submitted,



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DATED: February 26, 2015

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<sup>36</sup> See Complaint Counsel’s Opposition to Respondent’s Second and Third Motions to Exclude the Ohio State study (Mar. 27, 2014).



**CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATION**

This brief complies with the type-volume limitations of 16 C.F.R. § 3.52(c)(2) and the Commission's Order dated February 25, 2015 because it contains 16,057 words, excluding sections of the brief exempted by 16 C.F.R. § 3.52(k).

**CERTIFICATE OF SERVICE**

I hereby certify that on February 26, 2015, one original and twelve copies of Respondent ECM BioFilms' Brief on Appeal from the Initial Decision of Chief Administrative Law Judge D. Michael Chappell, were mailed via UPS Next Day Air to:

Donald Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Ave., NW, Room H-159  
Washington, DC 20580

I hereby certify that this is a true and correct copy of Respondent ECM BioFilms' Brief on Appeal from the Initial Decision of Chief Administrative Law Judge D. Michael Chappell, and that on February 27, 2015, I caused the foregoing to be served **electronically** to the following:

The Honorable D. Michael Chappell  
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