No. 15-4339

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ECM BIOFILMS, INC.,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Petition for Review of an Order of the
Federal Trade Commission
FTC Docket No. 9358

CORRECTED BRIEF OF THE FEDERAL TRADE COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

The FTC believes oral argument may assist the Court in its consideration of this appeal and therefore requests oral argument.

QUESTIONS PRESENTED

ECM Biofilms advertised that its plastic additive product was scientifically proven to make ordinary plastic "biodegradable." The Commission found that claim was misleading and violated Section 5 of the FTC Act. After a full administrative trial, the Commission reviewed the record and determined that consumers interpret "biodegradable" to mean that the plastic completely breaks down within a reasonable time after disposal—about five years. Indeed, ECM had touted that time frame for biodegradation in its promotional materials to customers. But ECM had no scientific proof that its product would cause plastic to biodegrade in any reasonable time frame. Without substantiation, its claims were false. The Commission ordered ECM to cease and desist from making further biodegradability claims unless the claims are true, not misleading, and supported by reliable scientific evidence. The questions presented are:

1. Whether the Commission reasonably found that consumers interpret a claim that plastic is "biodegradable" to mean that it will biodegrade within about five years.

2. Whether the Commission's findings or its remedial order violate the First Amendment.

3. Whether the Commission's order violates the Administrative Procedure Act or denies ECM due process.

INTRODUCTION

As consumers become more environmentally conscious they increasingly want biodegradable products, and the idea of biodegradable plastic is particularly appealing. In landfills, where most household waste is disposed, plastic bottles and bags can take millennia or more to decompose. ECM Biofilms offered plastic manufacturers what sounded like the perfect way to satisfy that consumer demand: an additive that allegedly turns landfill-clogging plastic into "biodegradable" plastic that will break down in landfills. At first, ECM claimed complete biodegradability without reference to any time period. Responding to customers' desire to know how long biodegradation would take, ECM soon specified that complete breakdown would happen in nine months to five years. Later, it changed its claim to say biodegradation would take "some period greater than a year." ECM assured customers that all of its claims were supported by rigorous science.

In the proceeding under review, the FTC determined that the claims were untrue. ECM now concedes both that its products do not cause plastics to completely biodegrade in nine months to five years (or any other specific time period) and that it lacked any scientific proof of that claim. ECM challenges, however, the FTC's finding that its "unqualified biodegradability" claim—the contention that its additive would make plastic biodegradable with no time frame specified—implied that biodegradation would occur within a reasonable period of about five years. In

its brief, ECM doubles down on its misrepresentations to its customers, arguing that consumers' understanding of "biodegradable" is irrelevant as long as scientists agree that ECM plastic is "intrinsically biodegradable."

As we show below, that is not the law. Consumer interpretation, not scientific understanding of technical language, is paramount in determining the meaning of an advertisement. The record firmly supports the FTC's finding that consumers read the word "biodegradable" to imply a time frame for decomposition. That reading makes sense because given enough time *everything* will biodegrade; labeling a product "biodegradable" means nothing unless it conveys some time period within which the product will decompose. Two consumer surveys prove both that consumers read the term to have a time element and that they view that time period to be five years or less. Indeed, when its customers wanted to know how long plastic would take to decompose if they used the product, ECM itself came up with "nine months to five years."

STATEMENT OF THE CASE

A. The Legal Framework For Deceptive Advertising.

Section 5 of the FTC Act prohibits the use of deceptive acts and practices in commerce; the Commission is "empowered and directed to prevent such practices." 15 U.S.C. § 45(a). Companies can be liable under Section 5 not only if they deceive consumers directly, but also when they "put into the hands of others the

means by which they may mislead the public." *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963); *In re Litton Indus., Inc.*, 676 F.2d 364 (9th Cir. 1982); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493-494 (1922).

Congress gave the FTC "an influential role" in interpreting Section 5 because the Commission "is often in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the Act." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). To determine whether a representation is deceptive, the Commission "engages in a three-step inquiry, considering: (i) what claims are conveyed in the ad, (ii) whether those claims are false, misleading, or unsubstantiated, and (iii) whether the claims are material to prospective consumers." *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015).

Claims conveyed can be either express or implied. Express claims are made directly; implied claims are all other "messages an ad can reasonably be interpreted as containing." *In re Kraft, Inc.*, 114 F.T.C. 40, *aff'd* 970 F.2d 311 (7th Cir. 1992). A claim can be implied even if it is not the only possible interpretation of an advertisement. *Thompson Med. Co. v. FTC*, 791 F.2d 189, 197 (D.C. Cir. 1986). And an interpretation can be reasonable even if it is not shared by all or even a majority of consumers, or by "particularly sophisticated" consumers. *FTC Policy Statement on Deception*, 103 F.T.C. 174, 177 n.20 (1984) ("*Deception Statement*"). Thus, the Commission has long held that a claim is implied so long as "at least a

significant minority of reasonable consumers would likely interpret the ad to assert the claim." *POM*, 777 F.3d at 490 (internal quotation marks omitted); *Deception Statement*, 103 F.T.C. at 177 n.20 ("A material practice that misleads a significant minority of reasonable consumers is deceptive.").

The Commission may examine materials beyond the ads themselves to determine what claims have been made, including consumer surveys, expert opinions, and evidence that the company intended to convey a given message. *Kraft, Inc. v. FTC*, 970 F.2d 311, 318 (7th Cir. 1992); *In re Telebrands Corp.*, 140 F.T.C. 278, 307 (2005); *In re Novartis Corp.*, 127 F.T.C. 580, 683 (1999). The Commission particularly values surveys as evidence of how consumers perceive representations. *Kraft*, 970 F.2d at 318; *Nat'l Bakers Servs., Inc. v. FTC*, 329 F.2d 365, 367 (7th Cir. 1964); *In re Stouffer Foods Corp.*, 118 F.T.C. 746, 804 (1994).

A company's representations are not necessarily limited to the "technical meaning" of the terms used in an advertisement. "[I]n situations involving 'technical . . . terms,' it may become reasonable to assume that members of the public may be 'unaware of the . . . meanings of such terms' and that 'substantial numbers' might be misled." *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 (D.C. Cir. 1985) (quoting *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985)). Thus, even if the words of an advertisement are "technically true," that alone "does not prevent their being framed so as to mislead or deceive."

Koch v. FTC, 206 F.2d 311, 317 (6th Cir. 1953). Furthermore, the Commission may find an advertisement to imply a claim where consumers' understanding of the ad is based in part on their preexisting beliefs, even if the advertiser did not create those beliefs. *Stouffer Foods*, 118 F.T.C. at 810 n.31 ("[R]espondents may be held liable for dissemination of ads that capitalize on preexisting consumer beliefs.").

A claim need not be overtly false. "[E]ven a true statement may be banned for creating a misleading impression." *Buchanan v. Northland Grp.*, 776 F.3d 393, 396 (6th Cir. 2015). Half-truths can deceive by omission, and even silence can deceive where the circumstances leave a false impression in place. *In re Int'l Harvester Co.*, 104 F.T.C. 949, 1984 FTC LEXIS 2, at *240-241 (1984). An advertiser's obligation to dispel a misimpression can arise even when consumers' understanding of an advertisement "is attributable in part to factors other than the advertisement itself." *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1146 (9th Cir. 1978). And that a belief is based in part on such information "does not preclude the advertisement from being deceptive"; the advertiser must include information to dispel the viewer's false impression or ignorance. *Id.*, *see also J.B. Williams Co. v. FTC*, 381 F.2d 884, 889-890 (6th Cir. 1967) (ads for Geritol misleading for failing to disclose that for most people tiredness is not caused by iron deficiency). Thus, sellers may be required to correct consumers' misimpressions even if they did not

directly create, or only partially created, the misimpression. *Int'l Harvester*, 104 F.T.C. 949, 1984 FTC LEXIS 2, at *278 & n.14.

Once the Commission has discerned the claims conveyed by a representation, it turns to the second step of its analysis: whether the claims are false or misleading, or lack support. *POM*, 777 F.3d at 490; *Deception Statement*, 103 F.T.C. at 175 n.5. The level of substantiation required depends on the kind of claim. If the advertiser claims that a product has a particular quality—an "efficacy" claim—the FTC determines the appropriate level by analyzing the factors listed in *In re Pfizer Inc.*, 81 F.T.C. 23 (1972). If the claim is that a product's quality is scientifically proven—an "establishment claim"—the advertiser must have "well-controlled scientific studies" that the relevant scientific community would view as sufficient to support the claims. *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1498 (1st Cir. 1989); *POM*, 777 F.3d at 491. In either case, the advertiser has the burden to substantiate its claims. *E.g.*, *In re QT*, 448 F. Supp. 2d 908, 959 (N.D. Ill. 2006). Claims that lack a reasonable basis are deceptive as a matter of law. *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 8 (1st Cir. 2010).

At the third step, the Commission considers whether a claim is material; that is, "likely to affect a consumer's decision to buy a product or service." *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 631 (6th Cir. 2014); *POM*, 777 F.3d at 490. Because promotional materials are ordinarily meant to influence purchasers,

the Commission presumes the materiality of express claims, intentionally implied claims, and claims that pertain to a product's "central characteristics." *Deception Statement*, 103 F.T.C. at 182; *Colgate-Palmolive*, 380 U.S. at 392; *accord Kraft*, 970 F.2d at 322-323.

If an advertisement is deceptive, the FTC has "wide discretion" in crafting a remedy to prevent further violations. *Colgate-Palmolive*, 380 U.S. at 392; *Telebrands, Inc. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006); *Koch*, 206 F.2d at 320. The Commission is "not limited to prohibiting the illegal practice in the precise form in which it has been found to have existed in the past." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). "Having been caught violating the Act, the respondents 'must expect some fencing in.'" *Colgate-Palmolive*, 380 U.S. at 395, quoting *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957).

B. The Commission's Case Against ECM.

1. ECM's product and its environmental claims.

About 16 million tons of garbage in the United States are deposited in land-fills every year. App. 42.[1] Plastic disposed of in landfills is a particular concern because it can persist in the environment for 10,000 years or more. App. 43, 123. Thus, plastic is "often labeled a villain by environmental activists." Heartland

[1] "App." refers to the appendix filed by ECM; "S.A." refers to the Supplemental Appendix filed by the Commission; and "ALJ ¶__" refers to the ALJ's numbered findings.

Institute, *Plastics and the Environment, Villain or Friend?*, http://bit.ly/SPI-Heartland. Because of its extensive use in packaging, particularly for single-use products, plastic products are "criticized because they do not biodegrade and because they are manufactured from nonrenewable resources." *Id.* Plastic manufacturers thus are concerned that their customers will turn away from their products in favor of "greener" alternatives. *See* Amy Barrett, *Should You Switch To Green Packaging?*, Inc. Mag. (May 2011), http://bit.ly/Inc-SwitchToGreen; App. 42-43, 175 (ALJ ¶¶ 196, 205, 1503).

These manufacturers are ECM's customers. They make various plastic products—shampoo bottles, blister packs, shipping materials, grocery bags, etc.—and sell them for ultimate use by consumers. ECM offers these manufacturers a seemingly magic solution to worries that their downstream customers will choose more environmentally friendly materials: Just add ECM's product to ordinary plastic and it becomes biodegradable. App. 39, 43, 174 (ALJ ¶¶ 156-158, 200-201, 205, 1497, 1500). No special equipment is required, and the plastic will otherwise perform exactly as it would have without the additive. *E.g.*, App. 46 (ALJ ¶¶ 232-234); 407-408. What's more, ECM pitches, manufacturers can tell customers that their plastic products are biodegradable and assuage environmental concerns by labeling plastic products "biodegradable" and using ECM's "tree logo." App. 408; S.A. 475.

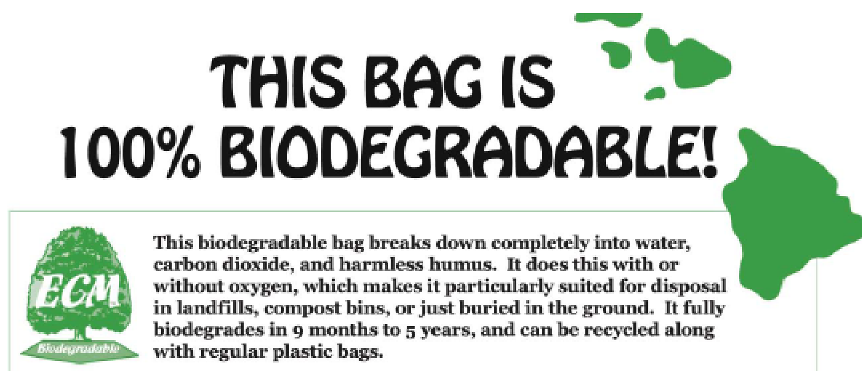
ECM's biodegradability claims have shifted over time. App. 342, 407-411; S.A. 550. Initially, ECM claimed that its product would cause ordinary plastics to biodegrade completely in a landfill without specifying a time frame—although it told customers that their plastic products would biodegrade as if they were organic material, like sticks or other small pieces of wood. S.A. 487-488, 489, 491; App. 46-47 (ALJ ¶¶ 232-237, 239). But ECM's customers wanted to know how long biodegradation would take. App. 43; S.A. 494-495. Downstream consumers demanded environmentally friendly products, and one that degrades in three years is better than one that does so in three hundred (or three thousand). App. 43, 48-49, 174-175 (ALJ ¶¶ 205, 245-246, 1498, 1501-1506); S.A. 550-551. Responding to that demand, ECM quickly altered its marketing campaign to specify that its product would cause plastic products to completely biodegrade in a landfill within

"9 months to 5 years." App. 48-49, 342, 407-408; S.A. 550. That statement appeared on ECM's marketing materials and throughout its website. App. 48-49, 52, 407-408 (ALJ ¶¶ 245, 265); S.A. 473-474. ECM provided its customers with materials they could use to market their products as biodegradable, including the tree logo shown above, emblazoned "ECM Biodegradable." *E.g.*, App. 411; S.A. 475.

ECM also assured customers that its biodegradability claims were supported by scientific evidence. App. 48, 52 (ALJ ¶¶ 245, 265); S.A. 473-474. It even gave them a certificate to prove it. App. 407, 409. The "Certificate of Biodegradability" asserted that plastics manufactured with ECM's additive "have been tested by independent laboratories in accordance with standard test methods" approved by standardization bodies "to determine the rate and extent of biodegradation." App. 407. The certificate lists several specific test standards and concludes that given the "results of these tests," "plastic products manufactured with ECM additives can be marketed as biodegradable and safe for the environment." *Id.* The certificate likewise pronounces that it "may be used by [the customer] to validate its claims to the biodegradability and environmental safety of plastic products" that use ECM's additive. *Id.*

ECM's customers conveyed ECM's biodegradability claims—including the claim of complete biodegradation in nine months to five years—to their own

customers. App. 56-58, 411-412, (ALJ ¶¶ 286-289). They also placed ECM's "Biodegradable" tree logo and other claims on their plastic products. App. 56-57, 411-412 (ALJ ¶¶ 286-292). At ECM's encouragement, its customers used the "Certificate of Biodegradability" to validate their own claims and passed the certificate on to their downstream customers. App. 53, 59, 190, 194 (ALJ ¶¶ 266-270, 305). In many instances, ECM reviewed and approved its customers' claims that their products would biodegrade in nine months to five years. App. 43 (ALJ ¶¶ 297-300). Millions of plastic products containing ECM's claims—grocery bags, plastic bottles, shampoo bottles, packaging materials, etc.—reached consumers. App. 56-58 (ALJ ¶¶ 285-286, 289, 300, 301). Those consumers were presented with claims like this one:



App. 411.

2. ECM's purported substantiation.

Contrary to its claims, ECM did not have scientific proof that adding its product to ordinary plastic would cause it to become "biodegradable" or to

biodegrade in a landfill within nine months to five years. App. 342. ECM's purported substantiation relied on tests that employed one of the test protocols listed on its certificate; namely, the D5511 protocol issued by the American Society for Testing and Materials. App. 379-381; *see* App. 429-435.

The protocol specifies the standards for running a "gas evolution" test designed to determine whether a material is capable of biodegradation under controlled, accelerated, anaerobic conditions.[2] App. 429-435. The material to be tested is first placed in a sealed container with a biologically active "inoculum"; the mixture is then heated and moisture is added to encourage the biological processes involved in biodegradation. App. 378, 431. The protocol next directs an assessment of whether the microorganisms produced methane, indicating that biodegradation has occurred. App. 378, 431-432. The percentage of biodegradation is calculated by comparing the volume of methane produced during the test to the theoretical maximum that could be produced based on the chemical structure of the test material and the inoculum. App. 432. The percentage can then be compared to results obtained from control samples that undergo the same test procedure except with materials known to be biodegradable or non-biodegradable. App. 378-379; 432.

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[2] In this context, "biodegradation" generally describes a biological process in which microoganisms use the carbon in organic material as a food source. App. 378.

ECM told its customers that the "results of these tests" show that "plastic products manufactured with ECM additives can be marketed as biodegradable," without qualification. App. 407, 409. The tests showed no such thing. The D5511 protocol is expressly not intended to support unqualified marketing claims that a material is biodegradable. C*ompare* App. 407 *with* App. 429; *see also* App. 44. It specifically directs that results "shall not be used for unqualified 'biodegradable' claims." App. 429. Nor can the results support a claim of *complete* biodegradation: "results shall not be extrapolated past the actual duration of the test." *Id.*; App. 383, 432. Moreover, the test is designed to simulate conditions in facilities that actively treat municipal solid waste—not ordinary landfills. App. 379, 429. Thus, no matter what the results of testing plastics made with ECM's additive showed, they were incapable of substantiating its unqualified claims of biodegradability (in general or in a landfill). And ECM did not even assert that the testing could substantiate a claim of biodegradation within five years or less.

3. The FTC's Green Guides and ECM's revised marketing.

In response to the increase in marketing that ascribes environmental benefits to various consumer products, in 1992 the FTC issued "Green Guides" to help marketers avoid making misleading environmental claims. The Guides are not binding rules, but as the name implies, they are intended to provide general guidance to marketers and the public about the FTC's view on specific environ-

mental claims. 16 C.F.R. § 260.1. Accordingly, advertising is not necessarily unlawful if it is inconsistent with the Guides. *Id.* But the Commission may determine to bring an enforcement action against marketers making such claims, in which case the Commission must prove that the claims violate Section 5 of the FTC Act. *Id.*

The 1996 version of the Green Guides advised that unqualified claims of "biodegradability" should be made only if the marketer has scientific evidence that the product will biodegrade in a "reasonably short period of time." FTC, Guides for the Use of Environmental Marketing Claims, 61 Fed. Reg. 53311, 53318 (Oct. 11, 1996). In the current version (released in 2012), the Commission clarified that it would consider unqualified biodegradability claims deceptive unless the product had been shown to completely biodegrade within one year of customary disposal. 16 C.F.R. § 260.8(c). The Guides advise that for items customarily disposed of in landfills, *any* unqualified claim is deceptive because landfills "do not present conditions in which complete degradation will occur within one year." *Id.*

Before the 2012 revision, ECM could not substantiate either its unqualified claim of biodegradability or its specific claim of complete biodegradation within nine months to five years. In an attempt to evade the spirit of the revised guidance while conforming to its letter, ECM changed some of its marketing messages after 2012 to add a disclaimer that its products would biodegrade in "some period

greater than a year." (Emphasis added). App. 49-50; 409-410; 193-194. Even so, ECM continued to claim biodegradation within nine months to five years on its website, continued using sales brochures that contained the claim, and continued to tell its customers through individual communications that the "window of bio-degradation" was nine months to five years. App. 51 (ALJ ¶ 259), 343-344; S.A. 476-478, 479-480, 481-482, 484-485. ECM kept making the claim until January 2014, well after the proceedings in this case were underway.[3] *See id.*

C. The FTC's Complaint And The ALJ's Decision.

In an administrative complaint, the FTC charged ECM with violating Section 5 of the FTC Act by falsely representing: (1) that plastics made with its additive are biodegradable, that is, that they "will completely break down and decompose into elements found in nature within a reasonably short period of time after customary disposal"; (2) that its products would render traditional plastics biodegradable in a landfill; (3) that the plastics would completely biodegrade within nine months to five years; and (4) that scientific tests proved these claims. App. 449-450. The complaint also charged ECM with giving its customers marketing materials containing its false claims, thereby providing the means and

[3] Indeed, a recent search showed that some ECM customers still claim that ECM plastics will biodegrade in nine months to five years. *E.g.*, http://www.sanbornwebdesigns.com/going-green-packaging.asp; http://azurepac.com/biodegradable-bags-2 (both visited April 20, 2016).

instrumentalities for the commission of deceptive acts in violation of Section 5. App. 450.

An administrative law judge conducted a three-week trial, during which the parties presented more than 1,760 exhibits and the live or deposition testimony of 20 witnesses.[4] ECM made no effort to defend the truth of its "nine months to five years" claim, nor did it attempt to show that its products render traditional plastics biodegradable in any given period of time.[5] App. 88-89, 245-246. Instead, its principal defense was that the word "biodegradable" refers only to a process of decomposition and does not suggest any particular time period. It contended that its claims were not misleading because its additive makes ordinary plastic "intrinsically biodegradable" as proven by scientific tests. App. 293. ECM argued that its "nine months to five years" claim was not material because its customers cared only about "intrinsic" biodegradability. App. 301-302, 305.

The ALJ found that ECM falsely represented that plastics manufactured with its additive would fully degrade in a landfill within nine months to five years and

[4] The Commission's administrative enforcement actions are prosecuted before an administrative law judge or the Commission itself under Part 3 of the Commission's regulations, 16 C.F.R. Part 3 *et seq.* While an adjudicative matter is pending, either before an ALJ or the Commission, the Commission sits in an adjudicative capacity and *ex parte* contact is forbidden between a Commissioner or the ALJ and the FTC employees prosecuting the action (known as "complaint counsel"). 16 C.F.R. § 4.7.

[5] One of ECM's experts did suggest that by extrapolation, plastics manufactured with its additive might biodegrade in 30 years or perhaps 100 years. App. 104, 246.

that tests proved this to be true. App. 304. The ALJ concluded that ECM's claims were material to both ECM's direct customers and downstream customers. App. 159, 291. The ALJ further found that ECM provided its customers with the "means and instrumentalities" to deceive others by distributing marketing materials with the deceptive claims. App. 21, 307-309.

The ALJ did not decide whether consumers would interpret an unqualified biodegradable claim to mean that the plastic would completely biodegrade within a reasonable time after disposal, nor what that period might be. Instead, focusing on the 2012 revision to the Green Guides, the ALJ looked only to whether ECM's claims conveyed that the treated plastics would biodegrade in *less than a year*. App. 346; *see also* App. 47, 195-198. The ALJ found that complaint counsel's consumer survey evidence did not establish that claim. The ALJ further found that consumers could not logically understand "some period greater than a year" to mean breakdown in less than a year. App. 197-199.

The ALJ also viewed the evidence as insufficient to show that ECM's *unqualified* claim of biodegradability was false; *i.e.*, that ECM's product doesn't work. App. 197, 299. To reach this conclusion, the ALJ credited ECM's theory that its unqualified claim of "biodegradability" means no more than that the product is capable of biodegrading or is "intrinsically biodegradable." App. 199. In the ALJ's view, the term "biodegradable" has only a "scientific" meaning, which

"does not require completion or impose a time restraint." App. 22. Indeed, the ALJ determined that even traditional plastics are "intrinsically biodegradable" because they will break down eventually. App. 124 (ALJ ¶¶ 899, 901). With that understanding of the term "biodegradable," the ALJ concluded that ECM's testing evidence was sufficient to support an unqualified claim that its product makes plastic "biodegradable" or that it accelerates the biodegradation of conventional plastics. App. 125 (ALJ ¶ 917), 299.

D. The Commission's Decision.

ECM and complaint counsel cross-appealed to the full Commission. In such proceedings, the Commission reviews the ALJ decision *de novo*. App. 347.

1. ECM's express claims of biodegradability.

ECM did not defend its claims that plastics manufactured with its additive would biodegrade in nine months to five years and that scientific testing proved as much. Instead, ECM renewed its contention that the claims were not material. App. 392. ECM defended its unqualified use of the term "biodegradable" as referring only to "intrinsic" biodegradability, by which it meant that the material is capable of being broken down by biological processes without reference to any particular time period. ECM argued that the results of tests using the D5511 protocol prove this "intrinsic biodegradability."

2. ECM's implied representations.

The Commission determined that its evaluation of ECM's unqualified biodegradability claim would not be limited to whether ECM's claims implied decomposition in less than a year. "The Complaint reads more broadly," alleging that ECM's unqualified claim conveys complete biodegradation "within a reasonably short period of time." App. 352. Moreover, complaint counsel had identified the claim as one to five years throughout the administrative proceeding. *Id.*

The Commission found that both ECM's unqualified biodegradability claim and its claim that plastics manufactured with its additive would biodegrade "in some period greater than a year" imply complete breakdown in a landfill within a reasonably short period of time, that is, within five years of disposal. App. 353. The Commission rejected ECM's argument "that the word 'biodegradable' means, in the context of consumer advertising, *only* that the product is 'intrinsically' biodegradable, with no time element." App. 352. ECM's interpretation "would render the term meaningless," because "nearly all substances, including conventional plastics, will biodegrade if given enough time—even if that time period might be thousands or millions of years." *Id.* Moreover, the "scientific" understanding of the term "tells us nothing about *consumers' understanding*." App. 352-353. If ECM were correct that "consumers interpret biodegradability claims . . . without infer-

ring a rate," then they effectively "ascribe no meaning whatsoever to the word 'biodegradable.'" App. 353. That interpretation "is not plausible on its face." *Id.*

The Commission thus found that ECM's use of the term "biodegradable" implied that products made with its additive would break down within a reasonable period of time. App. 354. Indeed, the central feature of ECM's additive is a claim about time—its purported ability to *speed up* biodegradation in plastic products, and "ECM's customers were interested in just how fast their products could degrade" if they used ECM's product. *Id.* ECM itself recognized the importance of time to decomposition. It asked that customers pledge to use its additive in at least the recommended proportion, for otherwise ECM's reputation could be damaged when products "fail to biodegrade with[in] a reasonable period of time." *Id.*, S.A. 496.

The Commission next found that the consumer survey evidence in the record establishes that "reasonable consumers expect that plastic products labeled 'biodegradable' will decompose within a reasonably short period of time" of about five years. App. 353. The parties had submitted four surveys. The Commission rejected two of them as unreliable and credited the two others. It gave particular weight to the survey conducted by complaint counsel's expert, Dr. Frederick.

Dr. Frederick used Google Consumer Surveys, a service that polls internet users by presenting them with a single survey question in a pop-up box, which they

must answer to view content on particular websites. App. 354-355. The survey asked respondents one of 60 different questions about biodegradability claims in general and plastic products in particular and collected a total of nearly 29,000 responses. App. 355-356, 358 n.23. The results showed that:

- Between 40% and 76% of consumers expected plastic products labeled "biodegradable" to break down within five years;
- Large majorities of consumers responding to the survey (between 77% and 85%) would feel misled if a plastic product labeled biodegradable did not biodegrade in five years; and
- Adding ECM's "biodegradable" logo to a plastic product increased the proportion of consumers who believed that product would decompose within five years by more than 30%. For example, 35% more consumers estimated that a Tupperware container would biodegrade in five years or less; for a plastic bag, the increase was 32%.

App. 358-359; S.A. 501-503; 560-562. Moreover, the survey showed that that the appearance of ECM's tree logo on a plastic product *caused* consumers to believe that it would break down in five years or less. App. 356; S.A. 504-506. Far more people shown a plastic container bearing the tree logo believed it would decompose in five years or less (56 percent) than people shown the container without the logo (21 percent). S.A. 504, 506. As discussed in further detail below, the Commission thoroughly examined and rejected ECM's numerous objections to Dr. Frederick's survey. App. 356-363.

The Commission also credited the results of a survey proffered by ECM. The Commission found Dr. Stewart's survey confirms that at least a significant

minority of reasonable consumers believe that an item labeled biodegradable will decompose within five years. App. 363. Using different methodology than Dr. Frederick, Dr. Stewart's survey showed that 64% of those who responded with a number and a unit when asked how long something biodegradable would take to decompose answered with times of five years or less. App 365; S.A. 528, 531, 567. Even if the answers that did not provide a number and unit of time are included in the denominator (which the Commission found unreasonable because it assumes that all those respondents would have given a time frame longer than five years) the answers of five years or less still represented 23% of all responses. App. 365; S.A. 531, 567-568.[6]

In keeping with the survey results, the Commission found that consumers reasonably interpret "biodegradable" to imply breakdown in five years. App. 356-357. "It makes sense that consumers read some time period into the word 'biodegradable,' because otherwise the term ceases to have any significance." App. 356. Moreover, the implication that "biodegradable" means five years "is not 'outlandish' or indicative that the respondents are unreasonable outliers." *Id*. Even

[6] The Commission found that ECM's claim of biodegradability in "some period more than a year" also implied a reasonable period. App. 372-376. ECM's customers were unlikely to understand "some period more than a year" to mean *any* period greater than a year, whether 366 days, 1 million years, or more. App. 373-374. Rather, the very mention of "one year" creates an "anchoring" effect that skews numerical estimates towards the stated value. *Id.*

if consumers are mistaken about how quickly materials actually biodegrade, that does not make their interpretation of the term unreasonable. Whether a product will biodegrade and how long it takes to do so are not matters that consumers can reasonably verify on their own. App. 357.[7]

3. ECM's lack of substantiation.

The Commission concluded that ECM lacked substantiation for its implied claims that plastics manufactured with its additive will biodegrade in landfills within five years. App. 376-378. The Commission found that the ALJ rulings ECM did not appeal, together with the consensus opinion of the parties' experts, showed that ECM lacked substantiation for the claim that its products will biodegrade in a landfill within a reasonable time of five years after disposal. App. 377-378. It therefore had no need to determine the requisite level of substantiation required to evaluate whether ECM's evidence was sufficient.

The ALJ had found that ECM lacked substantiation for the *express* claim that its products would biodegrade within nine months to five years. Experts on

[7] Commissioner Ohlhausen dissented from the finding that extrinsic evidence showed that consumers would understand ECM's unqualified claims to mean that its plastics would break down within a reasonable period (whether one year or five), believing the survey evidence insufficient. App. 414-416. Commissioner Ohlhausen also would have held that under the *Deception Statement*, the Commission cannot properly determine that an advertisement interpretation is reasonable solely because a "significant minority" of consumers hold that interpretation. App. 422.

both sides had also testified that plastics manufactured with ECM's products would not biodegrade in a landfill within five years. App. 377-378, citing App. 103-104 (ALJ ¶¶ 698-702); S.A. 520, 538. ECM did not contest the ALJ's finding. It followed directly from ECM's conceded lack of substantiation for the express claim that ECM also lacked substantiation for the identical *implied* claim. App. 377. To further confirm its finding that ECM's claims were unsubstantiated, the Commission examined ECM's substantiation evidence in detail. App. 378-390.

4. The materiality of ECM's claims.

Turning to the third step of the deception analysis, the Commission found that ECM's biodegradability claims were material. App. 390-391. The Commission explained that it presumes the materiality of claims that involve a product's "central characteristics." App. 390. The claims here qualified because the central feature of ECM's product is its purported ability to hasten biodegradation. In addition, the claims all were either "express claims" or intentionally made implied claims—categories that are also presumptively material. *Id.*

The Commission affirmed the ALJ's finding that the claims were material even apart from the presumption. App. 391-392. The ALJ correctly found "no dispute" that ECM's customers buy its additive "because they want to provide 'biodegradable' plastics to meet their customers' demand for such products." App. 392, quoting App. 175, 300 (ALJ ¶¶ 1503-1507). ECM's customers demonstrated

the importance of ECM's claims to their buying decisions by regularly asking ECM about the time it would take their plastic to degrade. App. 392-393. The Commission rejected as inconsistent with the record ECM's contention that its customers cared only about "intrinsic" biodegradability. App. 392. Had that been the case, ECM would not have made deceptive claims about how quickly its products would biodegrade. App. 392-393.

5. Means and instrumentalities liability.

Finally, the Commission affirmed the ALJ's finding that ECM had violated Section 5 by providing its customers with marketing materials containing its misleading claims, which were "the means by which they may mislead the public." App. 394-395, quoting *Waltham Watch*, 318 F.2d at 32. ECM encouraged the customers to use the materials in their own advertising, and the customers did so. App. 395.

E. The Commission's Remedial Order.

Because ECM's violations were serious, repeated, and deliberate, the Commission imposed fencing-in relief to prevent the company from engaging in future deceptive practices. App. 403-404. ECM's deceptive conduct persisted for years, and the company adopted the express "nine months to five years" claim even though it knew it could not substantiate the claim. App. 404. The company adopted the "some period greater than a year" language in a "calculated choice" to

"literally conform[]" to the Green Guides while conveying "essentially the same deceptive implied claim." *Id*. And ECM knew or should have known that it was misusing the results of its D5511 testing, given the express instructions laid out in the protocol itself. App. 404-405.

The Commission thus ordered ECM to refrain from making unqualified claims that any plastic product is biodegradable unless it has scientific evidence that the entire item will completely decompose within five years of customary disposal. App. 3-4. The Commission explained that the limitation on unqualified claims "is necessary to prevent deception of reasonable consumers" who understand an unqualified claim of biodegradability to mean that a plastic product will biodegrade within five years of disposal. App. 403.

The order permits ECM to make qualified claims that plastic products are biodegradable if it has competent scientific evidence to support the claim, so long as ECM includes the time to complete decomposition or the rate and extent of decomposition. If the product will not decompose by a customary method of disposal, ECM must supply information about the type of non-customary disposal method and its availability where the product is sold. App. 3-5, 403. ECM may promote the benefits of its products to the extent they are scientifically proven, but it must disclose that the rate and extent of decomposition does not mean that the plastic will continue to decompose. App. 4, 403.

As fencing-in relief—to prevent ECM from attempting to work around the its specific provisions—the order prohibits ECM from making representations that any products, packages, or services provide any environmental benefit unless the claim is true, not misleading, and properly substantiated. App. 4, 403-404. To address ECM's "means and instrumentalities" violations, the order prohibits the company from providing materials containing false or misleading environmental claims to others. Lastly, the order prohibits ECM from misrepresenting scientific tests or research and the results of testing protocols. That restriction would prevent ECM from misusing scientific tests the way it misused the results of its D5511 test. App. 405.

STANDARD OF REVIEW

1. The Court "review[s] the Commission's legal conclusions *de novo*, and its factual findings under the substantial-evidence standard." *ProMedica Health Sys. v. FTC*, 749 F.3d 559, 564 (6th Cir. 2014). Substantial evidence requires "more than a mere scintilla" but "less than a preponderance" of the evidence. *Miller v. Comm'r of Soc. Sec.*, 811 F.3d 825, 833 (6th Cir. 2016). A reviewing court must accept the Commission's findings if they are supported by evidence that a "reasonable mind might accept as adequate to support a conclusion." *Promedica*, 749 F.3d at 564, quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). "Commission findings are well-suited to deferential review because they may

require resolution of 'exceedingly complex and technical fact issues.'" *Kraft*, 970 F.2d at 317, quoting *Zauderer*, 471 U.S. at 645.

The deferential standard applies to the Commission's findings of fact and to reasonable inferences it draws from the facts. *Colgate-Palmolive*, 380 U.S. at 386. It applies as well to findings that a company's advertising conveys particular claims and that the claims are material, false, misleading or unsubstantiated. *E.g.*, *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246, 248-249, 251 (6th Cir. 1973). This is because the Commission is often "in a better position than are courts to determine when a practice is 'deceptive' within the meaning of the [Federal Trade Commission] Act." *Buchanan*, 776 F.3d at 398, quoting *Colgate-Palmolive*, 380 U.S. at 385. The substantial evidence standard "is not modified in any way" when the FTC disagrees with its administrative law judge. *Universal Camera*, 340 U.S. at 496.

Review of a Commission cease and desist order is likewise deferential. A Court reviewing the Commission's choice of remedy for violations of the FTC Act will "interfere with the remedy selected by the FTC 'only where there is no reasonable relation between the remedy and the violation.'" *Telebrands*, 457 F.3d at 358, quoting *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 377 (1965).

2. The FTC's interpretation of an advertisement to determine what claims it makes is also reviewed under the deferential substantial evidence

standard. *Brown & Williamson*, 778 F.2d at 42 n.3; *Kraft*, 970 F.2d at 316-318. ECM argues that the Court should apply *de novo* review (Br. 45-46), suggesting that this result follows from the Supreme Court's decisions in *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), and *Peel v. Attorney Registration and Disciplinary Comm'n*, 496 U.S. 91 (1990). Courts have repeatedly rejected that argument. The D.C. Circuit observed that "*Bose* itself suggests that commercial speech might not merit the same approach as set out therein for libel cases." *Brown & Williamson*, 778 F.2d at 42 n.3. The court concluded that *Bose* "does not change the standard of review in deceptive advertising cases." *Id.*; *see also POM*, 777 F.3d at 499; *Novartis Corp. v. FTC*, 223 F.3d 783, 787 n.3 (D.C. Cir. 2000). The Seventh Circuit similarly distinguished the review of "an individualized FTC cease and desist order, prohibiting a particular set of deceptive ads" from the circumstances in *Peel*, which involved "a prophylactic regulation applicable to all lawyers, completely prohibiting an entire category of potentially misleading commercial speech." *Kraft*, 970 F.2d at 317. This case, like *Kraft*, involves an individualized cease and desist order.

ECM attempts to distinguish *Kraft* with the non sequitur argument that the Court need not defer to the Commission's findings because it lacks expertise in the science of biodegradation. Br. 47. This argument fails to distinguish *Kraft*'s rejection of a *de novo* standard for individual FTC cease and desist orders. 970 F.2d at 317.

Moreover, the relevant expertise here involves how consumers interpret marketing messages. On that question "the Commission's judgment is to be given great weight by reviewing courts." *Firestone*, 481 F.2d at 249, quoting *Colgate-Palmolive*, 380 U.S. at 385.

3. An agency's adjudicative decision may be disturbed under the Administrative Procedure Act only if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). "The 'arbitrary or capricious' standard of review is a deferential one which presumes that an agency's actions are valid." *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1083 (6th Cir. 1984). Thus, the Court is "required to uphold [agency] decisions supported by a 'rational basis.'" *Ohio v. Ruckelshaus*, 776 F.2d 1333, 1339 (6th Cir. 1985). The Court will find an abuse of discretion "only if there is no evidence to support the [agency's] decision, or if it is based on an improper understanding of the law." *Oakland Cty Bd. of Comm'rs v. United States Dep't of Labor*, 853 F.2d 439, 442 (6th Cir. 1988), quoting *Pappas v. FCC*, 807 F.2d 1019, 1023 (D.C. Cir. 1986) (internal brackets omitted). Moreover, this Court "applies a harmless-error rule to APA cases, such that a mistake that has no bearing on the ultimate decision or causes no prejudice shall not be the basis for reversing an agency's determination." *Sierra Club v. Slater*, 120 F.3d 623, 637 (6th Cir. 1997); *see* 5 U.S.C. 706 (court must take "due account of the rule of prejudicial error").

SUMMARY OF THE ARGUMENT

1. Substantial evidence supports the Commission's finding that ECM's unqualified use of the term "biodegradable" implies that plastic made with its additive will decompose within a reasonable time period. On its face, the word necessarily conveys a time frame; otherwise, it would be meaningless. And ECM intended to convey a reasonable time—it expressly told customers for years that plastics made with its products would decompose in nine months to five years. Two surveys, one of them tendered by ECM itself, confirm that consumers, sometimes large majorities of them, understood ECM's unqualified biodegradable claim to convey decomposition within a reasonable time of five years or less.

The Commission properly applied its own *Deception Statement*, which states plainly that an advertisement "that misleads a significant minority of reasonable consumers is deceptive." 103 F.T.C. at 177 n.20. The *Deception Statement* thus makes clear that a majority of consumers need not hold a given interpretation of an ad before that reading may be considered reasonable. The Commission has often found deception based on significant minority views.

The Commission was not required to reject the reasonable interpretation of ECM's advertising claims held by substantial numbers of consumers because those views are "unscientific" or "uninformed." Environmental scientists may believe that the word "biodegradable" refers only to a process of decomposition that

occurs at some point, with no time element. But the relevant inquiry under the FTC Act is how *consumers* interpret an advertising claim. And the record is clear that consumers read the term to convey decomposition within a reasonable time period.

The Commission properly relied on the Frederick survey. It carefully examined and rejected all of ECM's challenges to the survey, and its explanations were sound. Indeed, the results of the Frederick survey are consistent with the Stewart survey, tendered by ECM itself.

The Commission was not required to defer to the ALJ's findings. The agency's review of the record is *de novo*, and its authority encompasses all of the ALJ's authority. 16 C.F.R. § 3.54. That level of review applies equally to determining the reliability of an expert witness. Such a determination turns on the quality of the expert's conclusions and data, not on his testimonial "credibility" on the witness stand.

2. ECM's First Amendment assumes away the deceptive nature of its advertising claims by relying on the fiction that its product really has been proven make ordinary plastic "biodegradable." To accept that fiction means throwing out the Commission's findings, limiting "biodegradable" to meaningless "intrinsic" biodegradability, and using ECM's dubious test data to prove what the test itself says it cannot prove. The constitutional claim, in other words, can succeed only if ECM can show that its advertisements were not false and misleading. Misleading

commercial speech enjoys no constitutional protection. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). Because ECM cannot show that the Commission misinterpreted its advertisement, the First Amendment claim thus founders at the outset.

ECM cannot salvage its First Amendment argument on the theory that its advertisements are only "potentially misleading" and not "inherently misleading." By conveying a false impression about the degradability of plastics, ECM's claims were actually misleading. And the distinction ECM relies on—between "inherently" and "potentially" misleading—applies only to regulations that prospectively ban all messages conveying particular information. It does not apply to an individualized cease and desist order that remedies one company's past deceptive conduct. In any event, ECM is free to advertise its product with appropriate and non-misleading qualifiers.

3. The Commission complied with the Administrative Procedure Act. ECM asserts that the Commission erred when it found that ECM's product may not work at all. Even if ECM were correct, any error would be harmless because *no evidence* in the record substantiated ECM's claim that its product causes biodegradation within five years. In any event, the Commission's discussion of the efficacy of ECM's product was supported by substantial evidence.

The same reasoning defeats ECM's claim that the Commission erred in analyzing the requisite degree of substantiation. Both sides agreed that ECM needed to show competent and reliable scientific evidence. Thus, even if the Commission misapplied one of the factors for reaching that determination, it had no effect on the outcome and any error was harmless.

Finally, the Commission provided ECM notice of the charges against it. with due process. The administrative complaint charged ECM with falsely claiming that its products rendered plastics biodegradable "within a reasonably short period of time after customary disposal." In pleadings and during the trial, complaint counsel specified that "reasonable period" meant within five years. And the complaint also charged ECM with making the false express claim that its product led to complete breakdown within nine months to five years. ECM therefore knew the nature of the claims against it.

ARGUMENT

ECM concedes that it violated the FTC Act when it told its customers that its product would make ordinary plastics biodegrade within nine months to five years. ECM also concedes that it gave its customers the means to convey that false claim to their own customers. ECM challenges only the Commission's reading of ECM's unqualified "biodegradable" claim as an implicit message to consumers that plastics made with ECM's product would break down in some reasonable time.

ECM argues that the Court must apply a "scientific" definition of the word "biodegradable" and hold that the term can refer only to the literal act of biodegradation, without implying any particular period of time. On that theory, if plastics made with ECM's product degrade in ten thousand years—or ten million—they may be truthfully advertised as "biodegradable." But the pertinent question is not how scientists understand a word, but how consumers understand it, for "the only true measure of deceptiveness" is "the public's impression." *Brown & Williamson*, 778 F.2d at 39-40, quoting 1A L. Altman, Callman's The Law of Unfair Competition, Trademarks and Monopolies § 5.04, at 5-32 (4th ed. 1981). The Commission determined that to consumers, "biodegradable" implies breakdown within a reasonable time period, about five years or less. Consumers would therefore be misled if they purchased a product labeled "biodegradable" that would not decompose for millennia.

As we show below, substantial evidence supported the Commission's determination that consumers interpret "biodegradable" to mean that plastic made with ECM's product will biodegrade within a reasonable time after disposal. Consumer surveys demonstrate that consumers read the term that way and ECM intended to convey that impression when it made the claim. Indeed, because everything degrades at *some* point, ECM's interpretation of "biodegradable" would effectively strip the term of meaning, whereas the FTC's interpretation does not.

Because "biodegradable" implies a reasonable time to decomposition and ECM lacked any proof that its product has that effect, the Commission's remedial relief applies only to misleading speech and is thus consistent with the First Amendment.

I. THE COMMISSION PROPERLY INTERPRETED ECM'S UNQUALIFIED BIODEGRADABILITY CLAIM TO IMPLY A REASONABLE TIME FRAME.

The core of ECM's case is that "biodegradable" has only one meaning: the literal, "intrinsic" ability to biodegrade, without regard to how long it takes to do so. The bulk of its arguments flow from that central premise. But the premise is false.

A. Substantial Evidence Supports The Commission's Holding That "Biodegradable" Implies Decomposition Within A Reasonable Time.

A company's marketing communicates a given message "if consumers acting reasonably under the circumstances would interpret the advertisement to contain that message." *POM*, 777 F.3d at 490, quoting *In re Thompson Med. Co.*, 104 F.T.C. 648, 788 (1984). Even if the words of an advertisement are "technically true," that alone "does not prevent their being framed so as to mislead or deceive." *Koch*, 206 F.2d at 317. Because consumers may not realize the nuances of technical interpretation, "the only true measure of deceptiveness" is consumer understanding. *Brown & Williamson*, 778 F.2d at 39-40.

The record firmly supports the Commission's determination that consumers interpret the term "biodegradable" to mean capable of biodegrading within a reasonable time of five years or less after disposal. To begin with, on its face the

word necessarily conveys a time element when used to market products to consumers. Testimony established that *everything* biodegrades over *some* time period. App. 352. Thus, if ECM were correct that "biodegradable" must mean only "intrinsically" biodegradable, without regard to time, then all matter is biodegradable and the term is empty. *Id*. The Commission reasonably held that this interpretation is "not plausible on its face." *Id.* "It is the Commission's function to find these facts and a court should not disturb its determination unless the finding is arbitrary or clearly wrong." *J.B. Williams*, 381 F.2d at 889. The Commission's facial reading of the claim was plainly reasonable.

The message that "biodegradable" means decomposition in some time frame wasn't just facially reasonable; the record showed that ECM *intended* to convey that message to its customers. *See* App. 354, 391. "The core attribute of the ECM Additive was purportedly to *speed up* the biodegradation process of plastic products." App. 354 (emphasis added). ECM thus made plastic manufacturers promise to use at least one percent of its additive in their plastics lest ECM's reputation suffer injury when products "fail to biodegrade within a reasonable period of time." *Id.*; S.A. 496. ECM also knew that end users desired plastics that decomposed in short order. Its president testified that it changed its marketing pitch to tout (falsely) complete breakdown within "nine months to five years" and "some

period greater than one year" because customers "were interested in having some idea of a time period." App. 342; *see* App. 407, S.A. 473-474.

Survey evidence both ratified the Commission's facial analysis of the meaning of "biodegradable" and established the time period within which consumers expect biodegradable materials to decompose. The Frederick survey of 29,000 consumers, tendered by complaint counsel, "provides evidence that a majority of consumers expect biodegradation to occur within five years." App. 354. Specifically, the survey showed that up to 91 percent of respondents believed that any product labeled "biodegradable" should decompose within 5 years. App. 355. As many as 76 percent of respondents believed that plastic products labeled biodegradable would decompose in that time frame, and as many as 85 percent would feel misled if such a plastic did not biodegrade within 5 years. *Id.*; App. 358-359; S.A. 560-562. And the survey showed that adding ECM's logo (which says "biodegradable") to a plastic product caused the number of respondents estimating that a product would biodegrade in five years or less to reliably increase by more than 30 percent. App. 356; S.A. 503-506.

The Stewart survey, tendered by ECM itself, confirmed that "at least a significant minority of reasonable consumers believe that an item labeled 'biodegradable' will decompose within five years." App. 363. When asked how long it should take a "biodegradable" product to break down, 23 percent of *all*

respondents to that question volunteered a period of five years or less. App. 365; S.A. 528, 567. Fully 64 percent of respondents who suggested a specific time frame (despite the question, not all did) answered five years or less. *See id.*

The evidence thus showed that *at least* a substantial minority—and perhaps even a sizable majority—of consumers reasonably interpret "biodegradable" to convey a time frame for decomposition of about five years or less. That evidence easily satisfies the substantial evidence test because it far exceeds the "scintilla" threshold, and a "reasonable mind" would readily accept it as "adequate to support [the FTC's] conclusion." *ProMedica*, 749 F.3d at 564; *FTC v. Ind. Fed'n of Dentists,* 476 U.S. 447, 454 (1986). Indeed, this Court has affirmed findings of deception when 15 percent of consumers were misled by an advertisement—and suggested it would do so for as few as 10 percent. *Firestone*, 481 F.2d at 249; *see also Telebrands*, 140 F.T.C. at 325, *aff'd* 457 F.3d 354 (10.5 to 17.3 percent "was sufficient to conclude that the challenged claims were communicated").

B. ECM's Counterarguments Are Unavailing.

1. The Commission correctly applied its *Deception Statement*.

ECM contends that the Commission misapplied its own policy statement on deception by finding that consumers' understanding of its unqualified "biodegradeable" claim was reasonable "only because a 'significant minority' of consumers supposedly shared that interpretation." Br. 63-64, 69-71. According to ECM, an ad

interpretation is reasonable if it is held by a majority of consumers, as allegedly shown by the *Deception Statement*'s description of cases where the Commission looked to the "average listener," "general populace," or "typical buyer." Br. 70; *see also* App. 421-422 (Commissioner Ohlhausen's dissent); *Deception Statement*, 103 F.T.C. at 179-180. ECM argues that deception of a "significant minority" matters only as an exception to the general majority rule, and that it comes into play only after the Commission has found a particular interpretation of an ad to be reasonable. In that situation, ECM says, an advertiser may not escape liability by showing that only a significant minority of consumers holds that view. Br. 70. The exception does not properly apply here, ECM asserts, because the consumers who believe "biodegradable" means a plastic product will break down within five years are unreasonable, "misguided," "uninformed," or "unscientific." Br. 63-64, 70.

This argument ignores what the *Deception Statement* actually says, misstates the Commission's holding, and unfairly labels the consumers who responded to the Franklin and Stewart surveys.

To begin with, the *Deception Statement* does not lay out a rule that the Commission will find a claim reasonable if it is held by a majority and will consider the view of a "significant minority" only as an exception to that rule. The *Deception Statement* makes clear that an interpretation can be reasonable "even though it is *not* shared by a majority of consumers" and that "[a] material practice

that misleads a significant minority of reasonable consumers is deceptive." 103 F.T.C. at 177 n.20 (emphasis added). The *Deception Statement* does not describe that approach as an "exception," and both the Commission and the courts have long found deception when a significant minority is misled. *See*, *e.g.*, *POM*, 777 F.3d at 499-500; *Thompson Med.*, 791 F.2d at 197; *Firestone*, 481 F.2d at 249 (10 to 15 percent sufficient to support finding of deception). Indeed, we are not aware of any case in which the Commission has described "significant minority" as an "exception." *Cf. In re POM Wonderful*, 2013 FTC LEXIS 6, 20-21; *In re Kraft*, 114 F.T.C. at 122; *In re Telebrands*, 140 F.T.C. at 291.

Built into the "significant minority" standard is the requirement that the consumers' interpretation of an advertisement be "reasonable." In other words, they must be "average listeners" or "typical buyers." 103 F.T.C. at 177-178 & n.20. ECM is thus incorrect to equate those phrases with a majority; not all average listeners or typical buyers will interpret an ad the same way. As the *Deception Statement* acknowledges, "a seller's representation" can "convey[] more than one meaning to reasonable consumers." 103 F.T.C. at 180 (emphasis added). In *Thompson Medical*, for example, the Commission found that an interpretation was reasonable where it misled "at least one group of average listeners." 104 F.T.C. at 808 (emphasis added); *see also Kraft*, 114 F.T.C. 40 ("Each interpretation is

reasonable as long as the subset of consumers making it is representative of the group of consumers to whom the ad is addressed.").

The *Deception Statement* contrasts reasonable interpretations held by a significant minority of representative consumers with claims that are "unreasonably misunderstood by an insignificant and unrepresentative segment" of the audience. 103 F.T.C. at 165. That description does not apply here because the Commission held that consumers who understand "biodegradable" to imply a reasonable time period were acting reasonably. App. 356. Specifically, the Commission found that "biodegradable" on its face "conveys some time element" and that consumers can reasonably understand it to include a reasonable time for decomposition, whereas ECM's opposite reading would strip the word of meaning. App. 353, 356. That finding fatally undercuts ECM's contention that the Commission interpreted "biodegradable" as it did "only because a 'significant minority' of consumers supposedly shared that interpretation." Br. 71. In fact, the Commission faithfully applied the approach set forth in the *Deception Statement*.

Indeed, it was not only a "significant minority" of consumers that interpreted "biodegradable" to convey a reasonable period of time for breakdown. The survey data showed that the *majority* of the broad group of survey respondents interpreted the term in that way. App. 355-356. Even under ECM's reading of the *Deception Statement*, that majority of consumers represents the view of the "general

populace." And the survey respondents were "ordinary members of the public" who were representative of "reasonable consumers." App. 357, quoting *Thompson Med.*, 104 F.T.C. at 810.

ECM cannot escape the convincing evidence of consumer interpretation of "biodegradable" by attacking those who understand the term to imply a reasonable time period as "misguided," "uninformed," or "unscientific." Br. 63-64.[8] As the Commission pointed out, "scientific and popular understandings are known to vary on occasion," and this is one of them. App. 353, quoting *Thompson Med.*, 104 F.T.C. at 809 n.33. Thus, even if ECM's use of "biodegradable" were "technically true" that does not prevent it from being deceptive to reasonable consumers. *Koch*, 206 F.2d at 317. When "technical terms" are at issue, it is reasonable to assume that the public may be unaware of their meaning and that "substantial numbers might be misled." *Brown & Williamson*, 778 F.2d at 41, quoting *Zauderer*, 471 U.S. at 653.

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[8] In fact, ECM's contention that "gas evolution tests" prove its product to render plastics "biodegradable" within the scientific meaning of the term, Br. 17-19, 25-30, 50-55, is false. As the FTC explained, all of ECM's studies were based on the ASTM D5511 test protocol, which carefully limits how results of the test may be reported. *See* App. 342-343; 429-435. The protocol makes clear that "claims of performance shall be limited to the numerical result obtained in the test and not be used for unqualified 'biodegradable' claims." App. 383, 429. The test simply is not designed to prove that plastic manufactured with ECM's additive (or any other material) is unqualifiedly "biodegradable."

That is true even if consumer interpretation of an ad rests on incorrect preexisting beliefs. If the advertiser has remained silent to capitalize on such beliefs—as ECM seemingly did here—it has violated the FTC Act. *In re Stouffer Foods*, 118 F.T.C. at 810 n.31. It makes no difference if the belief is "attributable in part to factors other than the advertisement itself"; the advertisement is still deceptive. *Simeon*, 579 F.2d at 1146. The "failure to disclose" facts necessary to dispel such an incorrect belief "is false and misleading." *J.B. Williams Co.*, 381 F.2d at 889.

2. The Commission properly relied on the Frederick survey.

Lacking a valid argument that the Commission misapplied the *Deception Statement*, ECM attacks the evidence that consumers were deceived. It argues that the Commission improperly relied on Dr. Frederick's survey because it was methodologically flawed. Br. 63-68.

As an initial matter, ECM's claim that the Commission accepted Dr. Frederick's survey "without reasoned explanation" (Br. 66), ignores the Commission's lengthy analysis of each complaint ECM leveled against the survey. App. 357-363. The Commission explained that Dr. Frederick properly defined a relevant population for the survey (App. 358-359); that his questions were appropriate, reliable, and free from bias (App. 359-360); and that he had properly analyzed the

data (App. 360-361). ECM's drive-by attack on Dr. Frederick's survey fails to rebut or even acknowledge that detailed discussion.

Moreover, Dr. Stewart's survey—which ECM itself says "met all the hallmarks for good survey practice" (Br. 67)—supports the same conclusion, showing that between 23 and 65 percent of respondents expect something labeled biodegradable to break down within five years. App. 363-365. The Stewart survey alone is substantial evidence sufficient to support the Commission's findings, and more so when added to the Commission's facial rejection of ECM's argument that "biodegradable" suggests only "intrinsic biodegradability."

In any event, all of ECM's substantive criticisms of the Frederick survey lack merit. ECM first complains that the Frederick survey lacked reliable demographic data. Br. 24. But the Commission explained the relevant population was broadly defined as "American consumers," and that data gathered through Google Surveys are reliable in light of Google's "dynamic imputation algorithms" that ensure the "demographic representativeness of each sample survey." App. 358. The overall demographic reliability is further safeguarded by the large pool of 29,000 survey respondents. App. 358-359. As Dr. Frederick testified, "any moderately large sample" in Google Surveys "is highly likely to be demographically representative," and smaller but still considerable subsets are likely to be representative as well. App. 359 & n.24.

ECM also argues that Dr. Frederick improperly disregarded a large number of responses and included "nonsensical answers" supporting complaint counsel's case. Br. 66; *see also* Br. 23-24. For questions seeking an estimate of the time for decomposition, Dr. Frederick omitted answers that lacked either a number or unit of time or that were otherwise unresponsive (*e.g.*, "7," "years," or "I don't know"). *See* App. 360-361 & n.27. ECM claims this "skewed the results" (Br. 24), but as the Commission explained, there is no reason to believe that respondents whose answers were omitted would systematically interpret ECM's representations differently from those that did.[9] In fact, even if Dr. Frederick had counted *all* of the excluded responses as if they answered with a period *longer* than five years, the survey would still show that adding a "biodegradable" logo causes at least 31 to 36 percent more consumers to estimate that a plastic bottle or container would decompose within five years. App. 361-362. Similarly, while complaining that Dr. Frederick improperly coded allegedly "nonsensical" answers in the Commission's favor, ECM has not shown there was any effect on the result, and Dr. Frederick testified that there was no such effect. *See* Br. 66-67; S.A. 546-547.

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[9] Dr. Frederick testified that the distribution of the responses that provided only a number was consistent with that of the responses that provided both a number and a unit of time. S.A. 543-544. ECM's expert agreed that according to the academic literature, the distribution of responses does not change substantially when participants are prevented from answering "I don't know." S.A. 553.

ECM also argues that the format of the Google survey resulted in "disinterest bias" because the survey questions appeared as an obstacle to the respondents' access to internet content. Br. 23-24, 66-67. But ECM fails to confront the Commission's finding that nothing in the record suggested that such bias has any greater effect than it does with other survey methods (such as the telephone calls employed in Dr. Stewart's survey), or that it caused Frederick's results to skew against ECM. App. 360.

ECM argues that Dr. Frederick and those assisting him were not "blinded" because they knew the identity of the client and the hoped-for result. Br. 24, 67. But ECM fails (as it did before the Commission) to identify any evidence that this affected the results of the survey. App. 362. In fact, the argument conflicts with ECM's complaint about the "bright line rule" regarding which answers to include. That rule *prevented* coders from injecting bias through their interpretation of ambiguous answers. App. 361.

ECM argues that these supposed defects collectively show that the Commission disregarded the criteria for survey validity described in the Manual for Complex Litigation. Br. 65. As shown above, this is incorrect. ECM had access to all of Dr. Frederick's underlying data, which was "both transparent and reasonable." App. 361. Had there been any skewing effect from the alleged defects in Dr. Frederick's

methodology, it would have been easily found. ECM's failure to identify any such effect indicates that there was nothing to find.

3. The Commission owed no deference to the ALJ.

ECM is also wrong that the Commission erred by failing to defer to the ALJ's findings on Dr. Frederick's "credibility." Br. 74-79. An agency is "not bound by [an ALJ's] credibility determinations, as long as its findings are supported by substantial evidence." *Allis-Chalmers Corp. v. OSHRC*, 542 F.2d 27, 30 (7th Cir. 1976). Rather, "[w]here the Commission reverses an ALJ, it is the Commission's order alone that is reviewed." *Chao v. Gunite Corp.*, 442 F.3d 550, 556 (7th Cir. 2006). Indeed, FTC regulations specify that on appeal from an ALJ's initial decision, the agency exercises "all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. 3.54; *Chrysler Corp. v. FTC*, 561 F.2d 357, 362 (D.C. Cir. 1977).

Moreover, the purported credibility determination at issue here concerns an assessment of experts' opinions and survey evidence of consumer perception, the very type of assessment that calls for the Commission's expertise. *E.g., Colgate-Palmolive*, 380 U.S. at 385. It does not involve "the determination of credibility of witnesses as shown by their demeanor or conduct at the hearing." *Universal Camera,* 340 U.S. at 496, quoting S. Rep. No. 79-752 at 24 (1945). This Court has made clear that the conclusions an ALJ draws from the evidence are distinct from

"credibility determinations" based on observing the witness's demeanor. *Singer v. Garvey*, 208 F.3d 555, 558-559 (2000). Here, the ALJ's findings came from his evaluation of the experts' opinions, not from observation of the experts' demeanor. The Commission was thus correct that it is "well situated to give *de novo* review to the experts' opposing opinions and to draw our own assessments thereof." App. 361.

C. There Is No Dispute That ECM's Claims Were False, Unsubstantiated, And Material.

Substantial evidence also supports the Commission's findings that ECM's claims were false and unsubstantiated—findings that ECM does not appeal. As explained above (*supra* p. 24), the Commission's finding of falsity followed from ECM's failure to appeal the ALJ's finding that its "nine months to five years" claim lacked substantiation. The finding is also supported by the unanimous testimony of all scientific experts that ECM's products *do not* cause plastics to decompose within five years. App. 377-378. ECM concedes this point, asserting that *nothing* completely decomposes within five years. Br. 59. Substantial evidence likewise supports—and ECM has not appealed—the Commission's finding that its claims were presumptively material. *See supra* p. 25.

II. ECM'S FIRST AMENDMENT ARGUMENT IGNORES THE MISLEADING NATURE OF ITS CLAIMS

ECM devotes much of its brief to its argument that the Commission's order restricting ECM's future use of the term "biodegradable" violates the First Amendment. The gist of the claim is that by restricting the unqualified use of the word, the FTC has prevented ECM from disseminating "truthful" information about its product. But as discussed above, the FTC concluded that ECM's unqualified biodegradable claim was false and unsupported. That conclusion alone is a complete answer to the First Amendment challenge.

"For commercial speech to come within [the First Amendment], it at least must concern lawful activity and not be misleading." *Central Hudson*, 447 U.S. at 566.[10] "[M]isleading advertising does not serve, and, in fact, disserves, th[e] interest" of "consumers and society . . . in the free flow of commercial information." *Brown & Williamson*, 778 F.2d at 43 (internal quotation marks omitted). Misleading speech therefore enjoys no First Amendment protection. Because ECM's unqualified claim that its product rendered plastics biodegradable was misleading to consumers, the claim is not entitled to constitutional protection.

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[10] *Accord Zauderer*, 471 U.S. at 638 ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading."); *In re R.M.J.*, 455 U.S. 191, 203 (1982) ("Misleading advertising may be prohibited entirely."); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977) ("Advertising that is false, deceptive, or misleading of course is subject to restraint.").

ECM cannot escape this bar to its First Amendment claim on the ground that, under a particular interpretation of the word "biodegradable," its claims are literally true. Br. 50-55. The category of unprotected misleading speech includes not only "actually false" statements, but also statements that are literally true but are nonetheless misleading. The First Amendment poses "no obstacle" to the prohibition of commercial speech that "is not provably false, or even wholly false, but only deceptive and misleading," because the government should ensure that "the stream of commercial information flow[s] cleanly as well as freely." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976). Here, for the reasons set forth above, the pertinent "stream of commercial information" is the promotional material directed at ECM's customers and ultimately consumers, as they would reasonably understand the term "biodegradable" in that context. It is of no moment that environmental scientists may understand that term differently.

Nor may ECM bring itself within the ambit of the First Amendment by claiming that its use of "biodegradable" is "only potentially misleading," rather than "inherently misleading." Br. 56. When assessing the constitutionality of speech regulations that prospectively ban all messages conveying particular information, Courts describe commercial speech as only "potentially misleading" if the information can be "presented in a way that is not deceptive," such as through

effective "disclaimers or explanation." *R.M.J.*, 455 U.S. at 203. An "absolute prohibition" on conveying such information in any and all forms is subject to constitutional challenge under *Central Hudson*. *Id.*

That principle does not apply here. ECM's claim that its product is proven to render ordinary plastic "biodegradable" is not merely "potentially misleading," it is actually misleading and has been found so by the agency charged with ferreting out and stopping such deception. Furthermore, the Commission's order does not prophylactically ban defined types of future commercial messages regardless of how they are worded and whether or not they are combined with effective disclaimers. It restrains one company from making particular representations that have been found to be false and misleading and allows truthful claims that have adequate support. A "prophylactic regulation . . . completely prohibiting an entire category of potentially misleading commercial speech" is constitutionally distinct from "an individualized FTC cease and desist order." *Kraft*, 970 F.2d at 317.

ECM criticizes the substantiation requirements in the Commission's order because they allegedly amount to a "de-facto ban on the word 'biodegradable,'" are "uniquely suppressive," violate ECM's "right to say truthful things," constitute "censorship" and an "absolute prior restraint," and prohibit "truthful information that ECM Plastics are 'biodegradable.'" That hyperbole is not warranted. The Commission correctly rejected the contention that its order "prohibits all

biodegradable claims." To the contrary, "products offered to consumers in the marketplace can include descriptions such as '3% biodegradable in 90 days,' provided that the descriptions are truthful and are accompanied by warnings making it clear that the test results do not support extrapolations." App. 396. In other words, ECM can convey accurate and truthful information about biodegradability to its customers—a long walk from "total censorship."

The Commission was not constitutionally required to adopt ECM's preferred advertising qualifier—that there is no known rate of biodegradation. *Id.* As the agency correctly explained, that qualifier "is inadequate" to dispel "the misleading impression" that plastic manufactured with ECM's product "will completely biodegrade in landfills within a reasonably short period of time." *Id*. The qualifier "addresses neither the rate nor extent of biodegradation." *Id*. Having found ECM in violation of the FTC Act, the Commission's tailored remedial order addressing ECM's misrepresentations easily satisfies the requirement that there be a "reasonable relation between the remedy and the violation." *Atlantic Ref. Co.*, 381 U.S. at 377.

The order's requirement that ECM refrain from claiming that a product will "continue to decompose" beyond the period for which it is tested is likewise tailored to remedy ECM's deceptive conduct in this case. ECM falsely claimed that the results of tests performed with the D5511 protocol prove that products manufactured

with its additive are unqualifiedly "biodegradable"—indeed, that they will *completely* biodegrade in a landfill—contrary to the protocol's express admonitions that it may not be used to support such claims. ECM continues to press that claim in its brief. The requirement that ECM refrain from misrepresenting the extent to which scientific tests substantiate its claims directly addresses this conduct.

ECM is also incorrect to suggest that "[n]o company can make an unquailfied biodegradable claim absent the FTC's required disclaimers." Br. 58. The order was entered against ECM to remedy its violations of Section 5 of the FTC Act. It does not apply to any other company. ECM's suggestion that companies cannot even claim that a banana peel is biodegradable without testing it for ten years (Br. 59-60) similarly overreads the order, which applies only to *ECM*'s representations about the biodegradability of "any plastic product or package." App. 4. Thus, ECM may not claim without qualification that a *plastic* banana is biodegradable, and rightly so.

Finally, ECM has not shown that the FTC violated the Constitution by "demand[ing] proof" of the time to decomposition that is "scientifically impossible" to obtain. Br. 39.[11] The impossibility of proving a misleading advertising claim does not give the advertiser constitutional carte blanche to make it. For example,

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[11] The amicus brief filed by Dr. Stephen Grossman addresses this point. ECM offered Dr. Grossman as a surrebuttal expert before the ALJ, who excluded his testimony as "outside the scope of fair rebuttal." App. 402.

even if there were no scientific way to prove that pomegranate juice prevents prostate cancer, that wouldn't mean a dietary supplement manufacturer can advertise it as such a cure. *See POM*, 777 F.3d at 478. ECM has failed to come to grips with the misleading message that consumers understand from its unqualified biodegradability claim. If a claim cannot be conveyed without deception, that claim should not be made at all—the answer is not that the claim "must survive at all costs." *Colgate-Palmolive*, 380 U.S. at 390.

III. THE AGENCY PROCEEDING COMPLIED WITH THE APA AND PRINCIPLES OF DUE PROCESS.

A. The FTC Complied With The Administrative Procedure Act.

ECM claims that various aspects of the Commission's order are arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706. This standard "is the least demanding form of judicial review of administrative action." *Shields v. Reader's Digest Ass'n*, 331 F.3d 536, 541 (6th Cir. 2003), quoting *Davis v. Ky. Fin. Cos. Ret. Plan*, 887 F.2d 689, 693 (6th Cir. 1989). The Court "presumes that an agency's actions are valid," *Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1083 (6th Cir. 1984), and will uphold decisions that are "supported by a 'rational basis.'" *Ohio v. Ruckelshaus*, 776 F.2d 1333, 1339 (6th Cir. 1985). In brief, "[w]hen it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." *Shields*, 331

F.3d at 541. ECM fails to show that any part of the Commission's decision falls short of this undemanding standard.

ECM's brief couches its objections to the Commission's decision in APA terms by liberally applying the "arbitrary and capricious" label throughout. Many of those arguments have already been addressed. We have shown that the Commission's decision meets the substantial evidence standard; those same reasons show, *a fortiori*, that the Commission's decision is not arbitrary and capricious. In the separate APA section of its brief, ECM raises two principal additional claims. Both lack merit because any error (and there was none) would have been harmless.

ECM challenges the Commission's finding that "it is as likely that the ECM Additive has no meaningful effect on the biodegradation of plastics as that it does." Br. 74, 50-55; App. 386. According to ECM, the Commission improperly considered the scientific evidence of efficacy and drew an erroneous conclusion that the record was in equipoise.

Even if that claim were correct, it states—at best—a case of harmless error. The Commission made the finding challenged by ECM in the course of determining whether ECM had scientific support for its claim of biodegradability. There was no dispute before the agency—and there is no dispute before this Court—that ECM cannot show that its product causes decomposition within five years (or any other reasonably short time frame). Notably, ECM does not challenge the Commission's

finding that "[n]one of the [scientific] tests even purports to demonstrate complete biodegradation in landfills within five years." App. 386. Thus, even if the Commission should have deferred to the ALJ's findings, or should have analyzed the scientific evidence differently, those findings could not have shown the unqualified biodegradability claim to be true, and the claim would still have violated the FTC Act. Under the harmless error rule, "a mistake that has no bearing on the ultimate decision . . . shall not be the basis for reversing an agency's determination." *Sierra Club*, 120 F.3d at 637.

ECM's argument fails in any event. It rests mainly on the contention that the Commission disagreed with the ALJ in selecting the scientific evidence on which to rely. But as explained above (p. 49), the Commission reviews ALJ decisions *de novo* and is not bound by the ALJ's findings. ECM does not seriously contend that the evidence the Commission relied on fails to support its judgment.

ECM also argues that the FTC misapplied the *Pfizer* factors. As discussed above (p. 7), the Commission applies *Pfizer* to determine the amount and type of substantiation required justify a claim. According to ECM, in applying the factors, the Commission "cited nothing from the record" but drew conclusions "in direct conflict with record evidence." Br. 80.

ECM waived any objection to the required level of substantiation. As the ALJ said, "the parties agree that, applying the *Pfizer* factors, the appropriate level

of substantiation for Respondent's claims is 'competent and reliable scientific evidence.'" App. 252, 382. ECM does not argue for a different level of substantiation on appeal.

Even if ECM could show any error in the *Pfizer* analysis, it was harmless. The point of the test is to determine *how much* substantiation is required to prove an advertised claim. But ECM had *no substantiation at all* for its claims that its product would cause complete biodegradation in five years. It therefore did not matter whether the FTC properly applied *Pfizer*; the outcome—that ECM violated the FTC Act—would have been the same under any analysis.

In any event, ECM fails to show any error in the Commission's analysis. ECM complains that the Commission found that consumers were induced into paying higher prices for allegedly biodegradable plastics even though many of ECM's end products are plastic bags that are given away free of charge. The finding was correct as a matter of simple economic logic. ECM's product cost the bag manufacturer *something* and that cost plainly would have been reflected in the cost of the bags. Even if there is no direct charge to the consumer who uses a bag, its cost will be passed through to the consumer indirectly through the price of goods.

B. ECM Had Notice Of The Charges Against It.

ECM asserts that it was denied due process because the Commission provided inadequate notice of the charges against it. The administrative complaint charged that ECM falsely claimed its products rendered plastics biodegradable "within a reasonably short period of time after customary disposal," without specifying a particular time period. App. 449. ECM claims that it had no notice that "reasonably short period of time" meant five years, and not the one year suggested in the 2012 version of the Green Guides (*see* p. 15, *supra*), and by complaint counsel in some courtroom proceedings. Br. 86-89. As a result, ECM contends, it had no "opportunity to rebut the Commission's finding that the unqualified biodegradable claim implies complete decomposition within five years, as opposed to one year." Br. 88. ECM was not denied due process.

"The purpose of the administrative complaint is to give the responding party notice of the charges against him." *L.G. Balfour Co. v. FTC*, 442 F.2d 1, 19 (7th Cir. 1971). When an agency's finding varies from the complaint, there is no due process violation so long as the party "understood the issue and was afforded full opportunity to justify his conduct." *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986) (internal quotation marks omitted). Here, ECM had both notice of the charge that it falsely claimed its products would render plastics biodegradable within five years and the full opportunity to defend against that

charge. ECM was provided adequate notice that complaint counsel interpreted a "reasonable time" as a range of one to five years because complaint counsel said so, both in pleadings and during the trial. App. 352 (collecting instances). Moreover, the complaint also charged ECM with making the false *express* claim that its products would render plastics fully degradable in nine months to five years. App. 443-444, 449. ECM therefore suffered no prejudice when the Commission interpreted "reasonable time" to mean five years.

ECM's due process claim gets no support from *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354 (D.C. Cir. 1998), or *General Electric Co. v. EPA*, 53 F.3d 1324, 1328 (D.C. Cir. 1995). *See* Br. 87-88. Both cases involved penalties imposed on companies for the violation of an ambiguous administrative rule that the agency interpreted in the first instance. In those circumstances, the companies were entitled to fair notice of the regulatory requirements to which they were to be held. But this case has neither of the two elements crucial to those decisions. First, the Commission's order simply restrains ECM from further violations of the FTC Act; it does not impose a fine or other direct monetary penalty. Indeed, in *General Electric* the court recognized that "[h]ad EPA merely required GE to comply with its interpretation, this case would be over." 53 F.3d at 1328. Second, ECM was not held liable for violating a new interpretation of an existing regulation. ECM contends the Commission varied from the revised Green Guides' suggestion that a

reasonable time for an unqualified claim of biodegradability is complete decomposition within a year. Br. 59-60. But the Green Guides are only guides, not binding regulations. ECM was held liable for violating Section 5 of the FTC Act, which by its own terms provides constitutionally adequate notice of its requirements. *E.g.*, *FTC v. Wyndham Worldwide Corp.*, 799 F.3d 236, 255-256 (3d Cir. 2015).

Courts have long rejected claims "that the complaint filed by the Commission was inadequate to apprise [defendants] of the Commission's disapproval of the particular trade practices that the proof and findings ultimately developed." *E.g.*, *Country Tweeds, Inc. v. FTC*, 326 F.2d 144, 148 (2d Cir. 1964). For example, in *J.B. Williams*, this Court rejected a claim that a company was not given proper notice of the specific implied claim the Commission found to be false and misleading. 381 F.2d at 887-888. The claim was not charged in the complaint and was initially disclaimed by a government attorney. But because the issue was extensively discussed during the trial and was related to other issues in the case, this Court rejected the argument that the company did not receive proper notice. *Id.* at 888. The Court should reject ECM's due process claim for similar reasons. As in *J.B. Williams*, the record does not show that ECM "was unfairly prejudiced by [the FTC's] finding," and there was no significant "variance between the complaint and the Order." *Id.*

C. The Commission Acted Within Its Authority.

Finally, ECM argues that the Commission's order is *ultra vires* because it impinges on the EPA's authority to manage solid waste disposal. Br. 82-84. ECM contends that the Commission's order could change market incentives to make certain kinds of plastics, leading to changes to the makeup of landfills and ultimately frustrating the EPA's authority. The convoluted and fanciful scenario is speculative, frivolous, and unsupported by any evidence in the record.

CONCLUSION

The Commission's order should be affirmed.

Respectfully submitted,

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May 5, 2016

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the Clerk's March 1, 2016 order in this case setting a 17,000-word limit on the parties' principal briefs in that it contains 14,413 words.

May 5, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2014 I filed and served the foregoing with the Court's appellate CM-ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

May 5, 2016

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