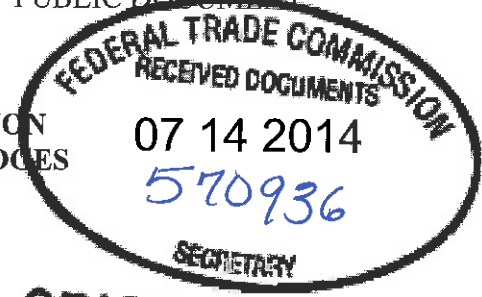


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.



In the Matter of

ECM BioFilms, Inc.,
a corporation, also d/b/a
Envioplastics International,

Respondent.

Docket No. 9358

ORIGINAL

PUBLIC

RESPONDENT ECM BIOFILM'S MOTION *IN LIMINE* AND MEMORANDUM IN SUPPORT TO EXCLUDE THREE DECISIONS BY THE NATIONAL ADVERTISING DIVISION OF THE COUNCIL OF BETTER BUSINESS BUREAUS

Pursuant to 16 C.F.R. § 3.43 and the Scheduling Order, Respondent ECM BioFilms ("ECM") hereby moves this Court to bar three decisions from the National Advertising Division ("NAD") of the Better Business Bureau ("NAD Decisions") from being admitted into evidence. The NAD is a private, self-policing entity that uses its own standards of review that differ from those of the FTC. Moreover, the universe of evidence considered by the FTC in the three decisions is but a small subset of the universe of evidence, including scientific evidence, present in this proceeding. Furthermore, all three of the NAD decisions relating to ECM's customers are based on truncated records and, consequently, are discordant and conflictive. Therefore, the probative value of these NAD decisions is substantially exceeded by the prejudicial effect their consideration would have on ECM.

BACKGROUND

The NAD has decided three cases involving ECM customers and their use of the ECM additive. *See* RX-A–RX-C. Complaint Counsel includes these decisions in their Proposed Exhibit List as CCX-26–CCX-28. NAD’s mission includes providing a “low-cost alternative to litigation [and] providing a quick and private process.” *See* RX-D. The first decision regards Dispoz-o Product’s Enviroware Plastic Utensils and Tableware. *See* RX-A. This decision only explicitly considered the ChemRisk report, which will be one of many—indeed of dozens—of tests and reports that ECM will rely upon in this case. *See* RX-A at P. 6. The second decision regards Masternet Ltd’s Plastic Netting Packaging Products. *See* RX-B. In that case, the NAD considered only a “Certificate of Biodegradability of Plastic Products Made by MasterNet Ltd” and “an Ecological Assessment for a component of MasterNet’s plastic products.” RX-B, at P. 7.

The third decision regards FP International’s Biodegradable SUPER 8 Loosefill Environmentally Friendly Packaging. *See* RX-C. This decision considered significantly more evidence than the Dipoz-o and Masternet decisions, and concluded that the evidence “supported the theory that [FP’s] product would eventually degrade over time.” *Id.*, at PP. 13–15. However, even that decision does not state exactly what testing and studies were considered, and undoubtedly does not reflect the totality of scientific evidence that will be before this Court. *Id.* PP. 13–14. For example, it does not appear that this decision was based on testing done by Northeast and Eden Laboratories—tests which are among those that ECM will rely upon in this case and that reveal plastic degradation resulting from the ECM additive. *Id.*

**THE NAD DECISIONS SHOULD BE EXCLUDED TO AVOID UNFAIR PREJUDICE,
UNDUE DELAY AND WASTE OF TIME**

Rule 3.43(a) provides that “[e]vidence, even if relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or if the evidence would be misleading, or based on considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” 16 C.F.R. § 3.43(a). This “amended rule is intended to make clearer to litigants that the ALJ is empowered to exclude unduly repetitious, cumulative, and marginally relevant materials that merely burden the record and delay the trial. This clarification is intended to enhance the ALJ’s ability to assemble a concise and manageable record.” *In the Matter of Intel Corp.*, 2010 WL 1989988, at *3 (F.T.C. May 6, 2010).

In accordance with this rule, even if the NAD Decisions have a scintilla of probative value, they should be excluded from evidence “pursuant to the balancing test provided in Commission Rule 3.43(b).” *Id.* While the risk of confusing the jury is not present in this or any other FTC action, the other elements of the balancing test “provide strong reasons for excluding the Decision.” *Id.* at *5. “First, there is danger of unfair prejudice to [ECM].” *Id.* Prejudice exists here because, while the defendants in the NAD Decisions used and marketed the ECM additive, ECM itself was not a party to that action and therefore not able to defend its additive. Using those decisions is, therefore, extremely prejudicial to ECM. *See, e.g., Univ. of Ill. Found. v. Blonder-Tongue Lab., Inc.*, 334 F. Supp. 47, 48 (N.D. Ill 1971) (noting that “prior adjudication involving a different defendant had no preclusive effect”).

Second, “admissions of the findings of the [NAD] Decision would require a ‘minitrial’ as to their trustworthiness, weight, credibility,” and relation to the applicable standards in this case. *Intel Corp.*, 2010 WL 1989988, at *5. As explained above, the NAD Decisions were necessarily based on an incomplete record, which, because of the extensive discovery efforts of both ECM

and Complaint Counsel, will be based upon numerous tests and other documents that were not before the NAD when it rendered the decisions. In two of the decisions, the NAD had only extremely sparse evidence. *See* RX-A and RX-B. In the third decision, while having a more significant record to consider and while including NAD determinations finding biodegradation caused by the ECM additive, this record was still without vital tests that ECM will rely upon in this case. Moreover, the NAD is merely a private company providing a low cost, quick, and private alternative to litigation, not an exhaustive review of all relevant facts under the FTC's legal and scientific standards. RX-D.

Therefore, should the NAD decisions be considered at the hearing, ECM "would be compelled, in its defense, to present, among other things, evidence as to potential bias in the findings; variances between [NAD] and [FTC] law applicable to the findings; and evidence that was inaccessible or ignored by, the [NAD]." *Intel Corp.*, 2010 WL 1989988, at *5. "Thus, any probative value that the [NAD] Decision[s] possess[] is far outweighed by the undue delay that would ensure from its admission." *Id.*

RELIEF

Based on the foregoing reasons, ECM respectfully requests that this Court exclude from evidence Complaint Counsel's proposed exhibits CCX-26–CCX-28.

Respectfully submitted,

/s/ Jonathan W. Emord
Jonathan W. Emord (jemord@emord.com)
EMORD & ASSOCIATES, P.C.
11808 Wolf Run Lane

PUBLIC DOCUMENT

Clifton, VA 20124
Telephone: 202-466-6937
Facsimile: 202-466-6938

DATED: July 14, 2014.

STATEMENT CONCERNING MEET AND CONFER

Pursuant to Rule 3.22(g), 21 C.F.R. § 3.22(g), the undersigned counsel certifies that, on July 14, 214, Respondent's counsel conferred via telephone with Complaint Counsel in a good faith effort to resolve by agreement the issues raised in the foregoing Motion. The parties were unable to make contact.

Respectfully submitted,



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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES
Washington, D.C.

In the Matter of

ECM BioFilms, Inc.,
a corporation, also d/b/a
Enviroplastics International,

Respondent.

Docket No. 9358

PUBLIC

**[PROPOSED] ORDER GRANTING RESPONDENT ECM BIOFILMS, INC.'S MOTION
IN LIMINE AND MEMORANDUM IN SUPPORT TO EXCLUDE THREE DECISIONS
BY THE NATIONAL ADVERTISING DIVISION OF THE BETTER BUSINESS
BUREAU**

This matter having come before the Administrative Law Judge on July ___, 2014, upon a Motion *in Limine* to Exclude Three Decisions by the National Advertising Division of the Better Business Bureau, filed by Respondent ECM BioFilms, Inc. ("ECM") pursuant to Commission Rule 3.43 and the Scheduling Order.

Having considered ECM's Motion and all supporting and opposing submissions, and for good cause appearing, it is hereby ORDERED that ECM's Motion is GRANTED; Proposed trial exhibits identified as CCX-26– CCX-28 are deemed inadmissible and shall not be considered at the hearing in this case.

ORDERED:

Date:

D. Michael Chappell
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on July 14, 2014, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy to the Office of the Secretary through the e-filing system:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-113
Washington, DC 20580
Email: secretary@ftc.gov

One electronic courtesy copy to the Office of the Administrative Law Judge:

The Honorable D. Michael Chappell
Administrative Law Judge
600 Pennsylvania Ave., NW, Room H-110
Washington, DC 20580

One electronic copy to Counsel for Complainant:

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I certify that I retain a paper copy of the signed original of the foregoing document that is available for review by the parties and adjudicator consistent with the Commission's Rules.

Respectfully submitted,

/s/ Jonathan W. Emord

Jonathan W. Emord (jemord@emord.com)

EMORD & ASSOCIATES, P.C.

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Clifton, VA 20124

Telephone: 202-466-6937

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DATED: July 14, 2014

RX-A

Case #4990 (3/27/2009)

DISPOZ-O PRODUCTS

Enviroware Plastic Utensils and Tableware

Advertising Agency: *Unknown*

Challenger: *Solo Cup Company*

- Advertising claims that a product or packaging offers an environmental benefit must be supported by competent and reliable evidence.

Basis of Inquiry:

Environmental claims made for disposable utensils and tableware by Dispoz-o (“advertiser”) for its Enviroware products were challenged by the Solo Cup Operating Corporation (“challenger”), a competing manufacturer of disposable foodservice products including utensils and tableware. The challenged biodegradability claims included the following:

“Enviroware is formulated to degrade in months when buried or discarded in a landfill”

“Enviroware is designed to interact with micro-organisms present in landfills, composters, and almost everywhere in nature including oceans, lakes and forests. These micro-organisms metabolize the molecular structure of the plastic, breaking it down into soil.”

“Enviroware does not require oxygen and will begin the degradation process as early as 9 months after being placed in the landfill.”

“Enviroware will degrade in as little as 9 months.”

“Enviroware cutlery, straws, hinged containers, plates, bowls and trays are 100% biodegradable and come with a certificate of biodegradability.”

“Degraded by Nature”

Challenger’s Position: The challenger argued that the advertiser made false and misleading claims, on its website, regarding the biodegradability of the Enviroware products. The claims, according to Solo, mislead environmentally conscious consumers to believe that they are purchasing products that biodegrade within a relatively short amount of time after customary disposal when there is no reliable evidence that they do.

I. Landfill Claims

The challenger argued that claims that Enviroware products have the ability to degrade in landfills are false and misleading since conditions in modern landfills inhibit the degradation of any matter, including organics, for decades. The challenger explained that landfills are designed to isolate refuse from the air and water and maintain very few micro-organisms to slow

DISPOZ-O PRODUCTS

Enviroware Plastic Utensils and Tableware

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biodegradation and decrease the emission of greenhouse gases.¹ Because landfills contain so few micro-organisms, the challenger maintained that Enviroware products do not have significant environmental benefits over disposable plastic products that micro-organisms cannot breakdown. The challenger maintained that studies have found twenty to twenty-five year old samples of organic material in landfills suggesting that Enviroware products cannot be expected to degrade under similar landfill conditions.²

Further, the challenger contended that the advertiser makes contradicting claims about the extent and timing of its product's biodegradation. In one claim, the advertiser stated that the Enviroware can completely degrade in as little as 9 months while another claim stated that Enviroware may *begin* to degrade as early as 9 months in a landfill. And, an extent of degradation claim stated that Enviroware would degrade completely into soil, while another claim stated that it would degrade into water, methane and carbon dioxide.

The challenger acknowledged that some biodegradation does occur in landfills, but noted that it occurs very slowly. Methane gas produced from this degradation, the challenger contested, is not proof that degradation is occurring at an appreciable rate. Instead, a small percentage of degradation will produce a large quantity of methane due to a landfill's sheer mass.³ Moreover, the challenger argued that despite the advertiser's criticism of the "Garbage Project" as out-of-date and not sufficiently representative of current landfill conditions, the advertiser did not produce evidence that anything will biodegrade in a landfill within a reasonably short period of time.

II. Claims that the Product is 100% Degradable

The challenger argued that most consumers understand biodegradable to mean that the material will breakdown naturally within one year and disappear completely following customary disposal.⁴ Therefore, the claims that Enviroware products are 100% biodegradable leads consumers to believe that the products will breakdown quickly when disposed of in landfills. The challenger also contended that the advertiser provides a certificate of biodegradability, but does not provide the name of the independent certifier, or any reliable evidence of degradation within a reasonably short period of time.

The challenger objected to evidence submitted by the advertiser as substantiation, noting that there was no testing of the actual product and it offered other criticisms of the testing methodology set forth in the advertiser's "Ecological Assessment of XXX Plastic" study (the

¹ Citing West, Larry. Do biodegradable items really break down in landfills? Available at: <http://environment.about.com/od/recycling/a/biodegradable.htm>.

² The challenger refers to the "Garbage Project" study which examined, among other things, the rate at which organic products degrade. See Rathje, William and Cullen Murphy. Rubbish! The archaeology of garbage. p. 114. (2001).

³ See Garbage project research & reporting record, available at <http://traumwerl.stanford.edu.3455/GarbologyOnline/48>.

⁴ See BPI Comments on current FTC advertising guidelines, at <http://www.bpiworld.org/Files/Article/Art1WVHOh.pdf>.

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Envioware Plastic Utensils and Tableware

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“Chemrisk Report”).⁵ According to the challenger, the Chemrisk Report tested only the proprietary additive, and not the biodegradability of the actual Envioware products that are the subject of the advertising claims. The challenger argued that the advertiser is merely presuming that because one component in the product is biodegradable the entire product will be, but by any amalgam, it would degrade at a slower rate than the additive alone. The challenger also argued that the testing method, ASTM D5511-94 (Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic-Digestion Conditions), was meant to simulate conditions in anaerobic digesters, not landfill conditions. The challenger argued that typical landfill conditions were not represented by the ASTM D5511-94 testing standards, which more closely replicate bioreactor conditions present at only a small number of landfills. Finally, the challenger argued that the Chemrisk Report concluded that the XXX treated plastics are not compostable, which contradicts the advertiser’s implied claims that Envioware products are, in fact, compostable.

III. Federal Trade Commission Guides

The challenger further maintained that the advertiser’s claims do not meet the standards established by the Federal Trade Commission (“FTC”) for making environmental claims in advertising. The FTC requires a reasonable basis to support assertions about the environmental attributes of a product. A reasonable basis is defined as “competent and reliable evidence,” which requires “reliable scientific evidence.”⁶ In its Environmental Marketing Guides (“Green Guides”), the FTC provided that claims about biodegradation in landfills will be difficult to substantiate because landfills are designed to slow degradation.⁷ The challenger maintained that the advertiser has not provided the reliable and scientific evidence necessary to substantiate its claims under the FTC Green Guides.

The challenger also contested that the advertiser’s amended claim that Envioware products degrade in 9 months to 5 years. The claim, according to the challenger, is still unsupported due to the fact that the most relevant testing relied upon to support the claim was conducted under aerobic and not anaerobic conditions. Furthermore, the challenger maintained that even with competent testing, the 5 year claim still does not meet FTC requirements of biodegradation in a “reasonably short period of time.” The challenger noted that most consumers believe that biodegradable products will breakdown within a year, an understanding supported by a survey sanctioned by the American Chemistry Council.

Advertiser’s Position: The advertiser maintained that its claims regarding the biodegradability of Envioware products are accurate and supported by reliable product testing, including testing conducted pursuant to an industry standard, ASTM D5511-94.⁸ The advertiser also explained

⁵ The identity of the additive and full title of the report was redacted as the data was submitted to NAD in confidence pursuant to NAD Procedures § 2.4(D).

⁶ See FTC Environmental Marketing Guides at 18. (discussing §260.5 of the FTC Green Guides)

⁷ *Id.*

⁸ ASTM D5511-94 is the Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic-Digestion Conditions

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that certain information and research concerning its ingredient was highly confidential. It further noted that its products are not marketed to individual consumers but are sold in bulk to distributors and therefore, it argued, its marketing efforts are not “national advertising” within the meaning of NAD Procedures.

I. Landfill Claims

The advertiser criticized the challenger’s reliance on the “Garbage Project,” to support its contention that no biodegradation occurs in landfills. The study, argued the advertiser, is dated and does not accurately describe information that is representative of modern landfills. The advertiser argued that biodegradation does in fact occur in landfills, as evidenced by the presence of methane and carbon dioxide, byproducts of decomposition under anaerobic conditions.⁹ With regards to claims on the timeframe of degradation in landfills, the advertiser noted that it has amended its marketing material to include a general timeframe of 9 months to 5 years for the biodegradation of its Enviroware products. The amendments also included corrections to consistently state that Enviroware products biodegrade into water, carbon dioxide/methane gas, and organic solids.

The advertiser contested the challenger’s assertion that its testing did not simulate landfill conditions, and noted that other laboratories have stated that ASTM D5511-94 protocol does provide accurate simulation of landfill conditions. The advertiser maintained that the Garbage Project is not an accurate measure or representation of the biodegradation in a landfill, rather measuring biogas is the most scientific method of determining the rate of biodegradation in landfills. Data shows that, over a period of time, conventional landfills and bioreactors produce statistically equivalent levels of methane gas; therefore, the advertiser argued that they have comparable rates of biodegradation.¹⁰

II. 100% Degradable Claims

The advertiser maintained that it provided the necessary support for its biodegradability claims by virtue of the certification and testing from its supplier, a process which is standard industry practice. The advertiser also interpreted the results of the Chemrisk Report as showing that the 100% XXX plastics will fully biodegrade under anaerobic conditions within 62.5 days and that XXX-treated plastics should fully biodegrade as well, though slower. Additionally, the advertiser presented scientific test results for other plastics and additives which, it maintains, are comparable to Enviroware products. The test results demonstrated degradation under anaerobic conditions, including a calculated half-life of approximately 4 years for bioPVC. The evidence submitted by the advertiser also included studies, conducted at the University of New Mexico, monitoring the degradation of expanded polystyrene or polystyrene foam samples through electron microscopy imaging. Further, an Enviroware fork and plate were buried in earth for 7 months, and when removed, the products showed signs of degradation. Finally, the advertiser contended that

⁹ *Citing US EPA-Methane: Sources and Emissions*, available at <http://www.epa.gov/cgi-bin/epaprintonly.cgi>.

¹⁰ *Citing State-of-the-Practice for Energy Recovery from Bioreactor Landfills*. (2008). (Presentation by Bob Gardner of SCS Engineers, Norfolk, Virginia, at the 11th Annual LMOP Conference and Expo)

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the testing it conducted meets the standards necessary to support its claims, and that claims were never made that Enviroware meets stricter standards such as the time frames of degradation found in the ASTM 6400 standard testing methodology.

The advertiser argued that the challenger misapplied the results of the survey conducted by the American Chemistry Council and that survey, therefore, did not accurately reflect consumer understanding of the natural process of biodegradation and its meaning. For example, noted the advertiser, it is well established that even organic material will not always be fully degraded after one year. Consequently, if consumer understanding of "biodegradable" required a complete breakdown in less than one year, then virtually no organic matter could be categorized as biodegradable unless it was placed into a costly commercial composting facility. Furthermore, the advertiser contended that the survey contained terms that were ambiguous, vague and allowed for the surveyor's bias to permeate into the results. For example, the advertiser noted that the challenger defined the term naturally as "on its own," implying that the action is occurring in a vacuum with no external forces, rather than as "in a natural manner."

III. Federal Trade Commission Guides

The advertiser maintained that the independent scientific reports provided by its supplier prove that plastic products manufactured with the XXX additive will biodegrade within a reasonable period of time, in accordance with FTC Green Guides. Moreover, the advertiser contended that the FTC does not require that testing be conducted on each and every individual product.¹¹ The advertiser maintained that based on the due diligence it has undertaken, and the evidence submitted, it substantiated claims that the Enviroware products are capable of biodegradation at a reasonable rate under anaerobic conditions.

DECISION:

NAD has noted the recent resurgence in environmental advertising claims in the marketplace and recognizes the impact such claims may have on the purchasing decisions of consumers who are concerned with sustainability and environmental issues.¹² Because consumers cannot typically verify for themselves the truth of environmental claims, advertising self-regulation is particularly important, playing an increasingly significant role in ensuring that environmental claims are truthful, non-misleading and adequately substantiated.

Plastic products, which are made of petroleum-based resins, have traditionally been recognized as resistant to degradation. Indeed, this resistance accounts for the durability and widespread utility of plastics in such a wide variety products. It has however, raised concerns about the solid waste created by the disposal of such products, particularly in light of heightened public consciousness about environmental issues. Consequently, advertising that claims a disposable product, such as plastic kitchenware, is biodegradable (and biodegradable in landfills) conveys a strong message of an environmental benefit to environmentally-conscious consumers.

¹¹ FTC Green Guides.

¹² GP Plastics Corporation (PolyGreen Plastic Bags), Case Report #4944, *NAD/CARU Case Reports* (March 2009).

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According to the advertiser, the Enviroware products feature a proprietary additive (Active Organic Catalyst) which, when compounded with a polyethylene or polypropylene resin, results in a plastic that is biodegradable. It explained that the biodegradation of the plastic occurs by virtue of both aerobic and anaerobic mechanisms. The advertiser maintained that microorganisms produce enzymes that break up the plastic's molecular chain into smaller structures which are metabolized into water, carbon dioxide or methane and organic solids.

As an initial matter, NAD observed that the challenged website, although purportedly targeted to distributors rather than the general public, constituted "national advertising" under NAD Procedures and that, consequently, NAD had jurisdiction to review the challenged claims. It next considered the evidence provided by the advertiser to assess whether it possessed competent and reliable scientific evidence in support of its biodegradability claims.

The Testing and Scientific Evidence

In support of the claims that the products will biodegrade in landfills, the advertiser relied upon a test involving high-rate dry anaerobic batch fermentation (ASTM D5511-94).¹³ The test was conducted on the additive in a pellet form and also on reference material (cellulose) placed in a concentrated medium with bacteria that is found in landfills. Test vessels were closed airtight and placed in an incubator for 15 days. At the end of the test, the amount of methane and carbon dioxide produced per gram was calculated to determine the percentage of degradation. Based on this method of measurement, 24% of the pellet sample had biodegraded after 15 days (as compared with 87% of the cellulose sample). The test results, provided in the Chemrisk Report, concluded that the pellets are biodegrade under anaerobic conditions and that plastics treated with the additive should also break down in anaerobic conditions, although at a slower rate than the concentrated pellets. The advertiser supplemented the ChemRisk report with additional scientific test results for other plastics and additives including studies that monitored the degradation of multiple polymers including polyethylene, polystyrene and polyvinyl chloride samples by means of electron microscopy imaging.

The issue for NAD was whether the biodegradability claims made by the advertiser for its Enviroware Products were supported by competent and reliable scientific evidence. Because NAD seeks to harmonize its decisions with the activities and guidelines set forth by the appropriate regulatory authorities, NAD has found the FTC Green Guides to be instructive with regard to claims of environmental benefits. FTC has addressed the issue of "biodegradability" and the use of the term in advertising, providing that:

¹³ According to the Chemrisk Report, submitted by the advertiser, the ecological assessment performed by Dispoz-o's supplier also applied other industry standard testing, including ASTM D5209-91, "Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sewage Sludge," ASTM D5338-98, "Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions," equivalent to CEN prEN WI 261085 and the ISO 14855 method "Evaluation of the Ultimate Aerobic Biodegradation and Disintegration of Plastics under High-Solids Anaerobic Digestion Conditions."

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[i]t is deceptive to misrepresent, directly or by implication that a product or package is degradable, biodegradable or photodegradable. An unqualified claim that a product or package is degradable, biodegradable or photodegradable should be substantiated by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e., decompose into elements found in nature within a reasonable short period of time after customary disposal.¹⁴

Upon reviewing the materials submitted in support of the advertiser's claims, NAD identified several concerns with the evidence provided. First, NAD noted that the actual products that are advertised, the Enviroware plastic utensils and tableware, were not subjected to clinical testing. The Chemrisk Report indicated the anaerobic testing of only concentrated XXXX (proprietary additive) pellets. Although the advertiser maintained that these pellets are encased in a plastic carrier, the pellets are structurally different from a polystyrene fork or plate and there was insufficient evidence upon which to conclude that the actual product would degrade at the same rate or to the same degree as the additive alone, or in a different or concentrated composition.¹⁵ The advertiser conducted an anecdotal test of a sample fork and plate that was buried under six inches of earth for seven months. Although, examination of these samples under a low-power imaging microscope yielded some signs of biodegradation, there was no evidence that products had completely broken down, or that they would do so in landfill conditions.¹⁶

Second, it was unclear whether the anaerobic testing referred to in the Chemrisk Report adequately simulated landfill conditions. ASTM D5511-94 provides:

This test method may also resemble some conditions in biologically active landfills where the gas generated is recovered and biogas production is even actively promoted, for example, by inoculation (codeposition of anaerobic sewage sludge, anaerobic leachate recirculation), moisture control in the landfill (leachate recirculation), and temperature control (short-term injection of oxygen, heating of recirculated leachate).¹⁷

This ASTM test measures "Biodegradation of Plastic Materials Under High-Solids Anaerobic-Digestion Conditions." It is true that most landfills also involve anaerobic conditions but the test method is otherwise designed to test under different conditions. For example, it involves a specially prepared inoculum (source of bacteria) that is derived from a properly operating anaerobic digester functioning with a pretreated household waste as a sole substrate. The test is also designed to achieve optimal conditions for pH, nutrients, and volatile fatty acids. These represent very controlled conditions, not conditions typical of most landfills.

¹⁴ FTC Green Guides. 16 C.F.R. 260.7(b). FTC addressed the issue of "biodegradability" in *the Matter of RBR Productions, Inc.*, 122 F.T.C 444 (1996) and *In the Matter of Archer Daniels Midland Company*, 117 FTC 403 (1994).

¹⁵ The advertiser argued that if pellets biodegraded at 24% in 15 days, then the logical conclusion is that 62.5 days would result in 100% biodegradation. NAD was not presented with scientific support for this contention.

¹⁶ The FTC Green Guides refer to "customary disposal" i.e., landfills.

¹⁷ ASTM D5511-94 at 1.2.

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NAD noted that the parties dispute certain facts about the nature of landfills in the United States. The dispute is relevant since landfills are still the destination of choice for the “customary disposal” of garbage. The challenger maintained that landfills, traditionally, are “mummifiers” and are specifically created to minimize the amount of degradation that occurs because that limits the production of biogas released into the atmosphere. The advertiser took issue with the challenger’s characterization of landfills and noted that many landfills, even conventional landfills, produce significant amounts of biogas or methane. The production of gas is, according to the advertiser, not only evidence that biodegradation is occurring in landfills (however slowly) but is also an indicator that these landfills may be candidates for landfill Gas-to-Energy projects.

NAD Findings and Recommendations

NAD appreciates the advertiser’s interest in developing technology and the utilization of degradable plastics in an effort to reduce the environmental impact of plastics in the post consumer waste stream. On the basis of its testing, the advertiser provided a reasonable basis for its claim that “Enviroware is designed to interact with micro-organisms present in landfills, composters, and almost everywhere in nature including oceans, lakes and forests. These micro-organisms metabolize the molecular structure of the plastic, breaking it down into soil.” However, the advertiser did not establish, by means of competent and reliable scientific evidence that its products will *completely* break down and return to nature within a *reasonable short period of time* after *customary disposal*.

Accordingly, NAD recommended the following claims be discontinued:

“Enviroware is formulated to degrade in months when buried or discarded in a landfill”

“Enviroware cutlery, straws, hinged containers, plates, bowls and trays are 100% biodegradable and come with a certificate of biodegradability.”

NAD noted 1) that the evidence did not establish that the products are 100% degradable in landfill conditions and 2) that a “certification” of a product or additive as biodegradable by a supplier is not a substitute for competent and reliable scientific evidence that an advertiser must possess in order to substantiate environmental claims in its marketing and advertising.

Finally, NAD appreciated the advertiser’s willingness to modify its advertising to provide a more conservative time-frame for the expected rate of degradation. (The advertiser noted that it has amended its marketing material to include a general timeframe of 9 months to 5 years for the biodegradation of its Enviroware products.) The challenger maintained that even if this more conservative measure was substantiated, it is not a return to nature within “a reasonable short period of time.”

According to FTC Green Guides, claims of degradability or biodegradability “should be qualified to the extent necessary to avoid consumer deception about: (1) the product or package’s ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent

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Enviroware Plastic Utensils and Tableware

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of degradation.”¹⁸ Although the advertiser provided some evidence of the product’s properties of degradation (as compared with conventional plastics), it did not provide competent and reliable scientific evidence that the products would biodegrade when disposed of in landfill conditions. Accordingly any claims about the expected time frame of degradation, must be significantly qualified to indicate the limited nature of the conditions tested.

CONCLUSION:

The advertiser had a reasonable basis for claiming that its Enviroware products are designed to interact with micro-organisms and break down into soil. However, the advertiser did not establish, with competent and reliable scientific evidence, that Enviroware plastic utensils and tableware products completely break down and return to nature within a reasonable short period of time after customary disposal in landfills. NAD therefore recommended that its claims that its product is 100% biodegradable, and biodegradable in landfills be discontinued.

ADVERTISER’S STATEMENT:

Dispoz-o respects the role of NAD in the process of self-regulation of advertisers and is appreciative of the opportunity to participate in this process. Furthermore, Dispoz-o Products is pleased that NAD determined that advertiser provided a reasonable basis for its claim that “Enviroware is designed to interact with micro-organisms present in landfills, composters, and almost everywhere in nature including oceans, lakes and forests. These micro-organisms metabolize the molecular structure of the plastic, breaking it down into soil.”

Dispoz-o Products also notes that NAD recommends the advertising claims of 100% biodegradable” and “Biodegradable in landfills”, without further qualification, be discontinued. Though Dispoz-o Products believes that we have provided extensive competent and scientific evidence to support these claims, we accept NAD’s decision and will discontinue the two advertising statements per your recommendation until such time that our actual products complete the clinical and/or on-site testing and we can make a qualified claim based on these tests in accordance with the parameters of the NAD decision. (#4990 DGM, closed 03/27/2009)

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¹⁸ FTC Green Guides. 16 C.F.R. 260.7(b).

RX-B

Case #5092 (10/02/09)

MASTERNET LTD.

Plastic Netting Packaging Products

Challenger: *Conwed Plastics LLC*

- **Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers**

Basis of Inquiry:

Environmental claims made for plastic netting packaging products produced by MasterNet Ltd. (“advertiser”) were challenged by Conwed Plastics LLC (“challenger”), a competing producer, distributor and marketer of plastic netting packaging products. The challenged advertising claims included the following:

Biodegradable Claims:

- MasterNet’s “Wattle Netting” is biodegradable”
- “Newly redesigned biodegradable Bottle Sleeves”
- “In fact, we’ve made a commitment to produce a minimum of 10% of our products using biodegradable materials”

General Environmental Claims:

- “More environmentally friendly”
- “Our innovative bottle sleeves have ... saved countless trees from destruction”
- “With our newly redesigned biodegradable Bottle Sleeves and another one of our product sectors committed to the cause, we are determined to achieve – and hopefully surpass – our goals of environmental responsibility, and we look forward to helping you achieve yours.”

Recyclable Claims:

- “Bottle Sleeves are manufactured using reprocessed plastic and can be recycled in the blue box, where facilities exist.”

Challenger’s Position

Biodegradable Claims

The challenger argued that the advertiser’s claims about the biodegradability of its Wattle Netting and bottle sleeves were misleading. The challenger maintained that environmental claims must be supported by competent and reliable evidence noting that consumers cannot typically

verify for themselves the truth of environmental claims.¹ The Federal Trade Commission's Green Guides provide that "an unqualified claim that a product or package is degradable, biodegradable, or photodegradable should be sustained by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature ... after customary disposal."² The challenger contended that the advertiser's evidence was insufficient to support its claims or demonstrate that its products would break down completely after customary disposal and within a reasonably short period of time.

The challenger maintained that a certificate of biodegradability, relied upon by the advertiser was insufficient to support a biodegradability claim. The challenger noted that NAD, in a previous decision, has held that a supplier's certificate of a product or additive as biodegradable is not an adequate substitute for competent and reliable evidence to substantiate environmental claims for a product.³ Moreover, the challenger took issue with the Ecological Assessment that was submitted by the challenger along with the certificate⁴ and argued that the report does not provide any experimental data constituting competent and reliable scientific evidence.

The challenger contended that the ASTM and EU testing standards relied upon by the advertiser, do not provide standards for testing degradation in a landfill and therefore, could not serve as substantiation for the advertiser's biodegradability claims.⁵ The challenger noted that one test method cited by the advertiser, ASTM D5209-91,⁶ had been withdrawn. The challenger also explained that the test method, ASTM D5511-94⁷ represented very controlled conditions, which were not typical of most landfills.⁸ The challenger also argued that ASTM 5338-98⁹ does not provide information on landfill disposal or provide real-world testing. Finally, the challenger argued that the EU's 94/62 EC only supports claims for "organic recycling;" noting that the directive also states that a "landfill shall not be considered organic recycling." Because plastic

¹ Citing *GP Plastics Corporation/PolyGreen Plastic Bags*, NAD Case Report #4944 (March 2009).

² 16 C.F.R. 250.7(b). See also *Dispoz-O Products/Enviroware Plastic Utensils and Tableware*, NAD Case Reports #4990 (March 2009).

³ See *Id.*

⁴ According to the challenger, the Ecological Assessment was prepared by ECM Plastic in 1999.

⁵ Landfills are the customary disposal method of plastic products in both Canada and the United States.

⁶ "Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sludge"

⁷ "Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions." This test was conducted on proprietary pellets (test material) and cellulose (reference material), where the materials were added to an inoculum consisting of a concentrated medium of the same bacteria found in landfills. The test materials were sealed in airtight test vessels and incubated for 15 days. At the end of the test, the amount of methane and carbon dioxide produced per gram of test substance was calculated, and the information used to calculate the percentage of biodegradation.

⁸ See *Dispoz-O Products/Enviroware Plastic Utensils and Tableware*, NAD Case Report #4990 (March 2009).

⁹ "Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions," which is equivalent to CEN prEN WI 261085 and the ISO 14855 method "Evaluation of the Ultimate Aerobic Biodegradability and Disintegration of Plastics under Controlled Composting Conditions." This test is conducted under optimum oxygen, temperature and moisture conditions, simulating an intensive aerobic composting process. The test was conducted on plastic films composed of 50% proprietary pellets and 50% resin, which were added to an inoculum consisting of mature compost and composted for 60 days. The carbon dioxide production rate and the cumulative carbon dioxide were measured at the end of the test, and the information used to calculate percentage of biodegradation.

products are customarily disposed of in landfills, the challenger maintained that the EU directive was not sufficient to substantiate the claims. The challenger also argued that an EU standard does not control in inquiries of United States advertising.

The challenger also contested the advertiser's assertion that its sales figures substantiated the claim that it produces 10% of its products using biodegradable materials. The challenger argued that the advertiser has not established that its netting products are biodegradable or that revenue from sales of two netting products establishes the percentage of biodegradable material that the manufacturer utilizes as compared to the total amount of material the company uses.

Environmental Claims

The challenger argued that claims of "more environmentally friendly" and that plastic bottle sleeves have "saved countless trees from destruction" are overstatements and unsubstantiated. The challenger noted that NAD and the FTC have made clear that claims should not overstate a product's proven environmental benefits, and that a single environmental benefit or attribute is not enough for a basis without considering the product's broader environmental impact. "Environmentally friendly" claims convey an overall takeaway that the product is either beneficial to, or at least not harmful to, the environment. The challenger averred that the advertiser's environmental claims are broad general claims that convey a message of far-reaching environmental benefits that the advertiser cannot support.

The challenger contended that the claim "more environmentally friendly" was misleading because it improperly implied that the advertiser's products offered more environmental benefits than competing products.¹⁰ Moreover, the challenger noted that the steps the advertiser has taken to improve its factory process, while potentially positive for the environment, still fall short of establishing that the products from the factory are "more environmentally friendly."

The challenger also argued that the advertiser could not substantiate its claim that its products have "saved countless trees from destruction." The challenger explained that the FTC has advised advertisers against misleading consumers by using "source reduction claims." The challenger noted that the advertiser submitted sales data of its bottle sleeves as substantiation, but did not explain any direct link between sales and saving trees. Further, the challenger argued that the sales data also included Christmas tree netting to show that the advertiser had surpassed internal environmental goals through the sale of biodegradable products; however, the advertiser failed to show that either product is biodegradable.

Recyclable Claims

The challenger noted that the advertiser's website prominently displayed the Society of Plastics Industry ("SPI") code on the page regarding its bottle sleeves.¹¹ The FTC specifies that the use

¹⁰ The challenger noted that NAD precedent has established that an advertiser is responsible for supporting all reasonable interpretations of its advertising claims, not just the messages it intended to convey.

¹¹ The code is a design consisting of arrows in a triangular shape around a number – in this case "4" – that identifies the component plastic.

of an SPI code constitutes a recyclable claim, which requires either recycling facilities to be available to a substantial majority of consumers or a disclosure about the limited availability of recycling programs for the container.¹² The challenger also noted that the advertiser claimed its bottle sleeves could be “recycled in the blue box,” and that the FTC states that such claims constitute an overstatement of an environmental attribute. The challenger argued that there has to be competent testing to support the advertiser’s recyclable claim.

Advertiser’s Position

Biodegradable Claims

The advertiser argued that it does not claim that all its Wattle Netting products are biodegradable, only that it offers a choice to its customers. In support of its claims, the advertiser provided a Certificate of Biodegradability of Plastic Products made by MasterNet Ltd. that incorporate a proprietary pellet (“Certificate”).¹³ The Certificate indicated that plastic products have been tested using ASTM D5209-91,¹⁴ ASTM D5338-98,¹⁵ ASTM D5511,¹⁶ and subject to an Ecological Assessment report.¹⁷ The advertiser maintained that these tests support its claim that the plastic products are biodegradable. The advertiser also argued that the certificate validated that any products manufactured with the proprietary pellets, in accordance with manufacturing guidelines for use, may claim the biodegradability and environmental safety of the resultant plastic products. Moreover, the advertiser maintained that the Certificate and its testing is adequate substantiation for the claims under Canadian requirements.¹⁸

The advertiser argued the claim that it has “made a commitment to produce a minimum of 10% of our products using biodegradable materials” was true. The advertiser provided its sales data up to October 2008 as substantiation of its claim. The data showed that the combined amount of

¹² 16 C.F.R. 260.7(d)

¹³ The advertiser noted that the certificate and use of the proprietary pellets are both highly confidential trade secrets.

¹⁴ “Standard Test Method for Determining the Aerobic Biodegradation of Plastic Materials in the Presence of Municipal Sludge”

¹⁵ “Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions,” which is equivalent to CEN prEN WI 261085 and the ISO 14855 method “Evaluation of the Ultimate Aerobic Biodegradability and Disintegration of Plastics under Controlled Composting Conditions.” This test is conducted under optimum oxygen, temperature and moisture conditions, simulating an intensive aerobic composting process. The test was conducted on plastic films composed of 50% proprietary pellets and 50% resin, which were added to an inoculum consisting of mature compost and composted for 60 days. The carbon dioxide production rate and the cumulative carbon dioxide were measured at the end of the test, and the information used to calculate percentage of biodegradation.

¹⁶ “Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic Digestion Conditions.” This test was conducted on the proprietary pellets (test material) and cellulose (reference material), where the materials were added to an inoculum consisting of a concentrated medium of the same bacteria found in landfills. The test materials were sealed in airtight test vessels and incubated for 15 days. At the end of the test, the amount of methane and carbon dioxide produced per gram of test substance was calculated, and the information used to calculate the percentage of biodegradation.

¹⁷ Report showed that plastics containing proprietary pellets were compliant with 94/62 EC for the EU.

¹⁸ According to the advertiser, Canadian environmental guidelines are comparable to United States requirements.

sales of biodegradable Bottle Sleeves and biodegradable Christmas tree netting constituted 14% of the advertiser's total sales.

Discontinued Claims

The advertiser contended that it periodically reviews its website to make changes and updates, and as a result, certain claims in the challenge have been discontinued. More specifically, the advertiser represented that the claim, "newly redesigned biodegradable Bottle Sleeves," and the use of a biodegradable logo were permanently discontinued and removed from the website. However, the advertiser maintained that these claims had been substantiated because the products were shown, based upon the certificate and related testing, to be biodegradable.

Environmental Claims

The advertiser argued that the challenger has taken the "more environmentally friendly" claim out of context and that the claim is not an overbroad comparative claim against competing products. The advertiser noted that the entire claim read:

"Committed to innovation and investment, we use these valuable insights to rethink our products and processes so that we can make them more efficient, and above all, more environmentally friendly."

The advertiser contended that, when the claim is viewed in context, the narrow message of the claim can be seen as a commitment to make the advertiser's products and processes more environmentally friendly.

The advertiser explained that it has demonstrated a commitment to making its products and processing more environmentally friendly through changes to its factory. The advertiser installed \$60,000 of electrode-less magnetic induction lighting, which uses less mercury and electricity than the previous lighting, in the manufacturing plant.¹⁹ The plant was also in the process of installing a new cooling tower to re-circulate more water in its manufacturing plant, thereby lowering the plant's consumption of water by an estimated 98%. Further, the advertiser explained that it also purchases its cardboard products from Atlantic Paper Packaging Ltd., which claims that the cardboard is made from recycled paper.

The advertiser also argued that its claim that "bottle sleeves have ... saved countless trees from destruction" was consistent with section 5.19 of the Canadian Competition Bureau's *Environmental claims: A guide for industry and advertisers*.²⁰ The advertiser stated that, in this case, the Bottle Sleeves are compared with the paper packaging for which the sleeves are a substitute. The advertiser also provided sales data showing the amount of bottle sleeves it has sold since January 1, 2005. The advertiser argued, because each bottle sleeve replaces one paper

¹⁹ It will stated that it will reduce the amount of mercury sent to land fills by 138,520 mg and will reduce the carbon dioxide output of the plant by 546 metric tons over 10 years.

²⁰ The section states that "self-declared environmental claims, including any explanatory statement, shall be relevant to the area where the corresponding environmental impact occurs."

bag, the bottle sleeves have decreased demand for an equivalent number of paper bags which in turn protected the trees otherwise needed to produce those bags.

Recyclable Claims

The advertiser noted that it has removed recycling claims from its website because of the wide variation in municipal recycling facilities. These claims included the recycling symbol and the claim that “Bottle Sleeves are manufactured using reprocessed plastic and can be recycled in the blue box, where facilities exist.”

DECISION:

NAD has, in recent years, observed the dramatic rise in environmental advertising claims in the market place, including those related to biodegradation or degradation of plastic products and packaging.²¹ In response to the demand for “greener” products, manufacturers of products traditionally perceived as being bad for the environment, (i.e., plastics) have made efforts to redesign products to make them environmentally friendly. Because customers (both consumers and business) cannot easily verify for themselves whether environmental claims are truthful or meaningful, purchasers often rely on advertising to determine any environmental benefits of a product through various stages of the supply chain.²² As a result, advertising self-regulation plays an important role in maintaining the truth and accuracy of environmental claims.

According to the advertiser, its plastic packaging products are manufactured with a proprietary pellet, which provides the plastic products with their biodegradable properties. It also maintained that its manufacturing process has been innovated so that both the product and manufacturing process are more environmentally friendly.

Biodegradable Claims

First, NAD addressed the issue of whether the advertiser provided adequate substantiation to support its biodegradability claims. In prior decisions, NAD has observed that claims promoting a product’s environmental benefits must be supported by competent and reliable evidence.²³ Furthermore, NAD has noted that the FTC Green Guides are instructive and provide important guidance about environmental claims in advertising.²⁴ The Green Guides provide (in part) that:

[A]n unqualified claim that a product or package is degradable, biodegradable or photodegradable should be sustained by competent and reliable scientific evidence that the entire product or package will completely break down and return to nature, i.e.,

²¹ See Dispoz-o Products (Enviroware Plastic Utensils and Bags), Case Report #4990, *NAD/CARU Case Reports* (March 2009) and GP Plastics Corporation (PolyGreen Plastic Bags), Case Report #4944, *NAD/CARU Case Reports* (March 2009).

²² See Case Report #4990

²³ See Case Report #4944

²⁴ See Case Report #4990

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decompose into elements found in nature within a reasonably short period of time after customary disposal.²⁵

In support of its claims, the advertiser submitted a “Certificate of the Biodegradability of Plastic Products Made by MasterNet Ltd.” and an Ecological Assessment for a component of MasterNet’s plastic products.²⁶ NAD, upon review of the evidence, found it to be insufficient to adequately support the biodegradable claims for the advertiser’s plastic products. First, NAD noted that the Certificate and the testing, upon which it appears to be based, do not support a finding that the plastics meet the standard for biodegradable as set forth by the FTC Green Guides or what a reasonable consumer would expect regarding the degradation of the product. A certificate issued by a third-party or supplier of an ingredient is not an adequate substitute for actual testing on the product or other competent and reliable scientific evidence. The Certificate stated that, on the basis of certain test methods conducted on a proprietary pellet, MasterNet products, when produced in accordance with manufacturing guidelines, may make biodegradability claims. However, the Certificate is not evidence that the actual products in question (the Wattle Netting and plastic bottle sleeves) as opposed to the proprietary pellets sold by a supplier, were tested. Similarly, the Ecological Assessment provided by the advertiser reported testing on the pellets, not the actual product that is advertised and sold.

Additionally, the test methods referred to in Certificate do not establish that the plastic products would biodegrade under actual consumer use. Wattle Netting and plastic bottle sleeves, when customarily disposed of will typically end up in a landfill, as with most plastic packaging products.²⁷ The testing conducted on the pellets, conducted in accordance with ASTM D5209-91 and ASTM D5338-98 are tests for aerobic biodegradation, which are not typical of landfills conditions. Additionally, ASTM D5511, which provides a test method for anaerobic conditions, was designed to test under more controlled conditions, not conditions that are typically found in a landfill.

NAD considered the sales data submitted to support the claim that the advertiser has “made a commitment to produce a minimum of 10% of our products using biodegradable materials.” The sales data showed that the combined sales of MasterNet’s “biodegradable” Bottle Sleeves and “biodegradable” Christmas tree netting constituted 14% of its sales. NAD observed that the evidence was insufficient to support the advertiser’s unqualified biodegradable claims. However, NAD also noted that total unit sales does not necessarily equate to total production. Sales figures do not take into account the total inventory of products that are produced and therefore, the ratio of total number of “biodegradable” units produced over total units produced is not necessarily the same as number of “biodegradable” units sold over total units sold.

Environmental Claims

²⁵ 16 C.F.R. 260.7(b). FTC also addressed the issue of “biodegradability” in *the Matter of RBR Productions, Inc.*, 122 F.TC 444 (1996) and *In the Matter of Archer Daniels Midland Company*, 117 FTC 403 (1994).

²⁶ The challenger noted in its submissions that it believes the report was an Ecological Assessment of ECM Plastic from 1999 or a similar report.

²⁷ See Case Report #4990.

NAD considered whether the advertiser's general environmental claims are adequately substantiated. It is well established that an advertiser is obligated to support all reasonable interpretations of claims in advertising, even messages that may not have originally been intended.²⁸ The FTC Green Guides also guard against overstatements in claims of general environmental benefit:

It is deceptive to misrepresent, directly or by implication, that a product, package or service offers a general environmental benefit. Unqualified general claims of environmental benefit are difficult to interpret, and depending on their context, may convey a wide range of meanings to consumers. In many cases, such claims may convey that the product, package or service has specific and far-reaching environmental benefits.²⁹

NAD shared challenger's concern that a general claim of "Environmentally Friendly" is overstatement and not supported by the evidence. NAD did, however, appreciate MasterNet's steps and investments it has undertaken to make its own manufacturing process "more environmentally friendly" than was previously the case. Accordingly, NAD observed that when the term "more environmentally friendly" appeared in the context of an online explanation of the company's practices, it did not suggest a comparison to other practices and the claim was adequately substantiated. Accordingly, NAD determined that the advertiser provided a reasonable basis for the following claim"

"Committed to innovation and investment, we use these valuable insights to rethink our products and processes so that we can make them more efficient, and above all, more environmentally friendly."

NAD determined however, that the advertiser did not provide adequate substantiation for the claim "saved countless trees from destruction." The advertiser submitted its sales data as support and argued that its sales of plastic products meant that it was replacing paper alternatives. NAD determined however, that a specific connection between an increase in the sale of plastic sleeves and saving "countless" trees was tenuous and insufficient to substantiate the claim.

Recyclable Claims

NAD appreciated that advertiser's representation that it had permanently discontinued the recyclable claims that were challenged in this case. NAD noted that advertisers wishing to make claims of recyclability must possess competent and reliable evidence that their plastics have been tested and are able to enter the common recycling stream.

Conclusion:

²⁸ See Kraft Foods, Inc. (Tombstone Pizza), Case Report #4915, *NAD/CARU Case Reports* (October 2008).

²⁹ See Church & Dwight Co., Inc. (Arm & Hammer Essentials Liquid Laundry Detergent), Case Report #4848, *NAD/CARU Case Reports* (May 2008) citing 16 F.T.C. 260.5

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NAD determined that the advertiser's evidence was insufficient to substantiate that its plastic products were biodegradable through customary disposal within a reasonably short period of time and therefore recommended that the advertiser discontinue its biodegradability claims. NAD further determined the claim, "more environmentally friendly," although overly broad as stand-alone claim was adequately supported when appearing in a non-comparative context describing the company's investments and changes to its manufacturing process. NAD recommended that the advertiser discontinue the claim that its bottle sleeves save countless trees from destruction. Finally, NAD appreciated the advertiser's voluntary discontinuance of its recyclable claims.

ADVERTISER'S STATEMENT:

MasterNet Ltd. believes in making accurate product claims and is a strong supporter of the advertising self-regulatory process. However, in this instance, MasterNet Ltd. disagrees with NAD's decision. MasterNet Ltd. believes it has utilized state-of-the-art evidence to support its environmental claims. MasterNet Ltd. continues to devote considerable resources to improving its products and processes, and continues to conduct further research into reducing the environmental impact of its products. MasterNet Ltd will take NAD's recommendations into account in future advertising. **(#5092 DGM, closed 10/02/2009)**

RX-C

FP International—Biodegradable SUPER 8 Loosefill Environmentally Friendly Packaging.

National Advertising Division. NAD Case Reports No. 5256. Closed December 3, 2010.

Back reference: ¶3020.

[NAD Headnote]

Advertising claims that a product or packaging offers an environmental benefit must be supported by competent and reliable evidence.

[Summary]

Industry Self-Regulation—Environmental Claims—Scientific Evidence—Packing Material.—The National Advertising Division concluded that there was insufficient evidence to support a packing material manufacturer’s unqualified “biodegradable” advertising claim or the advertiser’s more limited claim that its Super 8 Loosefill would biodegrade completely in a landfill within 9 to 60 months. Consequently, NAD recommended that the advertiser (1) discontinue the use of the term “Biodegradable” in conjunction with the name of the product in the heading of its advertising materials, and (2) discontinue the claim that the product biodegrades in a landfill within 9 to 60 months. Although NAD determined that the advertiser provided a reasonable basis for claiming certain specific environmental attributes for its products, NAD recommended that the advertiser discontinue comparative claims that “Starch loosefill uses crops which may increase food prices and decrease food supply” and that its own loosefill product “Emits 83% less greenhouse gas emissions than starch in its production.” Lastly, NAD concluded that, subject to the above modifications and recommendations, the advertiser provided a reasonable basis for making specific environmental benefit claims and/or a general environmental benefit claim based on these specific attributes, provided that such attributes were clearly and conspicuously disclosed.

The advertiser stated that it would review its advertising in light of NAD’s recommendations and make appropriate changes.

Full text of the decision is available in NAD/CARU Case Reports, Vol. 40, No. 10, December 2010. For further information, contact the National Advertising Division, 70 West 36th Street, 13th Floor, New York, New York 10018; <http://www.nadreview.org>.

Abstracts drafted by Wolters Kluwer Law and Business.

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FP INTERNATIONAL

Biodegradable SUPER 8 Loosefill Environmentally Friendly Packaging

Challenger: *StarchTech Inc.*

- **Advertising claims that a product or packaging offers an environmental benefit must be supported by competent and reliable evidence.**

Basis of Inquiry:

Advertising claims made by FP International (“FP”) for its Super 8 Loosefill packing material were challenged by StarchTech, Inc, the maker of loosefill packing material made from starch. The challenged claims, which appeared on packaging, labeling, print materials and on the Internet included the following:

Biodegradable Claims:

- “Biodegradable Super 8 Loosefill Environmentally Friendly Packaging”
- Super 8 Loosefill Packaging “will decompose completely within 9 to 60 months in the presence of microorganisms, whether it is sent to a landfill or ends up as litter in the soil.”
- “Made from 100% recycled polystyrene that is biodegradable.”
- “These eco friendly packaging products will biodegrade in aerobic (with air) and anaerobic (without air) conditions.”

Comparative Claims

- “Biodegradable Packaging SUPER 8 Loosefill is a better environmental choice than starch loosefill or paper.”
- “Starch loosefill uses crops which may increase food prices and decrease food supply”
- “Emits 83% less greenhouse gas emissions than starch in its production”
- “64% lighter than starch loosefill.”

General Environmental Benefit Claims

- “Green Family Environmentally Friendly Product.”
- “Better for the Environment”
- “Truly environmentally friendly packaging”

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Biodegradable SUPER 8 Loosefill Environmentally Friendly Packaging

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Challenger's Position:

The challenger, StarchTech, Inc, the manufacturer of starch-based loosefill packing peanuts, challenged the truth and accuracy of environmental claims made by FP International, Super 8 Loosefill, packaging material made from polystyrene plastic material.

I. Biodegradability Claims

The challenger argued that the advertiser's claims that its Super 8 loosefill packing material is biodegradable violates the Federal Trade Commission's ("FTC's") Green Guides, is not adequately substantiated and misrepresents the environmental impact of the advertiser's product.¹

According to the challenger, FP bases its biodegradable claims on testing that was conducted by the advertiser's additive supplier, ECM Biofilms on an additive found in the advertiser's product.² Although testing on the additive may show that the additive has particular biodegradable qualities, according to the challenger, these qualities cannot necessarily be attributed to a finished product. The challenger argued that the testing relied upon by the advertiser, does not substantiate an advertising claim as to the biodegradability of the finished loose fill product. The advertiser is making an indirect assumption based on an improper extrapolation of data and its claim of biodegradability is merely speculation based on the qualities of the additive contained in the finished loosefill product. The challenger noted that to make such a claim, testing should have been satisfactorily completed on the finished loosefill product, rather than relying on testing that related only to the additive.

In response to the advertiser's submission of a certification of biodegradability that had been issued by its additive supplier, the challenger made note of a prior NAD case in which NAD rejected certification that had been issued by a third-party or supplier as a substitute for substantiation for an advertiser's claim.³ In that case, the NAD found that the testing related to the supplier's additive did not constitute satisfactory substantiation that would allow for the advertiser to make biodegradability claims. Moreover, "certification" from a supplier was not a sufficient substitute for scientific evidence to substantiate an environmental claim.

The challenger also referred to the statements of experts, Professor Ramani Narayan, professor of chemical and biochemical engineering at Michigan State University, and Steven Mojo, Executive Director of the Biodegradable Products Institute, in support of its argument that the

¹ FTC Guides for the Use of Environmental Marketing Claims, Section 260.7. The challenger refers to the Guides for the Use of Environmental Marketing Claims ("Green Guides") issued in 1992, and revised in 1996 and 1998. In October of 2010, subsequent to the party's submissions to NAD, FTC issued its Proposed Revisions to the Green Guides. <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfn.pdf>

² The challenger disputed the advertiser's reliance on a third-party test, discussed in the *Ecological Assessment of ECM Plastic*.

³ Masternet Ltd. (Plastic Netting Packaging Products), Case Report #5092, *NAD/CARU Case Reports* (October 2009); See also, Dispoz-O Products (Enviroware Plastic Utensils and Tableware), Case Report #4990, *NAD/CARU Case Reports* (March 2009). ("Certification' of a product or additive as biodegradable by a supplier is not a substitute for competent and reliable scientific evidence that an advertiser must possess in order to substantiate environmental claims in its marketing and advertising")

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Biodegradable SUPER 8 Loosefill Environmentally Friendly Packaging

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advertiser's testing would not qualify as sufficient substantiation for the biodegradability claims because of various flaws in the testing. In analyzing ECM's brochure, *Ecological Assessment of ECM Plastic*, Professor Narayan concluded that the available data on anaerobic degradation data was not sufficient to support a claim of landfill biodegradation and did not meet "accepted norms and standards for biodegradable materials." Professor Narayan based these norms and standards on FTC's Guides for environmental marketing claims directives,⁴ ASTM standards, and the available ECM material test data.

Mr. Mojo opined that the available data did not support ECM's conclusions that use of their additive would lead to complete biodegradability of a plastic product using the additive. Mr. Mojo's conclusion was based on a number of factors including a lack of organic material in the additive and the inability for the additive to make the entirety of a product biodegradable. Mr. Mojo was also critical of the test's failure to comply with recommended usage levels. The ECM testing is also based on assumptions that the initial biodegradation process would continue.

Moreover, in considering the issue, the FTC found no evidence that products destined for landfills, incinerators, or recycling centers will totally decompose in a short period of time consistent with consumer expectations of unqualified degradable claims. The challenger maintained that FTC requires scientific evidence that is both competent and reliable to substantiate claims made, and that the entirety of the testing put forth by the advertiser, does not satisfy this standard.⁵

The challenger was also critical of the advertiser's reference to articles relating to ECM biodegradability as these did not constitute evidence as to the biodegradability of its own product. The challenger also argued that the limited testing completed by the advertiser ("Biodegradable Plastic Packaging Material White Paper") should also be discounted as it was done by their own organization and not an objective third party.

II. Comparative Claims

The challenger argued that the advertiser's claims comparing the advertiser's product to a starch loosefill were unsubstantiated and factually incorrect. It contended that its own product, although not recyclable, is reusable in the manner in which any standard packaging material may be. The challenger also explained that its product had undergone extensive testing in seeking certification of biodegradability both aerobically and anaerobically. In one test, that directly compared the challenger's product with the advertiser's product, the results demonstrated that the challenger's product (starch-based loosefill) had ten times the degradability of the advertiser's product (recycled polystyrene loosefill with "biodegradable" additive) under anaerobic conditions, within sixty days.

⁴ The three major points, as outlined by the Professor are: (1) completeness of biodegradation with no recalcitrant, persistent or toxic residues remaining; (2) time to achieve complete biodegradation (one to two years maximum); and (3) Defined disposal infrastructures, such as composts, anaerobic digester plants, specifically excluding landfills.

⁵ In the Matter of KMART Corporation, FTC Order File No. 082 3188 at 2 (2009), In the Matter of Dyna-E International, Inc. and George Wheeler, FTC Order File No. 082 3187 at 2-3 (2009), In the Matter of Tender Corporation, FTC Order File No. 082 3188 at 3 (2009).

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In response to the advertiser's claims that the production of its product results in less greenhouse gas emissions, the challenger submitted its results from an independent consulting firm, Caspervandertak, cited as a leader in measuring carbon footprint and life cycle assessments. Using the data obtained from the independent study, the challenger compared it with the advertiser's data and found that its own product produced 44% fewer greenhouse gas emissions in the production of its starch loosefill compared to the advertiser's Super 8 production emissions. The challenger also noted it emitted nearly 70% fewer greenhouse gasses in its production of starch loosefill as compared to the advertiser's production of its own starch loosefill.

The challenger also criticized the advertiser's use of data arrived at by means of the COMPASS life cycle methodology arguing that such testing does not provide definitive answers and cannot be reliably used to substantiate marketing claims. The challenger noted that the life cycle analysis field is still developing, and therefore, special attention must be paid to assure that such data is complete and accurate.

The challenger did not dispute that its own product is heavier than the advertiser's, but maintained that the difference is not sufficiently significant to justify claiming a benefit as to environmental impact.

The challenger also disputed the advertiser's claims regarding the use of corn starch and decrease in food production and increase in food cost. First, the challenger noted that the corn starch used in production is not a food grade corn starch. The challenger also disputed the implication that this use alone could be the source of such a food product problem. The challenger noted that even if its use did affect the price of corn, the price would rise less than 1 percentage point per year.⁶ Therefore, the challenger contended, the claims about food price and food production are inaccurate.

III. General Environmental Benefit Claims

The challenger contended that the advertiser cannot substantiate its general environmental benefit claim based on its claim of biodegradability. First, as previously discussed, the biodegradability claim is not supported by competent and reliable scientific evidence. The challenger noted the FTC's decisions in the KMART, Tender, and Dyna-E International cases which all noted that a "respondent...shall not represent...that a product or package offers any other environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation."⁷ The challenger argued that the advertiser's use of a general mark of environmental benefit could not be qualified under the standard enunciated by the FTC.

⁶ Based on publication of the USDA Economic Research Service

⁷ In the Matter of KMART Corporation, FTC Order File No. 082 3188 at 2 (2009), In the Matter of Dyna-E International, Inc. and George Wheeler, FTC Order File No. 082 3187 at 2-3 (2009), In the Matter of Tender Corporation, FTC Order File No. 082 3188 at 3 (2009).

The challenger also raised concerns over the use of degradable additives which, it contended, undermine the claim of a generally positive environmental benefit. The challenger noted that the Association of Postconsumer Plastic Recyclers (APR) has raised concerns over the impact degradable additives have on postconsumer plastics recycling. The challenger included the APR's press release highlighting this concern, quoting the APR technical direct, David Cornell, who feared that "[d]egradable additives that weaken products or shorten useful life...would have a strongly negative impact on postconsumer plastics recycling." As the degradation additives do not allow for a repeated use of the product, as the product degrades, the APR found these products to not be an efficient use of natural resources. The challenger noted the APR has released recycling guidelines for users of degradable additives in order to prevent any negative obstacles to plastic recycling, such as damage to the recycling stream or reducing the market in which recycled plastic may be used.

Although the challenger recognized the contributions the advertiser has made to recycling and their environmental impacts, the challenger questioned whether this was enough to substantiate a general environmental benefit claim.

Advertiser's Position:

I. Biodegradability Claims Are Substantiated and Valid under the FTC Green Guides

As an initial matter, the advertiser explained that it produces free-flowing cushioning material from expanded polystyrene ("EPS") known as "loosefill packing" and has devoted substantial efforts to lessening its products' impact on the environment.

The advertiser noted that there is no single standardized test method for determining a product's biodegradable properties. It maintained therefore, that any advertiser seeking to make a claim relating to biodegradability must rely on a total body of evidence rather than on merely one standardized test. Furthermore, the advertiser contended, the FTC Green Guides do not require that testing be done only by a third-party, noting that the Green Guides merely sets out guidelines for advertisers who "should" substantiate their claims by competent and reliable scientific evidence. Therefore, without a clear and concise standardized test method, the advertiser's reliance on a variety of testing and information to substantiate the claims of biodegradability is the most reasonable approach.

Time Period for Biodegradation

The advertiser explained that its biodegradable claim is a qualified claim relating to the ability of its product to biodegrade within a particular time period (within 9 to 60 months). The claim specifically includes the qualifying language indicating that the product must be in the presence of microorganisms. The advertiser asserted that this qualifying language removes the particular claim from the provision of the Green Guides to which the challenger invokes.⁸ The advertiser

⁸The FTC Green Guides refer to "an *unqualified* claim that a product or package is degradable, biodegradable or photodegradable should be substantiated..." (emphasis added).

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also contended that the qualifying language addresses the issue of consumer confusion by clearly outlining the time period in which decomposition is to be expected as well as the manner in which the product must be disposed for biodegradability to be achieved.

The advertiser also explained that landfills, once thought to not encourage or allow for biodegrading, are now designed to promote the conditions necessary for degradation. This includes moisture in the waste and anaerobic conditions, which are naturally found in landfills. The advertiser noted that leading landfill operators, such as Waste Management, Inc., are also harvesting landfill gases, which accelerates waste stabilization. The advertiser asserted that a number of conditions, both natural and those that are being promoted by landfill operators are leading landfills to be places of biodegradation.

The advertiser submitted third party testing to substantiate its claim of biodegradability. The advertiser explained that the supplier of the biodegradable additive had arranged for third party testing of the degradation of plastics using the additive.⁹ The results of the testing completed by the third party showed that the product will degrade in “aerobic and anaerobic conditions” including landfills. The testing concluded that “[p]roducts made using ECM treated plastics...can be marketed as biodegradable and safe for the environment[.]”

The advertiser also conducted its own testing of its own product. This testing was completed over a year, in a backyard compost environment. The advertiser’s Chief Scientist placed the biodegradable loosefill in a compost environment (along with the standard loosefill) and found the biodegradable loosefill product decomposed over time, consistent with the reports from the third party testing.

Claim of 100% recycled polystyrene and biodegradability

The advertiser contended that its product had been made entirely from recycled polystyrene since 1990. The advertiser included information regarding the amount of post-consumer, as compared to post-industrial, material was included as a part of the product over the years since the product has been made. The evidence, according to the advertiser, supports the claim that the product is 100% recycled polystyrene and recyclable.

Biodegradability in aerobic and anaerobic conditions

The advertiser contended that this biodegradable claim was substantiated by means of an Ecological Assessment, which concluded that the additive gave plastics the capability to biodegrade in both aerobic and anaerobic conditions. The advertiser also submitted a certification (for both aerobic and anaerobic conditions) given to another plastic product that incorporated the same biodegradable additive.

⁹ Testing methods included: ASTM D5338, ASTM G.21, ASTM G.22, ASTM D5511, OECD Guidelines for Testing of Chemicals #207, and European Test RAL GZ 251. Testing materials were also subjected to analysis under applicable EPA standards for extractable metals, volatile organic compounds, and toxicity characteristics leaching procedure.

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The advertiser explained it relied on a vast array of evidence to substantiate each of the biodegradable claims it makes in its packaging, labeling, and advertising. This includes more generalized substantiation (for example, basic documentation regarding the technology used in the product, including reports and articles) as well as testing relating to the additive and its own product.

The advertiser asserted that the challenger's reliance on prior NAD decisions (which, according to the challenger dismiss ECM testing) was inappropriate. The advertiser contended its Assessment clearly substantiates its claims which are specifically placed in the context of all the testing that is reported in the Assessment. Additionally, the advertiser disputed the challenger's dismissal of the ECM certification. Although the advertiser recognized that reliance on the certificate alone may not be sufficient to support its claims, the advertiser stressed that the certificate was merely an additional piece of competent and reliable substantiating evidence of biodegradability.

The advertiser also referred to additional testing of other plastic products that contain the biodegradable additive, including many different types of plastic, such as polystyrene, PET, PVC and polyethylene. It maintained, however, that it did not merely rely on outside testing or testing of the additive in other products. The advertiser explained that its Chief Scientist conducted its own testing of the loosefill product. The results demonstrated that the loosefill product biodegraded within the qualifying time and qualifying conditions as enunciated in the advertiser's claim.

The advertiser argued that the challenger's evidence (its Biochemical Methane Potential testing) actually supported the claims of biodegradability for the advertiser's product. Although the challenger's testing did show that the starch-based loosefill degrades faster than the biodegradable loosefill, it also shows that the advertiser's product 1) degrades, 2) degrades in landfill conditions, and 3) continued to degrade through a 60-day period. The advertiser contended that although its loosefill does degrade at a slower rater, this may actually be a benefit in a landfill, as the methane produced during degradation would be covered over time by other waste.

According to the advertiser, Professor Narayan and Steven Mojo are interested parties rather than disinterested professional experts and their opinions, therefore, should not therefore be relied upon. The advertiser noted, for example, that Professor Narayan makes reference to the conversion of the ECM test material to methane but provides little description of this test material.¹⁰ Professor Narayan actually acknowledges that materials are converting to methane, which is an indication of biodegradation in anaerobic conditions. The advertiser also disputed Professor Narayan's suggestion that current ASTM specification standards applicable to "compostable plastics" would also be appropriate for plastics with the ECM additives. This standard is meant for short term degradation, as opposed to the long-term biodegradation. The

¹⁰ According to the advertiser, the professor's, statement that claims made by other companies were "considered misleading by the environmental scientific community," were not substantiated or supported with information as to what claims were made or what entities in the scientific community found the claims to be misleading.

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advertiser was also critical of the arbitrary time frame used by the Professor (one year) to measure the amount of material remaining.

Lastly, the advertiser contended that the testing referenced by the challenger for supporting the biodegradability of the challenger's own product is the ASTM standardized test for products meant to compost in a "municipal and industrial composting facilit[y]." Therefore, the challenger's reference to this test does not support the typical consumer experience with the product. The facilities mentioned require a specific amount of heat that is not generally found in a consumer's compost.

Prior FTC cases

According to the advertiser, the FTC cases involving KMART, Tender Corporation, and Dyna-E International are not applicable as those products were different from its own product and technology.

NAD precedent

The advertiser noted several distinctions between the NAD precedent the challenger set forth, and matter at hand.¹¹ First, the advertiser asserted, the qualified claims it makes throughout the advertising and labeling prevent consumer confusion about the time period and conditions required for biodegradation. The advertiser contended that it provided additional information about 1) its own testing, 2) biochemical methane potential testing (via the challenger), 3) Testing and assessment of ECM materials, and 4) underlying ECM technology. Additionally, it provided information about biodegradation in landfills and current testing standards which, it maintained, supports its biodegradable claims.

II. Comparative Claims

The advertiser asserted that because it used to produce a starch-based loosefill, it was familiar with the qualities and characteristics of the challenger's own starch-based product. The advertiser explained that it chose to discontinue its sale of starch-based product because of poor performance and customer concern about the inability of the product to be recycled, heavier weight, shorter retaining of cushioning property as compared to polystyrene, and the limited ability to reuse the product for packing.

The advertiser contended this information was sufficient to support claims that its own product was the better environmental choice, and argued the reasonable consumer could easily come to this conclusion based on a number of distinguishing factors between its product and starch-based loosefill.

¹¹ Dispoz-O Products (Envioware Plastic Utensils and Tableware), Case Report #4990, *NAD/CARU Case Reports* (March 2009); Masternet Ltd. (Plastic Netting Packaging Products), Case Report #5092, *NAD/CARU Case Reports* (October 2009).

“Better Environmental Choice”

The advertiser explained that its “better environmental choice” claim is supported by information obtained from the COMPASS software tool (Comparative Packaging Assessment) provided by The Sustainable Packaging Coalition project of GreenBlue. This COMPASS tool assesses the environmental impacts of packaging design. From this tool, the advertiser noted a number of differences between the starch-based and the biodegradable loosefill the advertiser sells.

The advertiser set forth data derived from the COMPASS tool showing the difference between the starch-based loosefill and the advertiser’s expanded polystyrene product. The advertiser asserted that the data showed that the advertiser’s loosefill had a lesser impact on the environment, based on a number of factors including: fossil fuel consumption, water consumption, biotic resource consumption, mineral consumption, Green House Gas emission, aquatic toxicity, and eutrophication.

Greenhouse Gas Emissions & Life Cycle Analysis

The advertiser maintained that its claim “Emits 83% less greenhouse gas emissions than starch” was also based on the data available from COMPASS, indicating that greenhouse gas emissions are 83% more for starch than for the advertiser’s EPS loosefill. In response to the challenger’s contention that the Caspervandertak study demonstrated that production of its own product emitted fewer green house gas emissions than the advertiser’s, the advertiser explained that these two studies are incomparable because the choices of boundary conditions in the studies are not the same. The advertiser explained that the COMPASS tool is specifically designed to provide a common system boundary for package designers to provide information as to which materials and methods are that are more sustainable and more environmentally friendly.

Reusability

The advertiser asserted the polystyrene polymer within its product provided for more stable molecules that would be less likely to be effect by heat or water. It therefore contended that its own product would be able to be reused considerably more times than the starch-based product.

Prices and Food crops

As support for its food price and availability claims, the advertiser cited a Purdue University analysis indicating that starch products may increase the prices and decrease the supply. The advertiser stated that it does not matter if the starch is from industrial or food grade crops, because as a simple matter of supply and demand, the challenger’s product may have an effect on food prices and availability.

Comparative Weight

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According to the advertiser, its product is 64% lighter than starch loosefill. The advertiser noted that although the challenger acknowledged a difference in weight between the products, the advertiser stated that it would consider modifying the claim to recognize the true difference in the weights of the products.

III. General Environmental Benefit Claim

The advertiser maintained that each of its claims of environmental benefit is made in a context where all necessary information is provided. It argued that its claims are qualified claims whereas the FTC Green Guides address unqualified general environmental benefit claims.

The advertiser maintained that the combination of biodegradability, recyclability, use of recycled content, reusability, and other factors make its product an environmentally friendly one.

The advertiser took issue with the challenger's contention that degradable additives undermine the recyclability of the product. The advertiser explained the ECM additive creates a surface conducive to the formation of microorganisms when the product is exposed to an environment where other microbial biodegradation is occurring. Then, the organisms use the polymer as a food source. There also occurs a secretion of enzymes and acids that attach to the plastic and break it down. Because the polymer degrades in layers, the advertiser explained, the molecules can be absorbed and used in aerobic or anaerobic metabolism. Therefore, the polymer degrades in layers.

The advertiser explained that some of its products are marketed as part of the "Green Family" to create a distinction for those products with enhanced environmental characteristics. The advertiser asserted the qualities of the Super 8 product support a general environmental claim and the "Green Family" Designation.

DECISION:

NAD has, in prior decision, recognized that advertising claims for the environmental benefits of products can influence the purchasing decisions of consumers who are concerned with sustainability and environmental issues.¹² Because consumers cannot typically verify for themselves the truth of environmental claims, advertising self-regulation is playing an increasingly significant role in ensuring that environmental claims are truthful, non-misleading and adequately substantiated.

The advertising at issue in this case involve a broad range of environmental benefit claims, including claims of biodegradability for Super 8 Loosefill, packing "peanuts" made from

¹² Masternet Ltd. (Plastic Netting Packaging Products), Case Report #5092, *NAD/CARU Case Reports* (October 2009); See also, Dispoz-O Products (Enviroware Plastic Utensils and Tableware), Case Report #4990, *NAD/CARU Case Reports* (March 2009). GP Plastics Corporation (PolyGreen Plastic Bags), Case Report #4944, *NAD/CARU Case Reports* (March 2009).

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expanded polystyrene plastic. The advertiser raised the question of whether NAD review is appropriate explaining that its product is primarily sold to third-party distributors and that, consequently, its advertising is directed not to consumers, but to other businesses. NAD noted that even though the challenged marketing materials are not primarily directed at consumers, this does not deprive the advertising industry's self-regulatory forum of jurisdiction to review the claims.

It is well established that NAD jurisdiction over "national advertising" includes print, packaging and Internet claims that are directed to businesses as well as consumers.¹³ Further, NAD noted that claims of environmental benefit made to 3rd Party distributors, provide information that is ultimately conveyed to consumers about the environmental benefits of the product itself or the sustainability practices of 3rd party companies within the supply chain. Consequently, it is both appropriate and important that advertising self-regulation help ensure that such claims are truthful, accurate and properly substantiated.

Biodegradable Claims:

The challenger argued that the advertiser's claim that Super 8 Loosefill is biodegradable, as well as claims about the biodegradable properties of the product, is false and unsubstantiated. The challenged advertising included a general claim of biodegradability (The product is called *Biodegradable Super 8 Loosefill*) as well as the more specific claims of biodegradability included the following:

- Super 8 Loosefill Packaging "will decompose completely within 9 to 60 months in the presence of microorganisms, whether it is sent to a landfill or ends up as litter in the soil."¹⁴
- "These eco friendly packaging products will biodegrade in aerobic (with air) and anaerobic (without air) conditions."

In evaluating the messages conveyed by environmental marketing claims and the sufficiency of the supporting evidence, NAD seeks to harmonize its decisions with the activities and guidelines set forth by regulatory agencies with oversight authority. In prior decisions regarding claims of biodegradation and other environmental benefits, NAD has accorded great weight to the FTC Green Guides.¹⁵ NAD noted that the FTC has, in recent years, challenged degradability claims more than any other specific claim addressed by the Green Guides.¹⁶

¹³ NAD/NARB/CARU Procedures.

¹⁴ The advertiser stated that it has modified this claim to state: "will *biodegrade* completely within 9 to 60 months in the presence of microorganisms, whether it is sent to a landfill or ends up as litter in the soil."

¹⁵ Masternet Ltd. (Plastic Netting Packaging Products), Case Report #5092, *NAD/CARU Case Reports* (October 2009); See also, Dispoz-O Products (Enviroware Plastic Utensils and Tableware), Case Report #4990, *NAD/CARU Case Reports* (March 2009). GP Plastics Corporation (PolyGreen Plastic Bags), Case Report #4944, *NAD/CARU Case Reports* (March 2009).

¹⁶ In the Matter of KMART Corporation, FTC Order File No. 082 3188 at 2 (2009), In the Matter of Dyna-E International, Inc. and George Wheeler, FTC Order File No. 082 3187 at 2-3 (2009), In the Matter of Tender Corporation, FTC Order File No. 082 3188 at 3 (2009).

FTC Green Guides and Biodegradable Claims

In October of 2010 FTC issued its Proposed Revisions to the Green Guides.¹⁷ The revisions seek to strengthen FTC's guidance, to address the evolving consumer perceptions of new environmental claims and to provide clarification on the use of certain environmental claims including claims of degradability.

According to the proposed, Revised Green Guides:

A marketer making an unqualified degradable claim should have competent and reliable scientific evidence that the entire item will completely break down and return to nature (i.e., decompose into elements found in nature) within a reasonably short period of time after customary disposal.¹⁸

The proposed, Revised Green Guides provide additional direction concerning the timing of decomposition”

It is deceptive to make an unqualified degradable claim for solid items if the items do not completely decompose within one year after customary disposal. Unqualified degradable claims for items that are customarily disposed in landfills, incinerators, and recycling facilities are deceptive because these locations do not present conditions in which complete decomposition will occur within one year.¹⁹

NAD recognizes that FTC's proposed revisions have not yet been finalized. The current Guides state that a marketer should qualify a degradable claim unless it can substantiate that the “entire product or package will completely breakdown and return to nature within a *reasonably short period of time* after customary disposal.” (emphasis added).

The advertiser maintained that its claims for the biodegradability of Super 8 Loosefill are qualified and therefore in accord with the FTC Guides.

With respect to qualified claims of degradation, the Guides provide:

Degradable claims should be qualified clearly and prominently to the extent necessary to avoid deception about: (1) the product or package's ability to degrade in the environment where it is customarily disposed; and (2) the rate and extent of degradation.²⁰

¹⁷ <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>

¹⁸ § 260.8(b)

¹⁹ § 260.8(c); FTC referenced a 2006 survey conducted by APCO Insight for the American Chemistry Council. The survey found that 60 percent of consumers believed that a biodegradable package will disappear in one year or less. Additionally, 83 percent of consumers believed a biodegradable item will decompose even when disposed in a landfill.

²⁰ § 260.8(d).

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The advertiser argued that it has met these conditions by disclosing that its product will biodegrade completely “within 9 to 60 months in the presence of microorganisms, whether it is sent to a landfill or ends up as litter in the soil.”

“Biodegradable” Super 8 Loosefill

Although the advertiser maintained that its claim of biodegradability is a qualified claim, NAD observed that the claim “Biodegradable” also appears in a broad unqualified context. It is used in conjunction with the product name in the very heading of its marketing materials. (The product is called *Biodegradable Super 8 Loosefill*.) Although the text which appears in other portions of the brochure (or in the case of Internet advertising, elsewhere within the website) purports to limit this claim, the use of the term “Biodegradable” as part of the product name conveys a broad unqualified message of biodegradability. Because the product does not meet FTC’s Guides for unqualified biodegradable claims (i.e., will breakdown naturally within one year and disappear completely following customary disposal, which is likely to mean a landfill) NAD recommended that the advertiser discontinue the use the descriptor “Biodegradable” in conjunction with the name of the product.

Biodegradation within 9 to 60 Months

Qualified claims of biodegradation, as with any science based claim, must be supported by competent and reliable scientific evidence. In support of its claims that the product will biodegrade completely “within 9 to 60 months in the presence of microorganisms, whether it is sent to a landfill or ends up as litter in the soil” the advertiser relies upon the following body of evidence:

- 1) Studies regarding the underlying technology.²¹
- 2) The ECM Assessment performed by an outside 3rd-party testing laboratory on test samples including a test for short-term aerobic biodegradation²², long-term aerobic biodegradation²³, and anaerobic biodegradation testing.²⁴ The report concludes that “Biodegradation tests indicate that products made using this technology will degrade when disposed of in landfills...”
- 3) ECM Certification.²⁵

²¹ The mechanism by which degradation occurs in the product involves the compounding of an ECM pellet with a plastic resin (in the case of the advertiser’s product, with expanded polystyrene). This allows for the presence of micro-organisms which produce enzymes that break up the plastic’s molecular chain into smaller structures which are then metabolized into water, carbon dioxide or methane and organic solids

²² ASTM D5338 “Standard Test Method for Determining Aerobic Biodegradation of Plastic Materials under Controlled Composting Conditions.”

²³ ASTM G.21 and G.22

²⁴ ASTM D5511-94 is the Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic-Digestion Conditions

²⁵ The advertiser acknowledged that it would not be sound to rely solely on a certification from an additive supplier, but maintained that here, the certificate was based on 3rd party testing and constituted just one part of a compilation of data that provided support for its claim.

- 4) Testing conducted for ECM with different plastics including expanded polystyrene (EPS), PET, PVC and polyethylene films.
- 5) In-house testing
- 6) Biochemical Methane Potential (BMP Testing) indicating degradation based on production of methane in anaerobic conditions.

The challenger asserted that the evidence provided by the advertiser did not constitute competent and reliable scientific evidence sufficient to support its qualified claims of biodegradability. In particular, the challenger argued that the data for the ECM additive does not support the conclusion that the use of the additive will foster complete biodegradation or that plastics made with the additive will biodegrade in landfills within 9 to 60 months.

In prior NAD decisions involving claims of biodegradation, NAD has expressed concern about the reliability of biodegradability testing where the testing was done on a biodegradable additive (or a test sample involving an additive pellet in some other plastic carrier) and not on the product itself.²⁶ A similar issue presents itself here.

The ECM Assessment did not test samples of the Super 8 Loosefill product, but rather, tested samples of an ECM film.²⁷ According to the challenger, there is no basis for extrapolating from these results and concluding that the advertiser's EPS Loose fill will biodegrade either completely or within the time frame (9 to 60 months) provided in the marketing materials. The advertiser however, maintained that it is scientifically sound to conclude that the product will biodegrade within that time frame because of an understanding of the underlying technology and because the ECM Assessment is complimented by additional testing evidence which supports the conclusion. The additional evidence includes testing on other kinds of plastics (EPS, PET, PVC and polyethylene films) containing the ECM additive as well as in-house testing performed by FP. The only testing performed on the advertiser's actual Loose-fill product was the in-house testing which, according to the advertiser demonstrated that when placed in a backyard composting environment, the product degraded over a one-year period and was indistinguishable from compost.

The advertising claims that the product will biodegrade whether disposed of in aerobic conditions or in anaerobic conditions (i.e., a typical landfill environment). While NAD determined that the advertiser was, based on the totality of the evidence, able to support the claim that the product will degrade in certain aerobic conditions (and could make carefully qualified claims on the basis of its supporting evidence), the claim that the product will

²⁶ For example, in the *Dispozo* case, NAD observed that the test samples with additive were structurally different from a polystyrene fork or plate and that there was insufficient evidence upon which to conclude that the actual product would degrade at the same rate or to the same degree. Case Report #4990, *NAD/CARU Case Reports* (March 2009).

²⁷ Tests of short-term aerobic biodegradation were performed on a 50% ECM film. Other testing was performed on a 5% ECM film and ECM pellet.

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biodegrade in anaerobic conditions (within 9 to 60 months) was not sufficiently supported by the evidence.

NAD acknowledged that the evidence produced by the advertiser supported the theory that its product would eventually degrade over time. NAD determined however, that the evidence did not constitute competent and reliable evidence that it would biodegrade within 9 to 60 months *when disposed of in landfills*. NAD recognizes that all products degrade eventually and that the advertiser provided support that its own plastic product, because of its additive, will degrade at a faster rate than conventional petroleum-based plastics. In support of the claim that the product will biodegrade, within a reasonably short time, in a landfill, the advertiser relied on anaerobic testing conducted in accordance with ASTM D5511-94.²⁸

In its Proposed, Revised Guides, FTC addressed the limitations of assessing biodegradability in landfill conditions using standardized tests:

Most trash is disposed in landfills, which have varied, highly compressed, heterogeneous zones. The moisture, temperature, and contact conditions in landfills differ from the laboratory protocols. ASTM D 5511, for example, mimics a rare disposal environment – a highly controlled anaerobic digester, such as may be found on farms or in sewage treatment systems – with consistent moisture, heat, and exposure to degradation catalysts²⁹

NAD has also observed in a prior decision that the ASTM D 5511 test method was meant to simulate conditions in anaerobic digesters in very specific conditions, not landfill conditions. Although the advertiser observed that an increasing number of landfills are bio-reactive and/or designed to stimulate degradation³⁰, these landfill conditions are not typical. Consequently, the “customary disposal” of the product will most typically find the product in a traditional landfill, where the product will degrade eventually, but at a slow and indeterminate rate.

NAD determined that although, the advertiser provided a scientific basis for the theory that its product will degrade more rapidly, than conventional petroleum-based plastics in specified anaerobic conditions, the claim of biodegradation within 9 to 60 months (when disposed of in landfills, was not supported by competent and reliable scientific evidence. NAD therefore recommended that the advertiser discontinue the claim that the product will biodegrade within 9 and 60 months in landfill conditions.³¹

Comparative Claims:

²⁸ Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials Under High-Solids Anaerobic-Digestion Conditions),

²⁹ Footnote 203, <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>

³⁰ For example, the advertiser noted that EPA’s Landfill Methane Outreach Program (LMOP) encourages the recovery and use of landfill gas.

³¹ NAD recognized that FTC’s Proposed revisions to its Green Guides have not yet been finalized and that additional public comments have been submitted. Because NAD seeks to harmonize its recommendations with the appropriate oversight authorities, NAD may reopen the matter pursuant to § 3.8 of NAD Procedures should FTC’s finalized guides contain additional or contrary findings or recommendations.

The advertiser maintained that its claim that its Super 8 Loosefill product is a “better environmental choice” than starch-based loosefill is supported because of several attributes which, over that life-cycle of the product, may result in less of an impact on the environment). These include fossil fuel consumption, water consumption, biotic resource consumption, mineral consumption, emission of green house gases, aquatic toxicity, and eutrophication.³²

As with other claims of environmental benefit, comparative claims, must be supported by competent and reliable scientific evidence. Although the advertiser points to numerous attributes which arguably demonstrate an environmental advantage over the competitor, NAD noted that for certain of these points of distinction, there was an insufficient basis for claiming an environmental advantage.

For example, the advertiser’s claim, “Emits 83% less greenhouse gas emissions than starch in its production” is based on an analysis that compared production of Super 8 Loosefill not with production of the challenger’s (or other competitor’s) starch-based product but rather, with data and conclusions drawn from the advertiser’s *own* production of a starch-based product. Although the claim speaks to “starch” generally, the context of the claim invites a specific comparison to competitive products, such as the starch-based loosefill manufactured by the challenger. While there are certain attributes common to all starch-based packing materials, it cannot be assumed that the advertiser’s own emissions calculation is applicable to the production processes of its competitors’ starch-based products.³³

NAD also observed that life cycle analysis, while a very important tool for companies in their sustainability efforts, creates challenges for advertisers when used for purposes of claim substantiation. In its Proposed, Revised Green Guides, FTC did not offer specific guidance but highlighted some of the difficulties raised by life cycle analysis to support comparative advertising claims:

As the EPA notes in its Final Guidance on Environmentally Preferable Purchasing, in the context of making purchasing decisions, the term “life cycle” has several interpretations: “[t]o some, it connotes an exhaustive, extremely time-consuming, and very expensive analysis. To others, a life cycle perspective is possible in an abbreviated process, in which a long list of potential environmental attributes and/or impacts is narrowed to a few, allowing for comparison across a particular product category.”³⁴

FTC recognized that there may be various ways to measure life cycle and that different theories require different tools and metrics. FTC noted that “Marketers may rely on the results of an LCA [life cycle analysis] as all, or part of, their substantiation, as long as they ensure that the LCA results constitute competent and reliable scientific evidence to support their claims.” It

³² “Eutrophication” refers to the over-fertilization of lakes or other bodies of water.

³³ The challenger own analysis of greenhouse gas emissions resulted in a finding that that there 70% fewer greenhouse gasses in its production of starch loosefill as compared to the advertiser’s process for production of its own starch loosefill.

³⁴ <http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfm.pdf>

noted however that “The Commission has no basis for choosing one LCA methodology over another.”³⁵

The challenger and advertiser each rely on different tools and methodologies for conducting their life cycle analyses in this case. Neither party, however, set forth a compelling basis for concluding that one method was more accurate or meaningful than the other. Therefore, NAD determined that while the advertiser’s life cycle analysis can provide a basis for making qualified non-comparative claim about the environmental benefit of its product, the LCA evidence was insufficient to constitute competent and reliable evidence for claiming superiority over its competitor overall in terms of environmental impact.

NAD further determined that there was insufficient evidence to support the advertiser’s claim that “Starch loosefill uses crops which may increase food prices and decrease food supply.” Although this may be theoretically possible, it is highly speculative. NAD determined that there was no actual evidence that the challenger’s production of starch-based loosefill has any significant impact on food prices or food supply and therefore recommended that these claims be discontinued.

General Environmental Benefit Claims

The challenged advertising included the claim that the product is “environmentally friendly” and also uses a logo describing Super 8 Loosefill as being part of a “Green Family.” These claims, according to the challenger, re impermissible claims of general environmental benefit. The FTC’s Proposed, Revised Green Guides state that “It is deceptive to misrepresent, directly or by implication, that a product, package, or service offers a general environmental benefit.”³⁶ The Guides also provide:

Marketers can qualify general environmental benefit claims to prevent deception about the nature of the environmental benefit being asserted. To avoid deception, marketers should use clear and prominent qualifying language that limits the claim to a specific benefit.³⁷

FTC’s recent guidance is consistent with NAD precedent on the use of broad environmental benefit claims in advertising.³⁸

NAD determined that the advertiser provided a reasonable basis for certain qualified environmental benefit claims regarding its product. This includes the product’s recyclability, reusability, its comparatively light weight and other factors contributing to more favorable environmental impact or sustainability. In the context of the advertising that is qualified and sets forth these specific environmental benefits NAD determined that the “Green Family” claim was

³⁵ Id at 34.

³⁶ §260.4 (a)

³⁷ §260.4 (c).

³⁸ See, e.g., Masternet Ltd. (Plastic Netting Packaging Products), Case Report #5092, *NAD/CARU Case Reports* (October 2009).

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adequately substantiated and did not give rise to an unsupported claim of general environmental benefit.

CONCLUSION:

NAD concluded that there was insufficient evidence to support an unqualified biodegradable claim or the advertiser's more limited claim that Super 8 Loosefill would biodegrade completely in a landfill within 9 to 60 months. Consequently, NAD recommended that the advertiser 1) discontinue the use of the term "Biodegradable" in conjunction with the name of the product in the heading of its advertising materials, and 2) discontinue the claim that the product biodegrades in a landfill within 9 to 60 months. NAD determined that although the advertiser provided a reasonable basis for claiming certain specific environmental attributes for its products, it recommended that the advertiser discontinue the comparative claims that "Starch loosefill uses crops which may increase food prices and decrease food supply" and that its own loosefill product "Emits 83% less greenhouse gas emissions than starch in its production." Lastly, NAD concluded that, subject to the modifications and recommendations herein, the advertiser provided a reasonable basis for making specific environmental benefit claims and/or a general environmental benefit claim based on these specific attributes provided such attributes are clearly and conspicuously disclosed.

Advertiser's Statement:

FP International wishes to thank the NAD for its review, which found, among other things, that FP International demonstrated that its product, because of its additive, will degrade at a faster rate than conventional petroleum-based plastics. FP International will review its advertising in light of the NAD's recommendations and make appropriate changes. (#5256 DGM, closed 12/03/2010)

For Immediate Release

NAD RECOMMENDS FP INTERNATIONAL DISCONTINUE CERTAIN BIODEGRADABLE CLAIMS; FINDS ADVERTISER CAN SUPPORT QUALIFIED 'GREEN' CLAIMS

New York, New York – Dec. 14, 2010 – The National Advertising Division of the Council of Better Business Bureaus has recommended that FP International, the maker of "Biodegradable Super 8 Loosefill" packing material, omit the word "biodegradable" from the product's name and modify or discontinue certain comparative advertising claims. NAD determined that the advertiser could support a carefully qualified "green family" claim.

NAD, the advertising industry's self-regulatory forum, reviewed advertising for the FP product following a challenge by Starchtech, Inc., the maker of loosefill packing material made from starch. The challenged claims appeared on packaging, labeling, print materials and on the Internet.

Claims at issue included biodegradability claims:

- "Biodegradable Super 8 Loosefill Environmentally Friendly Packaging"
- Super 8 Loosefill Packaging "will decompose completely within 9 to 60 months in the presence of microorganisms, whether it is sent to a landfill or ends up as litter in the soil."
- "Made from 100% recycled polystyrene that is biodegradable."
- "These eco friendly packaging products will biodegrade in aerobic (with air) and anaerobic (without air) conditions."

NAD also examined comparative claims and claims related to general environmental benefits, including:

- "Biodegradable Packaging SUPER 8 Loosefill is a better environmental choice than starch loosefill or paper."
- "Starch loosefill uses crops which may increase food prices and decrease food supply"
- "Emits 83% less greenhouse gas emissions than starch in its production"
- "64% lighter than starch loosefill."
- "Green Family Environmentally Friendly Product."
- "Better for the Environment"
- "Truly environmentally friendly packaging"

The advertising at issue involved a broad range of environmental benefit claims for Biodegradable Super 8 Loosefill, packing "peanuts" made from expanded polystyrene plastic, treated with an additive manufactured by a second company, ECM Biofilms.

NAD has recognized that advertising claims related to environmental benefits can influence the purchasing decisions of consumers who are concerned with sustainability and environmental issues. Because consumers cannot typically verify for themselves the truth of environmental claims, advertising self-regulation is playing an increasingly significant role in ensuring that environmental claims are truthful, non-misleading and adequately substantiated.

(Full text of decision available to media, upon request.)

Following its review of the evidence in the record, NAD concluded that there was insufficient evidence to support an unqualified biodegradable claim or the advertiser's more limited claim that Super 8 Loosefill would biodegrade completely in a landfill within 9 to 60 months. NAD recommended that the advertiser discontinue the use of the term "Biodegradable" in conjunction with the name of the product in the heading of its advertising materials, and discontinue the claim that the product biodegrades in a landfill within 9 to 60 months.

NAD recommended that the advertiser discontinue certain comparative claims including the claim that starch loosefill "uses crops which may increase food prices and decrease food supply" and that its own loosefill product "emits 83% less greenhouse gas emissions than starch in its production."

NAD determined that the advertiser provided a reasonable basis for certain qualified environmental benefit claims regarding its product, including the product's recyclability, reusability, comparatively light weight and other factors contributing to more favorable environmental impact or sustainability. As a result, NAD determined that the "Green Family" claim was adequately substantiated, if used in a context that clearly and conspicuously disclosed that the product attributes form the basis for the claim.

FP International, in its advertiser's statement, said the company "will review its advertising in light of the NAD's recommendations and make appropriate changes."

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NAD's inquiry was conducted under NAD/CARU/NARB Procedures for the Voluntary Self-Regulation of National Advertising. Details of the initial inquiry, NAD's decision, and the advertiser's response will be included in the next NAD/CARU Case Report.

About Advertising Industry Self-Regulation: The National Advertising Review Council (NARC) was formed in 1971. NARC establishes the policies and procedures for the National Advertising Division (NAD) of the Council of Better Business Bureaus, the CBBB's Children's Advertising Review Unit (CARU), the National Advertising Review Board (NARB) and the Electronic Retailing Self-Regulation Program (ERSP).

The NARC Board of Directors is composed of representatives of the American Advertising Federation, Inc. (AAF), American Association of Advertising Agencies, Inc., (AAAA), the Association of National Advertisers, Inc. (ANA), Council of Better Business Bureaus, Inc. (CBBB), Direct Marketing Association (DMA), Electronic Retailing Association (ERA) and Interactive Advertising Bureau (IAB). Its purpose is to foster truth and accuracy in national advertising through voluntary self-regulation.

NAD, CARU and ERSP are the investigative arms of the advertising industry's voluntary self-regulation program. Their casework results from competitive challenges from other advertisers, and also from self-monitoring traditional and new media. NARB, the appeals body, is a peer group from which ad-hoc panels are selected to adjudicate NAD/CARU cases that are not resolved at the NAD/CARU level. This unique, self-regulatory system is funded entirely by the business community; CARU is financed by the children's advertising industry, while NAD/NARC/NARB's primary source of funding is derived from membership fees paid to the CBBB. ERSP's funding is derived from membership in the Electronic Retailing Association. For more information about advertising industry self-regulation, please visit www.narcpartners.org.

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Compliance Proceeding from NAD Case Decision #5256

Challenger: StarchTech Inc.

This compliance proceeding stems from an NAD decision issued following a challenge to advertising claims made by FP International (“FP”) for its Super 8 Loosefill packing material. The advertising was challenged by StarchTech, Inc, the maker of loosefill packing material made from starch.

The NAD Decision

The advertising claims challenged by StarchTech appeared on packaging, labeling, print materials and on the Internet, and included claims that Super 8 Loosefill Packaging material was “biodegradable” and other claims of environmental benefit. The challenged biodegradable claims included the following:

- “Biodegradable Super 8 Loosefill Environmentally Friendly Packaging”
- Super 8 Loosefill Packaging “will decompose completely within 9 to 60 months in the presence of microorganisms, whether it is sent to a landfill or ends up as litter in the soil.”
- “Made from 100% recycled polystyrene that is biodegradable.”
- “These eco friendly packaging products will biodegrade in aerobic (with air) and anaerobic (without air) conditions.”

In its underlying decision, NAD noted the interest of the advertising industry’s self-regulatory forum in harmonizing its decisions with the regulatory authority and guidelines set forth by the appropriate regulatory authorities. In evaluating the support for the advertiser’s “biodegradable” claims, NAD looked to both the scientific evidence in the record, to NAD’s cases involving claims of biodegradability¹ and to the *FTC Guides for the Use of Environmental Marketing Claims* (“FTC Green Guides”).²

In its decision, NAD recognized that the advertiser provided support that its own plastic product, because of its additive, is likely to degrade at a much faster rate than similar products made from conventional petroleum-based plastics. NAD determined however, that the evidence did not constitute competent and reliable evidence that it would biodegrade within 9 to 60 months when disposed of in landfills. NAD recommended that the advertiser discontinue its biodegradable claims or significantly modify them to avoid conveying the message that the product can be

¹ *Masternet Ltd. (Plastic Netting Packaging Products)*, Case Report #5092, *NAD/CARU Case Reports* (October 2009); See also, *Dispoz-O Products (Enviroware Plastic Utensils and Tableware)*, Case Report #4990, *NAD/CARU Case Reports* (March 2009). *GP Plastics Corporation (PolyGreen Plastic Bags)*, Case Report #4944, *NAD/CARU Case Reports* (March 2009).

² The issue of “biodegradability” is addressed in Section 260.7 of the FTC Green Guides. The Green Guides were issued in 1992 and revised in 1996 and again in 1998. NAD also considered the FTC’s Proposed Revisions to the Green Guides, issued in October of 2010.

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expected to degrade between 9 and 60 months in a landfill environment. NAD, in its conclusion, recommended that the advertiser, 1) discontinue claims of biodegradability, or significantly modify them to limit claims of degradation to the specific conditions supported by the testing, and 2) discontinue the use of the term “Biodegradable” to describe the product.

The advertiser stated that although it disagreed with NAD’s findings it would accept NAD’s recommendations in modifying its advertising.

The Compliance Proceeding

Approximately two months following the issuance of NAD’s final decision, StarchTech contacted NAD and requested that NAD initiate a compliance inquiry because of concerns that FP international’s advertising did not comply with NAD’s decision and recommendations. Specifically, StarchTech observed that the advertiser’s website continued to refer to the Super 8 Loosefill product as “biodegradable.” Pursuant to Section 4.1 of *NAD Procedures*, NAD requested that the advertiser report back on the status of its efforts to bring its advertising into compliance with NAD’s decision.

In reply, the advertiser stated that it had already made many changes to its advertising in an attempt to comply in good faith with NAD’s decision. Specifically, the advertiser noted that “Biodegradable SUPER 8 Loosefill no longer appears as a heading and that the term “biodegradable” is only used in connection with appropriate qualifying language. The advertiser also explained that it had modified the time period indicated for biodegradation and that it had modified the claim to state that it will take at least a year and may my take over 5 years to degrade, depending on conditions. The advertiser argued that this is accurate and appropriate. It also maintained that it continues to work with experts in seeking to add clarity on the issue of biodegradability.

NAD acknowledged the modifications made by the advertiser and appreciated its good faith effort attempt to comply with NAD’s decision. NAD recognized, for example that the claim “Revolutionary Biodegradable Packaging,” which appeared prominently on the advertiser’s homepage has been modified and now reads “Revolutionary Packaging.” NAD remained concerned, however, about the adequacy of the modifications made elsewhere on the website because of the meaning and reasonable takeaway from the term “biodegradable.” In its decision, NAD referred to the FTC Green Guides concerning biodegradation:

A marketer making an unqualified degradable claim should have competent and reliable scientific evidence that the entire item will completely break down and return to nature (i.e., decompose into elements found in nature) within a reasonably short period of time after customary disposal.³

³ § 260.8(b). In the FTC’s proposed revisions to the Green Guides, an unqualified claim of biodegradable is understood by consumers to mean that the material will “completely decompose within one year after customary disposal.”

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Although the advertiser maintained that the claims are not “unqualified” since they provide information about the time-frame and conditions required for the product to degrade, NAD believes that further modification is necessary to avoid a misleading message and to ensure that its advertising accurately reflects the supporting evidence and follows FTC’s guidelines. NAD noted that the website page which provides information on Super8 loosefill continues, in some places, to describe the product as “biodegradable Super loosefill packing.” NAD appreciated that the text also includes qualifying language which states: “Because conditions vary from place to place and landfill to landfill, the exact time for degradation varies depending upon the level of microbial activity.” Although this language is appropriate for providing additional information for prospective purchasers of the product, it does not, simply by virtue of being on the same page, effectively limit the unqualified claims of “biodegradable” that appear elsewhere on the webpage.

For example, the text provides: “Super 8 Loosefill packing is truly biodegradable packaging.” Additionally, a subheading on the page states in bold “Our biodegradable Super 8 loosefill offers important advantages over starch loosefill or paper. The page also features, in bold type, the claim “Our biodegradable Super 8 Loosefill is environmentally friendly packaging. Such references to “biodegradable” should be removed for the advertising to be in compliance with NAD’s finding and recommendations.

FP International expressed its commitment to this self-regulatory process and represented that it would further modify its advertising to address NAD’s concerns. Based on further modification NAD will close the matter pursuant to Section 4.1 (C) (i) of *NAD Procedures* subject to ongoing compliance review. (**#5256C DGM, closed 03/17/2011**)

RX-D