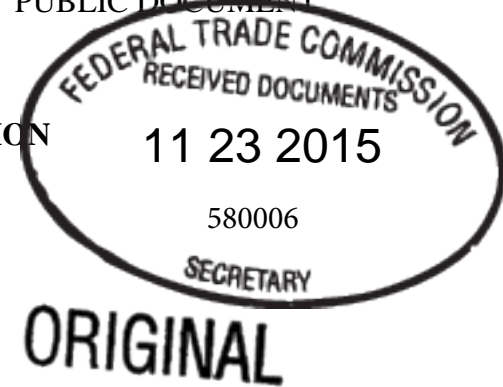


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

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

**RESPONDENT ECM BIOFILMS' REPLY TO COMPLAINT COUNSEL'S
OPPOSITION TO RESPONDENT'S APPLICATION FOR STAY PENDING JUDICIAL
REVIEW**

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RECORD REFERENCES & ABBREVIATIONS

Opp. – Complaint Counsel’s Opposition to Respondent’s Application for Stay

App. – Respondent’s Application for Stay Pending Judicial Review

Oral Arg. Tr. – Transcript of Oral Argument before the Commission

ALJ Oral Arg. Tr. – Transcript of Oral argument before the ALJ

Opin. – The Commission’s Opinion

Dissent – Commissioner Ohlhausen’s Dissent

ALJID – Initial Decision of the Administrative Law Judge

ALJFF – The Administrative Law Judge’s Findings of Fact

CCX – Complaint Counsel’s Exhibit

RX – Respondent’s Exhibit

JX – Joint Exhibit

Tr. – Transcript of Testimony before the Administrative Law Judge

Dep. – Transcript of Deposition

CCB – Complaint Counsel’s Post-Trial Brief

CCRB – Complaint Counsel’s Post-Trial Reply Brief

CCFF – Complaint Counsel’s Proposed Findings of Fact

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

RPB – Respondent’s Pre-Trial Brief

RB – Respondent’s Post-Trial Brief

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

RFF – Respondent’s Proposed Findings of Fact

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

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

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

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

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

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

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

INTRODUCTION

ECM has satisfied the elements for a Stay contained in Commission precedent. It has established the case to be complex, involving several novel bases for decision, which invite alternative conclusions. Those novel bases include the Commission's holding that extrinsic evidence from a "significant minority" constitutes as a stand-alone basis for deeming claim interpretation reasonable. *See* Ohlhausen Dissent, at 9 ("The FTC has never used extrinsic evidence of a 'significant minority' as a stand-alone basis to determine that a claim interpretation is reasonable"). For the first time, and contrary to its Green Guides, the Commission has established an arbitrary and unscientific standard as a condition precedent for use of the term biodegradable in commerce: That the product in question must break down into elements in nature within five years after customary disposal. In an unprecedented fashion, the Commission has ignored numerous relevant facts in the ALJ's Initial Decision that establish the ECM product's effectiveness, doing so without reasoned explanation for deviation from the Initial Decision. The Commission has ignored the constitutional standards that apply to prospective speech bans on commercial speech that is, at worst, only potentially misleading. Moreover, because the Order prohibits ECM from marketing its sole product, an additive that accelerates biodegradation of conventional plastics, ECM faces financial ruin. The absence of any evidence of actual consumer injury combined with the fact that competent and reliable scientific evidence confirms that ECM's product accelerates biodegradation, thus redounding to the benefit of the environment and to the methane gas collection program in landfills, constitute public interest factors strongly favoring imposition of a stay. All parties involved, including ECM, consumers generally, industry regulatees, and the Commission, benefit from having the Circuit Court's decision on the substantial legal and constitutional issues raised in ECM's forthcoming appeal,

yet another strong public interest factor favoring grant of a stay in preservation of the status quo ante.

APPROPRIATE STANDARD FOR GRANTING A STAY

Complaint Counsel argue that a stay is only appropriate where a movant shows “serious questions going to the merits.” Opp. At 2 (quoting *Mich. Coal. Of Radioactive Material Users, Inc. v. Grierpentrog*, 945 F.2d 150, 153–54 (6th Cir. 1991)). That is not the legal standard. *Michigan Coalition*, cited by Complaint Counsel, is a decision concerning stay of a district court order, not an administrative order. *Id.* at 152. That Court, in granting the stay, held that “a movant need not always establish a high probability of success on the merits.” *Id.* at 153, 156. Regardless, in the administrative context, “likelihood of success on the merits” is not measured by whether the Commission believes the respondent likely to succeed on appeal; were that the administrative standard, the Commission would have to reverse its decision *sua sponte* every time it granted a stay. The stay standard does not require that the Commission admit decisional error. Rather, a respondent makes a requisite showing of “likelihood of success on the merits” in the administrative context when the respondent shows that the law has been applied to a complex factual record, which complexity and novelty *could have* resulted in an alternative outcome. *In the Matter of Novartis Corp.*, 128 F.T.C. 233, 235 (1999). The novel aspects of the ECM decision, combined with the fact of the contrary Initial Decision and Commissioner Ohlhausen’s dissent, necessarily lead to the conclusion that the Commission could have chosen an alternative outcome.

ARGUMENT

Complaint Counsel misconstrue ECM’s arguments by claiming that ECM only argues that a stay is warranted because the U.S. Court of Appeals may set aside the Commission’s

factual findings. Opp. at 4–6 (stating that “a circuit court will only set aside the Commission’s factual findings if substantial evidence does not support them”) (citation omitted). To the contrary, ECM argues not only, under the judicial standard, that the Decision is likely to be reversed on appeal but, under the administrative standard, that the novelty and complexity of the decision reveal that the Commission could have chosen an alternative outcome. In light of that fact, the public interest is best served by preserving the *status quo ante* until an Article III court rules on the merits.

If for no other reason than this, the stay standard is satisfied: whether the Commission may lawfully use the significant minority exception as a basis for claim interpretation is an unprecedented construction that affects ECM’s speech rights and has a chilling effect on all of those similarly situated. *See Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247 (2011) (“Lack of historical precedent can indicate a constitutional infirmity.”).

Complaint Counsel also misconstrue the record by arguing that ECM offered no evidence that it will suffer irreparable harm absent a stay and that ECM will continue making deceptive claims if the Commission grants a stay. ECM submitted detailed declarations from its President and CFO explaining that abiding by the Order will cause ECM to suffer irreparable harm. That showing provided specific financial data evidencing extant losses. The notion that ECM will continue making deceptive claims is entirely speculative and void of a foundation in record evidence. It is also contrary to the representations made by ECM’s CEO in his affidavit. *See* Declaration of Robert Sinclair, attached to ECM’s Application for Stay as Exhibit H, at ¶ 9. The balance of the equities therefore strongly support the conclusion that the Commission should grant the requested stay.

A. Complaint Counsel Misconstrue ECM's Arguments

Complaint Counsels' Opposition parrots the Commission's Decision, but fails to address the serious legal questions at stake before the U.S. Court of Appeals. Complaint Counsel argue, in sum, that "[t]he Commission has considered and soundly rejected ECM's constitutional arguments, and [ECM] cannot [therefore] show serious arguments going to the merits." *See* Opp. at 1. But that is not the proper analysis under the governing administrative stay standard. If the standard to show "likelihood of success" depended on Commission admission that its Decision was erroneous, a stay would never be granted, making the rule superfluous. Either the Commission would find that it erred and reverse its decision *sua sponte* (thus not granting the stay) or it would reject the stay, either way making a stay impossible to obtain. The Commission is not required to find that it committed decisional error before it grants a stay. Rather, the Commission need only find that the matter before it was complex and that it could have interpreted the facts and law in a way that would have wrought an alternative conclusion. *Novartis*, 128 F.T.C. at 235 ("it is well settled that arguable difficulties arising from the application of the law to a complex factual record can support a finding that a stay applicant has made a substantial showing on the merits").

Complaint Counsel also misinterpret ECM's constitutional argument, which has consistently focused on the Commission's order; that order regulates *prospective* communication of biodegradable claims in the market. The FTC cannot avoid constitutional review of its order by invoking the "significant minority" doctrine. The Commission has rejected scientific consensus that accelerated gas evolution testing is appropriate to determine if a substance is intrinsically biodegradable in favor of an untested, unscientific, and arbitrary standard which prohibits use of the unqualified claim "biodegradable" unless the product in question can be

proven to break down into elements in nature within five years after customary disposal without extrapolation or modified test conditions (a demand for proof that is impossible to obtain because of the inherent variability of the environment). *See* ALJFF at ¶¶ 633–696; ALJID at 224–34. Without reasoned explanation, the Commission reached conclusions concerning implied claims that were based on novel applications of legal doctrine, to which the ALJ and Commissioner Ohlhausen disagreed. *See* Dissent at 8–11; ALJID at 220–23. That disagreement reveals an alternative conclusion was indeed possible.

The Commission has taken a scientific term, “biodegradable,” and imparted to it a restrictive meaning that is contrary to generally accepted science. *Compare* Opin. at 33 with ALJID at 224–34. The Commission has ignored the ALJ’s decision in pertinent part by deeming his scientific findings “irrelevant” in favor of its own contrived distinction, a newly announced “five year” rule (replacing its prior Green Guides’ “one year” rule). *See* Opin. at 41. It changed the terms of prior administrative policy (e.g., the Green Guides) without notice or public comment. *Compare* Opin. at 33 with 16 C.F.R. § 260.8. Whether the Commission “considered” those issues in the underlying case is irrelevant. The relevant inquiry is whether those legal issues are ones for which an alternative conclusion was possible.

In sum, Complaint Counsel misconstrue ECM’s arguments on why a Stay is appropriate in this case. A stay is not only appropriate because the Commission’s standard for granting a stay has been satisfied but also because the Commission has applied its findings to outright bar the truthful claim that ECM Plastics are intrinsically biodegradable, a fact established by the record at trial. Dr. Barlaz’s testimony at trial, fully adopted by the ALJ and uncontroverted by Complaint Counsel’s experts, proved that ECM Plastics are intrinsically biodegradable. *See, e.g.,* ALJID at 284–85. Indeed, the Commission’s Opinion did not conclude that Complaint

Counsel proved that the ECM Additive does not work. The Commission instead stated that “it is as likely that the ECM Additive has no meaningful effect on the biodegradation of plastic products as that it does.” Opin. at 47. Without meeting its burden of proving the ECM Additive inefficacious, the Commission cannot ban the claim that ECM Plastics are intrinsically biodegradable, as that claim is truthful, constitutionally protected commercial speech. The Commission nevertheless uses its findings of fact on consumer impression to impose an effective ban on ECM use of a biodegradable claim. A stay is therefore appropriate to allow the court of appeals to determine whether that outright ban is constitutional, even assuming the Commission’s findings are supported by substantial evidence.

B. A Stay Is Warranted because This Is the First Time the Commission Used the Significant Minority Exception to Find a Claim Interpretation Reasonable

Even if the Commission’s findings are supported by substantial evidence (they are not), a stay is warranted to preserve the status quo ante while the U.S. Court of Appeals determines whether the Commission’s choice of decision in deviation from the Initial Decision and the dissent of Commissioner Ohlhausen was a lawful choice. Commissioner Ohlhausen explained that this is the first time that the Commission has ever “relied solely on the significant minority exception to find an ad interpretation reasonable.” Dissent at 9. The Commission failed to consider evidence on whether that interpretation is scientifically supported, instead presuming only its preferred interpretation of “biodegradable” reasonable solely because it was presumably held by a “significant minority” of consumers. Opin. at 33. The Commission should not be able to conclude that an interpretation is reasonable solely because some undefined minority of consumers may interpret the claim in a certain way. *See* Dissent at 9 (the significant minority exception “does not mean that a claim is necessarily reasonable simply if held by a ‘significant minority’ (as low as 10%) of consumers”). Under the Commission’s logic, if a significant

minority of consumers believe that the world is flat, then that belief is reasonable (and controlling) regardless of the scientific evidence.

In addition, the majority of the Commission stated that “[i]n the absence of any evidence to the contrary we conclude [the consumers] are ‘reasonable.’” Opin. at 26. However, the Commission cannot presume what Complaint Counsel is required to prove. Dissent at 9 n.46. The record contains overwhelming evidence that a consumer interpreting a “biodegradable” claim on a plastic product to mean that the product will biodegrade within five years is unreasonable. Untreated plastic products take thousands of years to biodegrade. ALJFF ¶ 898. The fastest biodegrading items, like banana peels and tree trunks, will not reliably biodegrade within five years in a landfill. ALJID at 246. That is why “biodegradation” “refers to the biological process by which microorganisms such as bacteria and fungi use the carbon found in organic materials as a food source, and does not include a time requirement for completion.” ALJID at 226. Any consumer interpreting a “biodegradable” claim on a plastic product to imply that the product will biodegrade within five years therefore holds an unreasonable belief. And “[u]nreasonable interpretations are not deceptive[.]” Dissent at 8.

As this is the first time that the Commission has ever used the significant minority exception as the sole basis for finding an ad interpretation reasonable, a stay is appropriate to allow the circuit court to determine whether that action by the Commission is lawful. The Supreme Court has reasoned that “the most telling indication of a severe Constitutional problem is the lack of historical precedent[.]” *Nat’l Fed. Of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2586 (2012) (quoting *Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010)); see also *Virginia Office*, 563 U.S. at 260 (“Lack of historical precedent can indicate a constitutional infirmity.”). “At the very least,” appellate courts “should ‘pause to consider the

implications of the government's arguments' when confronted with such new conceptions of federal power.'" *Id.* (quoting *U.S. v. Lopez*, 514 U.S. 549, 564 (1995)). This is the first time in Commission history that it has used the significant minority exception to conclude that because a significant minority of consumers hold a belief, that belief is reasonable. Dissent at 9. A stay is therefore appropriate to allow the U.S. Court of Appeals to determine whether that application of the significant minority exception is lawful. *See N. Tex. Specialty Physicians*, 141 F.T.C. 10, *3 (2006).

C. A Stay Is Warranted because the Commission Failed to Apply the Central Hudson Test

Complaint Counsel argue that a stay is inappropriate because "ECM simply recycles its previously rejected argument that the record does not support the Commission's finding that an unqualified biodegradable implies a product will completely break down in 5 years." Opp. At 6. However, even assuming the Commission's findings of consumer impression on the term "biodegradable" are supported by the evidence (they are not), a stay is warranted to allow the U.S. Court of Appeals to determine the legal question of whether the Commission met its burden under *Central Hudson* in prohibiting ECM from prospectively making its biodegradable claim. The Commission failed to consider the possibility that ECM's biodegradability claim is only potentially misleading and not inherently misleading. Potentially misleading speech (meaning that speech capable of being corrected by a mandated qualification) is protected by the First Amendment. *See, e.g., Pearson v. Shalala*, 164 F.3d 650, 655 (D.C. Cir. 1999); *Fleminger, Inc. v. U.S. Dept. of Health and Human Servs.*, 854 F. Supp. 2d 192, 195 (D. Conn. 2012); *Alliance for Natural Health U.S. v. Sebelius*, 786 F. Supp. 2d 1, 13 (D.D.C. 2011). The Supreme Court has "reasoned that so long as information can be presented in a way that is not deceptive, such information is only potentially misleading" and must not be prohibited outright but must be

allowed in reliance on claim qualifications rather than censorship. *Whitaker v. Thompson*, 248 F. Supp. 2d 1, 9 (D.D.C. 2002) (citing *In re R.M.J.*, 455 U.S. 191, 203 (1982)).

Before the Commission can ban prospective speech it must meet its burden under *Central Hudson*. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561–70 (1980). The Commission attempted to ignore the *Central Hudson* test by finding that ECM’s “biodegradable” claim is inherently misleading, and therefore not protected by the First Amendment. *Opin.* at 56. No federal court has ever determined that a scientifically proven claim is inherently misleading because a significant minority of consumers misunderstand the claim. “If there is any likelihood that ‘truthful and nonmisleading expression will be snared along with deceptive commercial, the State must satisfy the remainder of the *Central Hudson* by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish that end.” *W. States Med. Ctr. v. Shalala*, 69 F. Supp. 2d 1288, 1301 (D. Nev. 1999), *rev’d on other grounds*, 283 F.3d 1090 (9th Cir. 2001). The term “biodegradable” is, at worst, only potentially misleading and protected by the First Amendment, as the Commission admits that qualifications can “prevent ECM’s prior unqualified claims from being misleading” *Opin.* at 57; see also *R.M.J.*, 455 U.S. at 203 (potentially misleading speech is misleading speech that can be remedied by “a requirement of disclaimers or explanation”).

Instead of applying the *Central Hudson* test to find a required disclaimer for ECM’s biodegradable claim that “directly advances” the Commission’s interest in preventing deception and that has a reasonable fit with that interest, *Pearson v. Shalala*, 164 F.3d 650, 656 (D.C. Cir. 1999), the Commission has adopted an effective ban on ECM’s ability to make the scientifically truthful claim that ECM Plastics are biodegradable. ALJID at 284–85. In the Application for Stay, ECM demonstrated that the Order effectively completely bars ECM from making that

claim. App. at 19–21. The Commission’s remedy therefore violates *Central Hudson*. See *Valley Broad. Co. v. U.S.*, 820 F. Supp. 519, 528 (D. Nev. 1993) (a regulation which “effectively imposes a ban” on commercial speech fails the *Central Hudson* test). That violation occurs even were all of the Commission’s factual findings supported by substantial evidence because whether a government restriction on speech meets the *Central Hudson* test is a purely legal question. See, e.g., *El Dia, Inc. v. Puerto Rico Dept. of Consumer Affairs*, 413 F.3d 110, 113 (1st Cir. 2005). Circuit courts review legal questions *de novo*. See *U.S. v. Van De Walker*, 141 F.3d 1451, 1452 (11th Cir. 1998) (collecting cases). The Commission cannot use the findings it made in this case to prohibit future truthful speech, or at least speech that is not demonstrably false. See Opin. at 47 (admitting that Complaint Counsel failed to meet its burden of proving that the ECM Additive is inefficacious). A stay is therefore appropriate to allow the circuit court an opportunity to determine *de novo* whether the Commission met its burden under *Central Hudson*. See, e.g., *Citizens for Responsibility and Ethics in Wash. v. Office of Admin.*, 565 F. Supp. 2d 23, 28 (D.D.C. 2008) (a stay is appropriate when a “serious legal question is presented”).

D. ECM Provided Sufficient Evidence to Show that It Will Suffer Irreparable Harm Absent a Stay

Complaint Counsel argue that “ECM merely asserts, without any support, that it will suffer irreparable injury if it must truthfully qualify its claims.” Opp. At 8. In the Commission’s decision, ECM is provided no claim qualification that can be proven scientifically and, thus, allowed under the terms of the order. Thus, under the decision the notion of biodegradable claim qualification is illusory. ECM supplied affidavits from both its President and Chief Financial Officer explaining in detail the precise financial bases underlying the conclusion that, if forced to abide by the Order, ECM will suffer irreparable injury. See Declaration of Robert Sinclair,

attached to ECM's Application for Stay as Exhibit H, at ¶¶ 3–9, 11–12, 14–17; Declaration of Kenneth Sullivan, attached to ECM's Application for Stay as Exhibit I, at ¶¶ 3–7.

Complaint Counsel entirely ignore ECM's evidence of financial harm. ECM presented sworn affidavits, balance sheets, and financial data showing that the Final Order will irreparably damage ongoing business and imperil the company's ability to finance an appeal. *See generally* Declaration of Robert Sinclair, attached to ECM's Application for Stay as Exhibit H; Declaration of Kenneth Sullivan, attached to ECM's Application for Stay as Exhibit I. That harm is based on ECM's inability to market product under the existing Order. Complaint Counsel argue that ECM can still market product because the Commission "reject[ed] ECM's contention that there is no scientific means to provide a rate or extent qualification." *See* Opp. at 9 (quoting Opin. at 57). That point is highly disputed and will be at issue on appeal. It is also irrelevant. Even if that point were correct (it is not—there is no generally accepted method to prove rate or extent of biodegradation within any set time period), the Commission's findings preclude ECM from using its existing science, a point ignored by Complaint Counsel in their Opposition. The Final Order prohibits industry (and ECM) from relying on accelerated gas evolution testing and from extrapolating data from those gas evolution tests when calculating biodegradation or biodegradability. *See* Order at 2–3. The Order requires testing under so-called "landfill" conditions, a limitation that was rejected as inaccurate and impracticable by expert testimony.¹ Because industry relies on accelerated gas evolution testing to determine intrinsic biodegradability, and ECM's tests employed accelerated testing, the Final Order actually might preclude ECM from marketing any "biodegradable" product. That would end ECM's business.

¹ All three of FTC's own experts had used accelerated testing and extrapolation principles to measure biodegradability of articles. ALJID at 242–45 (Drs. McCarthy and Michel); *see also* ALJFF ¶ 723 ("Dr. Tolaymat, Complaint Counsel's expert, agreed that accelerated testing to demonstrate biodegradation is possible.").

See Declaration of Robert Sinclair, attached to ECM's Application for Stay as Exhibit H, at ¶¶ 5–8.

Immediate enforcement of the Order absent a stay also threatens irreparable constitutional harm to ECM. See *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”). Complaint Counsel have entirely ignored ECM's relevant factual support. They argue that “ECM merely asserts, without any support, that it will suffer irreparable injury if it must truthfully qualify its claims.” Opp. at 8. That position presupposes that ECM will be wholly unsuccessful on appeal. Their argument is therefore misguided and improper, as it conflates ECM's likelihood of success with its potential for irreparable harm. Whether ECM's proposed claims are “truthful” is a matter to be determined by the Court. See *Peel v. Attorney Reg. & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 108 (1990) (extending *de novo* review to appellate courts when determining whether “inherent character of a statement places it beyond the protection of the First Amendment”). By contrast, if ECM is precluded from conveying that truthful information during its appeal, it suffers an irreparable harm. *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) (“The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief”).

Where the Commission has departed almost wholesale from its ALJ's opinion, and extended legal doctrine in ways never before seen, one would think awaiting Circuit review is a prudent safeguard against injustice. The Supreme Court has held in other contexts that the lack of government action in the past despite the attractiveness of that course “suggests an assumed absence of such power.” See *Printz v. U.S.*, 521 U.S. 898, 907–08 (1996); *Virginia Office*, 563

U.S. at 259; *Free Enterprise*, 561 U.S. at 505–06 (“Perhaps the most telling indication of the severe constitutional problem . . . is the lack of historical precedent for this entity.”). Preserving the status quo ante would reduce the risk of irreparable harm to ECM and businesses nationwide.

The public has an interest in constitutional government, perhaps the most paramount of all interests at stake in this case. “The public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties.” *Jones v. Caruso*, 569 F.3d 258, 278 (6th Cir. 2009) (explaining that “it is always in the public interest to prevent the violation of a party’s constitutional rights.”); *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.2d 1474, 1490 (6th Cir. 1995) (“the public as a whole has a significant interest in . . . protection of First Amendment liberties”). The public also has an interest in receiving truthful and non-misleading commercial speech. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 497 (1996) (quoting *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)).

As with the likelihood of success prong, here the significant constitutional questions warrant imposition of a Stay. Based on hundreds of factual findings that were never addressed by the Commission, the ALJ concluded that the ECM additive rendered plastics “biodegradable” and accelerated biodegradation in landfills. ALJID at 284 (“plastics manufactured with the ECM Additive are anaerobically biodegradable”). Moreover, the Commission, despite having a clear interest in justifying its investigation and Complaint, could not find sufficient evidence to rule against ECM on that point. *See Order*, at 47. The Commission explained that “we find as likely that the ECM Additive has no meaningful effect on the biodegradation of plastic products as that it does.” *Id.*; *but see* ALJID at 164–65 (explaining that the Commission’s burden to establish wrongdoing under the FTC Act is by a preponderance of the evidence). If anything, the clear

disagreement by the FTC ALJ is cause to Stay the Order until a circuit court passes on the significant factual and legal issues raised. Indeed, the ALJ's 323 page opinion largely favored ECM. The ALJ devoted only about 6 pages of content concerning ECM's expressed rate claim, which ECM has long abandoned. ALJFF ¶¶ 245–264, 697–708; ALJID at 175–78, 245–46. The Commission's decision overturned almost the entirety of the ALJ's remaining 317 pages. The palpable risk of a constitutional deprivation raises a significant prospect of public harm. *See* App. at 31–35.

E. Immediate Implementation of the Order Is not Required to Protect Consumers and the Public Interest

Complaint Counsel argue that “[t]here is every reason to believe that absent the Commission's Order, ECM will continue along the same path” of making “deceptive claims.” Opp. At 9. Complaint Counsel again ignore the declaration of Robert Sinclair, ECM's President, which states that “ECM does not intend to use a Commission or Judicial Stay to continue to perpetuate its prior advertising claims.” *See* Declaration of Robert Sinclair, attached to ECM's Application for Stay as Exhibit H, at ¶ 9. Rather, “ECM intends to revise its advertising materials consistent with the scientific evidence produced before and at trial.” *Id.*

Complaint Counsel has identified no “prior history of violations” by ECM. *See* Opp. at 9. The basis for Complaint Counsel's allegation is simply that ECM failed to immediately alter its advertising content—and effectively shutter its business—when faced with a government allegation. The ALJ was highly skeptical of this argument, logically so, when he interacted with Complaint Counsel during closing argument:

And if that's your position, then you're saying that respondent, any respondent, has no right to assume that they have not done anything wrong. They have to assume that the government is correct and change their actions immediately. Is that what you're saying?

... I'm listening to you and I'm applying common sense here. And there are two sides to this case. There's not just the government. There's a respondent here. And we're still a free country.

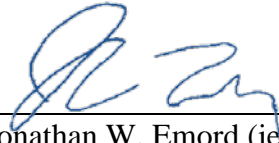
See Chappell, Tr. at 39-40 (Closing Argument, Nov. 22, 2014). In fact, ECM has no prior history of violations. Until this case, ECM had never been charged by an administrative, judicial, or private body with deceptive advertising. There is no evidence at all in the record suggesting that ECM's use of the word "biodegradable" on packaging has induced any purchase of higher-priced plastic or altered end-consumer behavior in any way. ALJID at 300-01 nn.58-69. ECM's immediate customers (i.e., plastics manufacturers) are now privy to substantially more information about the science of biodegradation and the biodegradability of ECM plastics than ever before. Those companies can also review the public ECM case. The risk of consumer deception in the presence of a stay is non-existent.

Further, ECM, as a good faith actor, attempted to comply with the Green Guides. The Green Guides state that an unqualified biodegradable implies to consumers complete biodegradation within one year after customary disposal. 16 C.F.R. § 260.8(c). So, in attempting to dispel that incorrect interpretation, ECM qualified its biodegradable claim with the disclaimer that ECM Plastics would biodegrade in some period greater than a year. ALJFF ¶ 253; ALJID at 182 ("ECM's revised stated time period of 'some period greater than a year,' on its face, is clearly and directly contrary to any message that complete biodegradation would occur 'within one year.'"). ECM is therefore a good faith actor, and ECM will not continue to make unqualified biodegradable if the Commission stays the Order.

CONCLUSION

ECM respectfully requests that the Commission stay the Final Order pending ECM's appeal to the United States Court of Appeals.

Respectfully submitted,



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DATED: November 23, 2015

CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of Respondent ECM BioFilms' Reply to Complaint Counsel's Opposition to Respondent's Application to Stay the Final Order Pending Judicial Review, and that on this November 23, 2015, I caused the foregoing to be served **electronically** to the following:

Donald Clark
600 Pennsylvania Ave., NW
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Washington, DC 20580

I hereby certify that this is a true and correct copy of Respondent ECM BioFilms' Application to Stay the Final Order Pending Judicial Review, and that on this November 23, 2015, I caused the foregoing to be served electronically to the following:

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