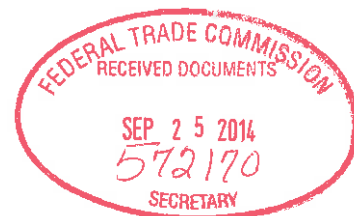


ANNOTATED PROPOSED ORDER

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**



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

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

DEFINITIONS

For purposes of this order, the following definitions shall apply:

1. “Clearly and Prominently”¹ shall mean as follows:
 - A. In print communications, the disclosure shall be presented in a manner that stands out from the accompanying text, so that it is sufficiently prominent, because of its type size, contrast, location, or other characteristics, for an ordinary consumer to notice, read and comprehend it;
 - B. In communications made through an electronic medium (such as television, video, radio, and interactive media such as the Internet, online services, and software), the disclosure shall be presented simultaneously in both the audio and visual portions of the communication. In any communication presented solely through visual or audio means, the disclosure shall be made through the same means through which the communication is presented. In any communication disseminated by means of an interactive electronic medium such as software, the Internet, or online services, the disclosure must be unavoidable. Any audio disclosure shall be delivered in a volume and cadence sufficient for an

¹ See, e.g., *FTC v. AJM Packaging*, Stipulated Order for Permanent Injunction and Civil Penalty Judgment, No. 13-cv-01510, at 5 (D.D.C. Oct. 1, 2013) (imposing civil penalties and entering new order as a result of environmental claims, including “biodegradable” claims, that violated an earlier administrative order; the new order employed the same definition of “clearly and prominently” as proposed here). Most of the language in the proposed order matches earlier Commission or federal court decisions and orders, including *AJM*.

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ordinary consumer to hear and comprehend it. Any visual disclosure shall be presented in a manner that stands out in the context in which it is presented, so that it is sufficiently prominent, due to its size and shade, contrast to the background against which it appears, the length of time it appears on the screen, and its location, for an ordinary consumer to notice, read and comprehend it; and

- C. Regardless of the medium used to disseminate it, the disclosure shall be in understandable language and syntax. Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any communication.
2. “Close proximity” means on the same print page, web page, online service page, or other electronic page, and proximate to the triggering representation, and not accessed or displayed through hyperlinks, pop-ups, interstitials, or other means.
3. “Commerce” shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.
4. “Competent and reliable scientific evidence”² shall mean tests, analyses, research, or studies that have been conducted and evaluated in an objective manner by qualified persons, that are generally accepted in the profession to yield accurate and reliable results, and that are sufficient in quality and quantity based on standards generally accepted in the relevant scientific fields, when considered in light of the entire body of relevant and reliable scientific evidence, to substantiate that a representation is true.³ Specifically:

² The Commission routinely requires that marketers support environmental claims with “competent and reliable scientific evidence.” See, e.g., *Down to Earth Designs, Inc.*, No. C-4443 (F.T.C. 2014); *Clear Choices Housewares, Inc.*, No. 122-3288 (F.T.C. 2013); *Kmart Corp.*, No. 82-3186 (F.T.C. 2009); *Tender Corp.*, No. 82-3188 (F.T.C. 2009); *Dyna-E Int’l Inc.*, No. 82-3187 (F.T.C. 2009); *Archer Daniels Midland Co.*, 117 F.T.C. 403, 415 (1994); *Mobil Oil Corp.*, 116 F.T.C. 113, 120-121 (1993); *American Enviro. Prods., Inc.*, 115 F.T.C. 399, 408-09 (1992); see also *The Guides for Environmental Marketing*, 16 C.F.R. § 260.8(b) (hereinafter “*The 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.”) (emphasis added); FOF ¶ 134 (the competent and reliable scientific evidence standard is consistent with the level of substantiation expected from experts in the field). Furthermore, as our accompanying brief makes clear, a *Pfizer* factors analysis demonstrates that “competent and reliable scientific evidence” is the correct standard. See *In re Pfizer Inc.*, 81 F.T.C. 23 (1972). Additionally, as part of the *Pfizer* factors analysis, the accompanying brief discusses why the order’s requirements are consistent with that standard.

³ This Commission used this definition of “competent and reliable scientific evidence” in *Gorell Enterprises, Inc.*, No. C-4360, 2012 FTC LEXIS 96, *5-8 (May 16, 2012) (consent) (energy saving claims for windows). See also *FTC v. AJM Packaging*,

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- A. For unqualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must assure complete decomposition within one year and replicate, *i.e.*, simulate, the physical conditions found in landfills, where most trash is disposed.⁴
- B. For qualified biodegradability claims, any scientific technical protocol (or combination of protocols) substantiating such claims must both:
 - i. assure the entire product will (1) completely decompose into elements found in nature⁵ in the stated timeframe or, if not qualified by time, within one year; or (2) decompose into elements found in nature at the rate and to the extent stated in the representation; and
 - ii. replicate, *i.e.*, simulate, the physical conditions found in the type of disposal facility or method stated in the representation or, if not qualified by disposal facility or method, the conditions found in landfills, where most trash is disposed.

For example, results from ASTM (American Society for Testing and Materials) International D5511-12, *Standard Test Method for Determining Anaerobic Biodegradation of Plastic Materials under High Solids Anaerobic Digestion Conditions*, or any prior version thereof, are not competent and reliable scientific evidence supporting unqualified claims, or claims of outcomes beyond the parameters and results of the actual test performed.⁶

Stipulated Order for Permanent Injunction and Civil Penalty Judgment, No. 13-cv-01510, at 5 (D.D.C. Oct. 1, 2013) (regarding “biodegradable” claims; the new order employed the same definition of “competent and reliable scientific evidence” as proposed here). The Commission employed similar variants in earlier orders. *Pure Bamboo, LLC*, No. C-4274, 2009 FTC LEXIS 231, *5-6 (Dec. 15, 2009) (consent) (bamboo fiber, environmentally friendly, degradable, or anti-microbial claims for textile products); *Kmart Corp.*, No. C-4263, 2009 FTC LEXIS 144, *3-4, (July 15, 2009) (consent) (degradable claims for paper products or disposable tableware products or packages); *Lentek Int’l, Inc.*, 135 F.T.C. 311, 340-42 (2003) (consent) (certain claims for air cleaning or pest control products).

⁴ To determine whether a product will biodegrade in a landfill (and how long it will take), the test must simulate landfill conditions. *See, e.g.*, FOF ¶¶ 136, 154.

⁵ Substantial numbers of consumers understand that a product labelled “biodegradable” will decompose into elements found in nature. FOF ¶ 312; *see also The Green Guides*, 16 C.F.R. § 260.8(b) (requiring 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)).

⁶ Both sides’ experts criticized the ASTM D5511 in numerous respects. *See* FOF ¶¶ 136, 139-40; 178, 187.

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5. “Customary disposal” means any disposal method whereby respondent’s products ultimately will be disposed of in a landfill, in an incinerator, or in a recycling facility.⁷
6. “Degradable” includes biodegradable, oxo-biodegradable, oxo-degradable, or photodegradable, or any variation thereof.⁸
7. “Landfill” means a municipal solid waste landfill that receives household waste. “Landfill” does not include landfills that are operated as bioreactors or those that are actively managed to enhance decomposition.⁹
8. “Means and instrumentalities” shall mean any information, including, but not necessarily limited to, any advertising, labeling, or promotional, sales training, or purported substantiation materials, for use by trade customers in their marketing of any product, package, or service, in or affecting commerce.¹⁰
9. Unless otherwise specified, “respondent” shall mean ECM BioFilms, Inc., a corporation, and its successors and assigns.

I.

IT IS ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service, in or affecting commerce, shall not represent, in any manner, directly or indirectly, expressly or by implication:

⁷ The evidence establishes that a majority of consumers understand that a plastic product labelled “biodegradable” will biodegrade in a landfill. FOF ¶ 311.

⁸ This definition matches the language in *The Green Guides*, 16 C.F.R. § 260.8(a).

⁹ Only 2% of landfills are permitted by the Environmental Protection Agency as “bioreactors.” FOF ¶ 434. Even accepting the testimony of ECM’s expert that 15%-20% of landfills take some measures to enhance biodegradation, the overwhelming majority of landfills do not take such steps. (Tolaymat, Tr. 338; Barlaz, Tr. 2200-2). Accordingly—even crediting ECM’s testimony—most products customarily disposed of in landfills will not go to landfills with bioreactor-like features.

¹⁰ See, e.g., *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922) (“That a person is a wrongdoer who so furnishes another with the means of consummating a fraud has long been a part of the law.”); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963) (explaining that “with respect to those instances where petitioner did not contribute to the misleading act, it is settled that one who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of the Act”) (quotations, alternations, and citations omitted); *FTC v. Five Star Auto Club, Inc.*, No. CIV-99-1693, 2000 U.S. Dist. LEXIS 10548, *9 (S.D.N.Y. June 9, 2000) (enjoining defendants “from providing to others the means and instrumentalities with which to make, expressly or by implication, orally or in writing, any false or misleading representation or omission of material fact”).

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- A. That any product or package is degradable, or that any product, package, or service affects a product or package's degradability, unless¹¹
- i. the entire item will completely decompose into elements found in nature within one year after customary disposal;¹² or
 - ii. the representation is clearly and prominently and in close proximity qualified by:
 - a. Either (1) the time to complete decomposition into elements found in nature; or (2) the rate and extent of decomposition into elements found in nature, provided that such qualification must disclose that the stated rate and extent of decomposition does not mean that the product or package will continue to decompose;¹³ and
 - b. If the product will not decompose in a customary disposal facility or by a customary method of disposal, both (1) the type of non-customary disposal facility or method and (2) the availability of such disposal facility or method to consumers where the product or package is marketed or sold

¹¹ The Order prevents deception while allowing ECM to make truthful, substantiated claims. To make a qualified claim about a product that will not completely biodegrade in a landfill within one year, ECM must: (1) conspicuously disclose the substantiated time to complete biodegradation; or (2) conspicuously disclose, with appropriate qualifications, the rate and extent of biodegradation shown through competent and reliable scientific evidence. If these claims are based on substantiation that applies only to certain disposal environments (*i.e.* – other than landfills), ECM must also conspicuously disclose this limitation.

¹² This provision prevents ECM from making deceptive unqualified biodegradable claims suggesting that its additive will make plastics biodegrade within a year in landfills. *See* FOF ¶¶ 200, 204, 208, 298, 374 (substantial numbers of consumers interpret unqualified “biodegradable” claims on plastic labelled “biodegradable” to mean that the product will biodegrade within one year); FOF ¶¶ 11-12 (landfills are the dominant method for managing discarded waste in the United States); FOF ¶¶ 35-37, 112-113 (ECM conveyed that plastics completely biodegrade in most landfill environments); FOF ¶ 311 (consumers understand unqualified “biodegradable” claims on plastic products to mean biodegradable in a landfill).

¹³ At least a substantial number of consumers would otherwise extrapolate rate and extent information concerning biodegradation times. *See* FOF ¶ 448.

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and such 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.¹⁴

- B. That any such product, package, or service offers any environmental benefit, unless the representation is true, not misleading, and, at the time it is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.¹⁵

II.

IT IS FURTHER ORDERED that respondent, and its officers, agents, representatives, and employees, directly or through any corporation, partnership, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any product, package, or service in or affecting commerce, shall not provide to others the means and instrumentalities with which to make, directly or indirectly, expressly or by implication, including through the use of endorsements or trade names, any false, unsubstantiated, or otherwise misleading representation of material fact regarding any environmental benefit.¹⁶

¹⁴ This proposed relief is needed to stop ongoing deception because, for years, ECM has been misusing incomplete test data that does not constitute competent and reliable scientific evidence. *See, e.g.*, FOF ¶ 154 (experts agree that, to support claims of biodegradation in landfills, tests should be run at appropriate temperatures with appropriate anaerobic bacteria); *see also supra* at 3 n.6 (both sides' experts criticize ASTM D5511). To determine whether an order is reasonably related to the unlawful practices, the Commission should consider: "(1) the seriousness and deliberateness of the violation; the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations." *In the Matter of POM Wonderful LLC*, No. 9344, 2013 FTC LEXIS 6, *49 (Jan. 10, 2013). In this case, ECM's violations were serious, repeated, and blatant. *See, e.g.*, FOF ¶¶ 97-106.

¹⁵ *See FTC v. Ruberoid Co.*, 343 U.S. 470, 473, 475 (1952) ("[T]he Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices disclosed."); *Removatron Int'l Corp. v. FTC*, 884 F.2d at 1498 ("Our role in reviewing a Commission order has been defined by the Supreme Court: It has been repeatedly held that the Commission has wide discretion in determining the type of order that is necessary to cope with unfair practices found, and that Congress has placed the primary responsibility for fashioning orders upon the Commission."). This discretion allows the Commission to issue orders with fencing-in provisions that are broader than the respondent's unlawful conduct. *See, e.g., FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) ("The Commission is not limited to prohibiting the illegal practice in the precise form in which it existed in the past. Having been caught violating the Act, respondents must expect some fencing in.") (quotation omitted); *see also FTC v. National Lead Co.*, 352 U.S. 419, 428-30 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-13 (1946).

¹⁶ This provision prevents ECM from providing its customers with the means and instrumentalities to deceive consumers. *See* FOF ¶¶ 53-65 (explaining that ECM

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III.

IT IS FURTHER ORDERED that respondent shall, for five (5) years¹⁷ after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Commission for inspection and copying:

- A. All advertisements, labeling, packaging and promotional materials containing the representations specified in Parts I and II;
- B. All materials that were relied upon in disseminating the representations specified in Parts I and II;
- C. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations; and
- D. All acknowledgments of receipt of this order obtained pursuant to Part IV.

IV.

IT IS FURTHER ORDERED that respondent shall deliver a copy of this order to all current and future subsidiaries, current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities relating to the subject matter of this order.¹⁸ Respondent shall secure from each such person a signed and dated statement acknowledging receipt of the order, with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.* Respondent shall deliver this order to current personnel within thirty (30) days after ~~date of service~~ the effective date of this order,¹⁹ and to future

provided marketing materials to its clients and encouraged clients to make unqualified “biodegradable” claims for their products on the basis of the materials ECM provided); *see also supra* at 4 n.8.

¹⁷ The five-year retention requirement derives from the five-year statute of limitations applicable to order enforcement actions. *See* 28 U.S.C. § 2462. The Commission routinely approves this recordkeeping provision with a five-year retention period. *See, e.g., In the Matter of POM Wonderful LLC*, No. 9344, 2013 FTC LEXIS 5, *6 (Jan. 10, 2013).

¹⁸ This provision promotes specific deterrence. The Commission routinely includes order acknowledgement requirements similar to the one the Proposed Order contains. *POM Wonderful LLC*, 2013 FTC LEXIS 5, at *6.

¹⁹ To provide ECM more time to comply, and consistent with Section 5(g) of the FTC Act, Complaint Counsel proposes modifying the Notice Order’s original language (“within thirty (30) days after the date of service of this order”) to “within thirty (30) days after the effective date of this order.” *See* Rule 3.56(a) (orders generally effective sixty

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personnel within thirty (30) days after the person assumes such position or responsibilities.

V.

IT IS FURTHER ORDERED that respondent shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order,²⁰ including, but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor entity; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the business or corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge.

Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, ~~Mail Stop M-8102B~~,²¹ Washington, DC 20580. The subject line must begin: “ECM BioFilms, Inc., File No. _____.”

VI.

days after service); *POM Wonderful*, 2013 FTC LEXIS 5, *7 (Jan. 10, 2013) (using “thirty (30) days after the effective date of this Order”); *In the Matter of Daniel Chapter One*, 149 F.T.C. 1574, 1575 (2010) (modifying final order); Modified Final Order, *In the Matter of Daniel Chapter One*, No. 9329, at 4 (Jan. 25, 2010) (containing modified language referring to “final and effective date”).

²⁰ Compliance monitoring provisions are necessary to ensure adherence to the Commission’s orders. *Cf. Five-Star*, 97 F. Supp. 2d at 533 (noting that equitable relief “necessary to accomplish complete justice” includes “monitoring provisions, and reporting requirements”); *FTC v. Think Achievement Corp.*, 144 F. Supp. 2d 1013, 1026-29 (N.D. Ind. 2000) (“Courts may order record-keeping and monitoring to ensure compliance with a permanent injunction”), *aff’d in part, rev’d in part on other grounds*, 312 F.3d 259 (7th Cir. 2002); *FTC v. SlimAmerica, Inc.*, 77 F. Supp. 2d 1263, 1276 (S.D. Fla. 1999) (“Record-keeping and monitoring provisions in the permanent injunction are also appropriate to permit the Commission to police the defendants’ compliance with the order.”). The Commission routinely imposes provisions similar to those here. *See, e.g., POM Wonderful*, 2013 FTC LEXIS 5, at *7-*10 (similar provisions); *Gorell Enters.*, 2012 FTC LEXIS 96 at *10-*12 (similar provisions).

²¹ We propose removing the reference to the (now outdated) mailstop. Packages sent via overnight courier can be delivered without a mailstop.

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IT IS FURTHER ORDERED that respondent shall, within sixty (60) days after the ~~date of service~~ effective date²² of this order file with the Commission a true and accurate report, in writing, setting forth in detail the manner and form in which respondent has complied with this order.²³ Within ten (10) days of receipt of written notice from a representative of the Commission, respondent shall submit additional true and accurate written reports. Unless otherwise directed by a representative of the Commission in writing, all notices required by this Part shall be emailed to Debrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, ~~Mail Stop 8102-B~~, Washington, DC 20580.²⁴ The subject line must begin: “ECM BioFilms, Inc., File No. _____.”

VII.

This order will terminate twenty (20) years from the date of its issuance,²⁵ or twenty (20) years from the most recent date that the United States or the Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

- A. Any Part in this order that terminates in less than twenty (20) years;
- B. This order’s application to any respondent that is not named as a defendant in such complaint; and
- C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided, further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

²² Consistent with the change to the Acknowledgments provision discussed *supra* at 7 n.18, Complaint Counsel proposes revising “within sixty (60) days after the date of service of this order” in the Notice Order to “within sixty (60) days after the effective date of this order.”

²³ See *supra* at 8 n.21.

²⁴ See *supra* at 8 n.22.

²⁵ Twenty-year sunset provisions reflect longstanding Commission policy. See *Policy Statement Regarding Duration of Competition and Consumer Protection Orders*, 60 FED. REG. 42,569 (Aug. 16, 1995).

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IN WITNESS WHEREOF, the Federal Trade Commission has issued this complaint against respondent and has caused it to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C. this _____ day of _____, 2014.

By the Commission.

Donald S. Clark
Secretary

SEAL

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 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**, one hard copy, and one copy through the FTC's e-filing system:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Room H-159
Washington, DC 20580
Email: secretary@ftc.gov

One electronic copy and three hard copies 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 the Respondent**:

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Date: September 25, 2014

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