

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

ORIGINAL

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



In the Matter of

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

Respondent.

Docket No. 9358

PUBLIC DOCUMENT

**RESPONDENT’S OPPOSITION TO COMPLAINT COUNSEL’S CORRECTION
REGARDING STATEMENTS MADE DURING ORAL ARGUMENT**

On May 14, 2015, the Commission held oral argument in the above-captioned case. On May 19, 2015, Complaint Counsel filed a purported “Correction Regarding Statements Made During Oral Argument” (the “Correction”). Respondent ECM BioFilms, Inc. (“ECM”) hereby responds to that Correction. It is neither authorized nor accurate.

Complaint Counsel’s post-hoc Correction is not authorized under the Commission’s rules of procedure. Complaint Counsel cited Commission Rule 3.54 as authority for its “Correction,” but Rule 3.54 does not apply. *See* 16 C.F.R. § 3.54. Complaint Counsel’s Correction is thus procedurally infirm, an improper attempt to re-argue matters presented at oral argument. *See In the Matter of LabMD, Inc.*, 2014 WL 6984161, at *3 (F.T.C. Nov. 19, 2014) (explaining that because a document was “improperly filed, the assertions and documents included therein will be disregarded and will not be considered for any purpose”). Moreover, because the “Correction” is

not authorized, at a minimum Complaint Counsel should have sought leave from the Commission before making a substantive submission.

Even if we presume the “Correction” without leave to be permissible, its substance misleads.¹ A minority of Dr. Frederick’s survey respondents are recorded as reciting that a plain plastic bag without biodegradable claims would biodegrade within one year (13% of respondents). When shown that same plastic bag with ECM’s biodegradable claim, 20% of respondents (just 7% more) are recorded as reciting that the product would biodegrade within one year.²

Apparently realizing that such data undercuts their prima facie case, Complaint Counsel now wishes to manipulate that data further and apply a post-hoc rationalization. *See* Correction at 1 n. 1 (referencing Question 3J of Dr. Frederick’s survey). The survey question (Question 3J) upon which Complaint Counsel rely was overtly suggestive, however, because Dr. Frederick repeated the “biodegradable” claim within the text of that question, thus placing unnatural and undue significance on the claim through the repetition. CCX 860 (Frederick, Rep.) at 32. Question 3J was different from the “control” question posed to respondents in Question 3O. Consequently, the proper comparison remains the one Commissioners Ohlhausen and Wright

¹ ECM has explained in its briefs before the ALJ and the Commission in detail why Dr. Frederick’s survey evidence is incompetent, as the ALJ so found. ALJID at 200–02. We here address Complaint Counsel’s substantive argument, which operates on the false supposition that Complaint Counsel has met its burden of establishing the Frederick study to be competent evidence.

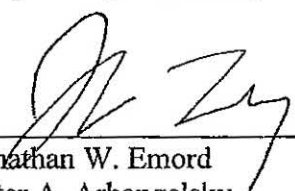
² To be sure, Complaint Counsel argued consistently that ECM’s unqualified “biodegradable” claim is equivalent to a claim that the product will disappear within one year. The “one year” claim appears in Complaint Counsel’s requested Order, in their Complaint, and in the Commission’s Green Guides. In their Correction, Complaint Counsel’s discussion of survey respondents “who believed plastic containers and bags would decompose within five years” is irrelevant. Complaint Counsel had the burden to prove the existence of an implied claim and whether that claim was material to purchasing decisions. *F.T.C. v. Bronson Partners, LLC*, 564 F. Supp. 2d 119, 124 (D. Conn. 2008). On this record Complaint Counsel cannot meet that burden.

posed between questions 3I and 3P. No record evidence (other than Dr. Frederick's unsupported speculation) suggests that survey respondents could not read the ECM logo in question 3I.

Frederick, Tr. 1153–54; *see also* ALJID at 193–94.

Complaint Counsel's post-hoc rationalization endeavors to obfuscate the issue raised by Commissioners Ohlhausen and Wright concerning Frederick's control questions. Dr. Frederick's questions revealed that his survey respondents had an inherently flawed understanding of plastics biodegradation, even for conventional plastics *not* held out as "biodegradable." *See* Oral Argument Tr. at 67:4–71:4. Dr. Frederick's survey cannot reveal whether consumers were influenced by ECM's biodegradable claims because he asked just one question of every survey respondent. Therefore, no data properly compared each survey respondent's understanding of both conventional and treated plastics. Dr. Stewart's survey did not include "control" questions concerning the conventional plastics.³ No reliable evidence exists from which the Commission can assess Complaint Counsel's alleged implied claim.

Respectfully submitted,



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³ Dr. Stewart's survey did reveal, however, that "consumers interpret the term, 'biodegradable,' to mean the process by which a product breaks down or decays; and consumers understand that the time for this process varies depending on the materials involved and that the process of biodegradability is not always, or even often, a rapid process." ALJFF ¶ 554.

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DATED: May 20, 2015

CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2015, I caused a true and correct copy of the foregoing to be served as follows:

One electronic copy, one copy through the FTC's e-filing system, and twelve hard copies to the **Office of the Secretary:**

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

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I further certify that I possess a paper copy of the signed original of the foregoing document that is available for review by the parties and the adjudicator.

Date: May 20, 2015

Eric Awerbuch

Attorney

Notice Of Electronic Service

I hereby certify that on May 21, 2015, I filed an electronic copy of the foregoing ECM Opp. to CC Correction, with:

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I hereby certify that on May 21, 2015, I served via E-Service an electronic copy of the foregoing ECM Opp. to CC Correction, upon:

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