ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

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

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S APPLICATION FOR A STAY PENDING JUDICIAL REVIEW

Pursuant to Commission Rule 3.56(d), 16 C.F.R. § 3.56(d), Complaint Counsel submit this memorandum in opposition to Respondent's Motion for Stay Pending Judicial Review.

I. INTRODUCTION

For over a decade Respondent, ECM Biofilms, Inc. ("ECM"), profited from disseminating deceptive biodegradable claims about its sole product, the ECM additive. For the past four years—through consent negotiations, administrative litigation, and appeal to the Commission—ECM has knowingly continued to convey these deceptive claims. On October 12, 2015, the Commission issued its Opinion ("Comm'n Op.") and a Final Order ("Order") at last ending ECM's deceptive advertising.

On November 9, 2015, ECM filed its Application for a Stay ("Stay App."). However, ECM has not satisfied any of the legal prerequisites for obtaining a stay. The Commission has considered and soundly rejected ECM's constitutional arguments, and it cannot show serious arguments going to the merits. Even if it could, the equities do not justify a stay. For these

reasons, and as more fully explained below, ECM's request to stay the Commission's Order should be denied.

II. THE COMMISSION SHOULD DENY RESPONDENT'S REQUEST FOR STAY

A. The Applicable Legal Standard for Evaluating a Stay Application.

Under Commission Rule 3.56(c), the Commission evaluates four factors in determining whether to grant a stay: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. 16 C.F.R § 3.56(c); *Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). In considering the stay factors, the probability of success is inversely proportional to the balancing of the equities (*i.e.*, the remaining three factors). *In the Matter of California Dental Ass'n*, No. 9259, 1996 FTC LEXIS 277, at *10 (May 22, 1996); *see also N. Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006) (*citing Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991)). But this inverse relationship is not without its limits. *Id.* To justify the granting of a stay, the movant is always required to demonstrate more than the mere "possibility" of success on the merits. *Michigan Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153-54 (6th Cir. 1991); *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 n. 4. (6th Cir. 1977). Even if a movant demonstrates irreparable harm, the movant must still show, at a minimum, "serious questions going to the merits." *Michigan Coal.*, 945 F.2d at 154 (internal citations and quotations omitted). Such serious questions arise when the case presents application of difficult legal questions to a complex factual record. *See California Dental*, 1996 FTC LEXIS 277, at *9-10 (the Commission will stay its own order only when it has ruled on "an admittedly difficult legal question and when the equities of the case suggest that the status quo

should be maintained."); *Toys "R" Us*, 126 F.T.C. at 697; *N. Texas Specialty Physicians*, 141 F.T.C at 457-58. However, "renewal" of arguments alone, without more, is "insufficient to justify the grant of a stay." *Novartis Corp.*, 128 F.T.C. 233, 234 (1999); *Toys "R" Us, Inc.*, 126 F.T.C. at 697; *Detroit Auto Dealers*, 1995 FTC LEXIS 256, at *4 (Aug. 23, 1995).

Even assuming a movant raises serious questions going to the merits, the balance of the remaining three equitable factors—harm to the movant, the harm to the other party, and the public interest—must be strongly in the movant's favor. *N. Texas Specialty Physicians*, 141 F.T.C. at 457-58 & n.2 (*citing California Dental*, 1996 FTC LEXIS 277, at *10). To show it will be harmed, the movant must demonstrate that denial of a stay would cause it *irreparable harm*. *Id.* Conclusory or unsupported assertions of harm do not suffice. *Novartis Corp.*, 128 F.T.C. at 235 (*citing Sampson v. Murray*, 415 U.S. 61, 90 (1974) (internal quotation marks omitted)). Finally, the Commission considers the last two factors—harm to consumers and the public interest—together. For the reasons more fully explained below, ECM has failed to meet its legal burden to justify a stay. It cannot demonstrate a serious question going to the merits, or that the balancing of the equities requires maintaining the status quo.

B. ECM Fails to Meet Even the Minimum Requirement for Showing a Serious Question On the Merits.

ECM bases its argument that this case presents serious questions on the merits on two unsustainable, constitutional arguments: that the Commission's Opinion and Order violate its First Amendment and its Due Process Rights. Neither argument, however, raises serious questions going to the merits.

1. ECM's First Amendment Argument Fails Both Legally and Factually.

ECM first complains that the Commission's Opinion and Order violate its First Amendment rights. (Stay App. 13-26.) The First Amendment, however, does not protect deceptive and misleading speech. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n,* 447 U.S. 557, 566 (1980). Thus, for ECM to have a colorable First Amendment argument, it must show that its claims are not deceptive or misleading. Therefore, ECM appears to premise its First Amendment argument entirely upon the contention that its unqualified biodegradable claims are not deceptive. However, appellate courts review the underlying findings for constitutional issues under the same deferential standard as other factual findings. *POM Wonderful v. FTC*, 777 F.3d 478, 499-500 (D.C. Cir. 2015).

Specifically, a circuit court will only set aside the Commission's factual findings if substantial evidence does not support them. *Id.* at 490 ("the findings of the Commission as to the facts, if supported by evidence, shall be conclusive.") That standard is "essentially identical" to the familiar "substantial evidence" test under the Administrative Procedure Act. *Id.* (internal citations omitted). This standard applies equally to constitutional questions. *Id.* at 499-500 ("In imposing liability against petitioners, the Commission found that POM's ads are entitled to no First Amendment protection because they are 'deceptive and misleading. Petitioners ask us to review that finding de novo in light of the First Amendment context, and to overturn the Commission's decision to impose liability. Our precedents, however, call for reviewing the Commission's factual finding of a deceptive claim under the ordinary (and deferential) substantial-evidence standard, even in the First Amendment context.'") (*citing Novartis Corp. v. FTC*, 223 F.3d 783, 787 n.4 (D.C. Cir. 2000); *FTC v. Brown & Williamson Tobacco Corp.*, 778 F.2d 35, 41 n.3 (D.C. Cir. 1985)); *see also Kraft, Inc. v. FTC*, 970 F.2d 311, 316 (7th Cir. 1992) (*cited in Novartis Corp.*, 223 F.3d at 787 n.4)).

Under the substantial evidence test, a reviewing court will not set aside the Commission's decision unless, considering the record as a whole, it could not reach the same conclusion. *See Schering-Plough v. FTC*, 402 F.3d 1056, 1063 (11th Cir. 2005) (*citing Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (substantial evidence means, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). This standard is deferential to the Commission's expertise in claim interpretation and findings of deception. *See FTC v. Colgate-Palmolvie Co.*, 380 U.S. 374, 385 (1965); *Thompson Med. Co. v. FTC*, 791 F.2d 189, 194 (D.C. Cir. 1986); *Removatron Int'l Corp. v. FTC*, 884 F.2d 1489, 1496 (1st Cir. 1989). Addressing this issue, the Supreme Court has frequently stated that reviewing courts must give the Commission's judgment great weight, particularly with respect to determinations of allegedly deceptive advertising. *FTC v. Colgate-Palmolive Co.*, 380 U.S. at 385 ("finding of a Section 5 violation rests heavily on inference and pragmatic judgment"). Courts also give some deference to the Commission's informed judgment on legal issues, *e.g.*, the identification of governing legal standards and their application to the facts found. *Indiana Fed'n of Dentists*, 476 U.S. at 454. For these reasons, courts will not set aside the Commission's decisions merely because, if trying the matter anew, it might reach a different result. *Simeon Mgmt. Corp. v. FTC*, 579 F.2d 1137, 1142 (9th Cir. 1978). "[A] court may [not] displace (an agency's) choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The Commission's findings more than meet this test. The Commission found "ECM's efficacy and establishment claims misleading because they were unsubstantiated using the science demanded by experts in the field." (Comm'n Op. 56.) "Where the Commission finds

that claims disseminated through commercial speech lack proper substantiation, such findings establish as a matter of law that such claims are deceptive and thus not protected by the First Amendment." *POM Wonderful, LLC*, 2013 WL 268926, at *60 n.35 (F.T.C. 2013), *aff'd, POM Wonderful LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015) (*citing Direct Mktg. Concepts, Inc.*, 624 F.3d at 8 ("Where the advertisers lack adequate substantiation evidence, they necessarily lack any reasonable basis for their claims. [w]here the advertisers so lack a reasonable basis, their ads are deceptive as a matter of law.").)

ECM does not even argue it can substantiate its implied five-year claim (in fact, ECM's own experts conceded they could not). Instead, ECM simply recycles its previously rejected argument that the record does not support the Commission's finding that an unqualified biodegradable claim implies a product will completely break down in 5 years. (Stay App. 14.) The Commission's finding, however, is unquestionably supported by substantial evidence. Specifically, the Commission relied on at least two consumer surveys—Dr. Frederick's and Dr. Stewart's (ECM's expert)—as well as evidence of ECM's intent to convey the five-year claim. (*See generally* Comm'n Op. 12-32.)

Faced with this overwhelming evidence, ECM argues that, because the consumer perception evidence upon which the Commission relied is complex, it has met its burden of showing a likelihood of success on the merits. In support of this proposition, ECM cites the Commission's decision granting a stay in *Novartis*. (Stay App. 10-11.) However, that decision is easily distinguished. In *Novartis*, the Commission granted a stay only of Part IV of its Order, which required corrective advertising. *Novartis Corp.*, 128 FTC at 234. In the underlying case, the Commission required corrective advertising after finding that "consumer beliefs caused or substantially reinforced by the deceptive advertising campaign are likely to linger." *Id.* at 234-

235. In granting the stay, the Commission determined that it based that finding on "a complex factual record." *Id.* Due to the complexity of determining such lingering effects, the Commission determined that Novartis' arguments on the merits were "adequate (if barely so) to warrant consideration of the remaining factors." *Id.* at 235. By contrast, in this case, the Commission merely had to determine how consumers interpret a single, textual claim. As discussed above, this routine claim interpretation was well supported by three lines of evidence, and fits squarely within the Commission's expertise. *See N. Texas Specialty Physicians*, 141 F.T.C. at 459 (distinguishing complex lingering effects analysis in *Novartis*); *Colgate-Palmolive Co.*, 380 U.S. at 385. Thus, it is not the type of complexity that will support a stay on its own.

2. ECM's Due Process Arguments Are Unsupported by The Record.

As with its First Amendment argument, ECM's due process argument fails based on the facts of the record. ECM argues that it did not have the opportunity to rebut the five-year claim interpretation. (Stay App. 26-28.) The Commission explicitly rejected this contention. In doing so, the Commission cited to substantial evidence demonstrating that Complaint Counsel argued the alternative five-year interpretation position throughout the case. (Comm'n Op. 13.) Moreover, the Commission based its findings, in large part, on Dr. Frederick's Google Consumer Survey evidence. (Comm'n Op. 17-24, 31.) ECM challenged Dr. Frederick's survey in multiple respects before the ALJ and on appeal to the Commission, vigorously arguing it is not competent survey evidence. (Resp. Ans. Appeal Br. 21-34.) Thus, it is hard to imagine what additional evidence ECM could have introduced to rebut the five-year claim, and ECM points to none.

Regardless, because ECM argued that the five-year claim was unsupported by extrinsic survey evidence in the record, it cannot now claim it lacked that opportunity. (Resp. Ans. App. Br. 14-15.) Consequently, ECM was not denied "a full and fair opportunity" to rebut that the

unqualified biodegradable claim implies complete decomposition within five years, as opposed to one year. Having raised no due process concerns to warrant reconsideration on appeal, and certainly none that rise to the level of "serious questions going to the merits," ECM's stay application should be denied.

C. Even if ECM Satisfied the Threshold Requirement, the Balance of the Equities are Not in ECM's Favor.

As the Commission has explained, there is an inverse relationship between the likelihood of success and the balancing of the remaining three equitable factors—harm to the movant, the harm to the other party, and the public interest. *N. Texas Specialty Physicians*, 141 F.T.C.at 457-58 & n.2 (*citing California Dental*, 1996 FTC LEXIS 277, at *10). Because ECM has made no showing of success on the merits, its stay application does not warrant further consideration. However, even if ECM satisfied the minimal threshold showing, it must still demonstrate that the weight of the remaining factors strongly warrants a stay. *Id.* The equities, however, are decidedly against a stay.

1. ECM Will Not Suffer Irreparable Harm.

ECM bears the burden of demonstrating that denial of a stay will cause irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. *See Toys "R" Us*, 126 F.T.C. at 698; *California Dental*, 1996 FTC LEXIS 277, at *7. A party seeking a stay must show with particularity that the alleged injury is substantial and likely to occur absent a stay. *Id*. Instead, ECM merely asserts, without any support, that it will suffer irreparable injury if it must truthfully qualify its claims. Furthermore, the Commission already expressly rejected this argument: "We reject ECM's contention that the Order effectively

prohibits all biodegradable claims because we reject ECM's contention that there is no scientific means to provide a rate or extent qualification." (Comm'n Op. 57.)[1]

Moreover, ECM's assertions of constitutional harm do nothing to tilt the equities in its favor. As discussed above, the Commission has considered and rejected ECM's constitutional arguments.

2. Immediate Implementation of the Order is Required to Protect Consumers and the Public Interest.

Because Complaint Counsel represents the public interest, the Commission analyzes the third and fourth factors together. *See Novartis*, 128 F.T.C. at 236. Both the harm to consumers and the public interest weigh heavily against ECM. The Commission found that ECM's violations of the law were serious, repeated, and deliberate. (Comm'n Op. 65.) There is every reason to believe that absent the Commission's Order, ECM will continue along the same path. ECM's current arguments (that an unqualified biodegradable claim only conveys some amorphous inherent biodegradable message) and its CEO's supporting declaration (in which he makes unsubstantiated and likely false assertions about its product) reinforce this conclusion. (*See* Stay App, Ex. I, Sinclair Decl. ¶¶4-5.) Given its prior history of violations, coupled with its present deceptive description of its product, the likelihood of continued violations is great and will cause the precise type of harm the Order is intended to prevent: inducing the purchase of higher-priced plastic based on deceptive biodegradability and environmental benefit claims and altering consumer behavior based on these deceptive claims. (*See* Comm'n Op. 43.) Therefore, consumer and public interest call for immediate implementation of the Order.

[1] ECM also argues that the "Commission completely barred ECM from making a truthful claim that its Additive causes plastic to become intrinsically biodegradable." (Stay App. 18). This is not true for two reasons. First, the Commission determined, based on the scientific evidence, that the additive just as likely does nothing at all to help plastic biodegrade. (Comm'n Op. 47.) Second, should ECM develop substantiation for such a claim, the Order would permit them to make it. The Order "permits ECM to promote the benefits of its products, in ways that are not misleading, to the extent, but not beyond, what can be scientifically substantiated." (Comm'n Op. 64.)

III. CONCLUSION

For the reasons stated above, Complaint Counsel respectfully requests that the Commission deny ECM's request for a stay of the Order pending the appeal.

Dated: November 18, 2015

Respectfully Submitted,

/s/ Katherine Johnson

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2015, I caused a true and correct copy of the foregoing to be served as follows:

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Notice of Electronic Service

I hereby certify that on November 18, 2015, I filed an electronic copy of the foregoing Complaint Counsel's Opposition to Respondent's Motion for Stay Pending Judicial Appeal, with:

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