

Interlocutory Orders, Etc.

IN THE MATTER OF
ECM BIOFILMS, INC.
D/B/A
ENVIROPLASTICS INTERNATIONAL

Docket No. 9358. Order, December 8, 2015.

Commission order staying enforcement of its Final Order pending review of the Commission's decision by the Sixth Circuit Court of Appeals.

**ORDER GRANTING RESPONDENT'S APPLICATION TO STAY FINAL
ORDER PENDING JUDICIAL REVIEW**

In an October 15, 2015 decision, the Commission found Respondent ECM BioFilms, Inc. ("ECM") liable under Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 for making deceptive claims about the biodegradability of plastics treated with its additive. The Commission's Final Order enjoins ECM from making an unqualified claim that a plastic product is degradable unless the claim is truthful and not misleading, ECM has competent and reliable scientific evidence substantiating the claim, and the item will completely decompose within five years after customary disposal. The order allows qualified degradability claims that are truthful and not misleading if (i) ECM has competent and reliable scientific evidence that substantiates the claim; and (ii) the claim is qualified by either the time to complete decomposition, or the rate and extent of decomposition; and, if the product will not decompose in a customary disposal facility or by a customary disposal method, information about the non-customary disposal facility or method.¹ On November 9, 2015, ECM applied for a stay pending judicial review of the Final Order. Complaint Counsel oppose the granting of a stay. On December 4, 2015, ECM filed a petition for review with the Sixth Circuit Court of Appeals. For the reasons stated below, the Commission stays enforcement of its

¹ The Commission's opinion in this matter is available at https://www.ftc.gov/system/files/documents/public_statements/819651/151019ecmbiofilmsopinioncomm.pdf. The order is available at <https://www.ftc.gov/system/files/documents/cases/151019ecmorder.pdf>.

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Final Order, effective immediately and until the Sixth Circuit issues a ruling disposing of ECM's petition for review.²

APPLICABLE STANDARD

Section 5(g) of the FTC Act provides that the Commission's cease and desist orders (except divestiture orders) will take effect "upon the sixtieth day after such order is served," unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission" or "an appropriate court of appeals of the United States." 15 U.S.C. § 45(g)(2). Service of the Commission's Opinion and Final Order was accomplished on October 19, 2015. Thus, absent a stay, the Final Order will become effective on December 18, 2015.

Under Commission Rule 3.56(c) an application for stay must address the following four factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) whether the stay is in the public interest. See 16 C.F.R. 3.56(c); *McWane, Inc.*, 2014 WL 1630460, at *1 (FTC Apr. 11, 2014). The required showing of the likelihood of success is "inversely proportional to the amount of irreparable injury suffered absent the stay." See, e.g., *North Texas Specialty Physicians*, 141 F.T.C. 456, 457-58 & n.2 (2006). We consider these factors below.

ANALYSIS

Addressing the first factor, ECM focuses solely on the Commission's determination that ECM's unqualified claim that its additive makes plastics "biodegradable" (without reference to time period) is false and unsubstantiated.³ ECM first argues that

² ECM filed a motion for *in camera* treatment of certain information contained in its application for a stay. The Commission also grants that motion.

³ Commissioner Ohlhausen agreed with the majority that ECM was liable for the express "nine months to five years" claim and the "some period greater than a year" claim, but she disagreed on the unqualified "biodegradable" claim. Her partial dissent is available at https://www.ftc.gov/system/files/documents/public_statements/819661/151019/ecmbiofilmsmkopartialdissent.pdf. Therefore, she supports the grant of this

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the Commission erroneously construed this claim as implying complete biodegradation in a landfill within a reasonably short period of time (five years or less). It also contends that the Commission's Final Order violates the First Amendment because it bars ECM from making what ECM maintains are scientifically verifiable claims that its additive accelerates biodegradation of plastic products. Third, ECM argues that the Commission violated its due process rights by failing to provide prior notice that an implied claim of biodegradation within five years was at issue in this case. Finally, ECM also asserts that a stay is warranted because this case is complex and involves novel issues.

ECM made similar arguments in its appeal to the Commission, and the Commission carefully considered and rejected them, for the reasons explained at length in our opinion. Although ECM now relies on the partial dissent by Commissioner Ohlhausen in support of its stay application, its repetition of the dissent's views neither changes the Commission's conclusions that ECM's unqualified biodegradable claim was misleading and unsubstantiated nor establishes a likelihood of success on appeal. However, while we are not persuaded that ECM is likely to succeed in its appeal, we do find that the issues in this case are sufficiently complex to tend to support a stay pending appeal.

With regard to the equities, ECM argues that issuance of a stay would risk no harm to consumers and is in the public interest because there is no evidence that the purchasers of its additive (as opposed to end-use consumers) were deceived by its implied biodegradability claims. We are not persuaded. The Commission found that ECM's customers purchased its additive because they wanted to make biodegradability claims to their own customers – that is, ECM's claims were important to the purchasing decisions of those in ECM's commercial supply chain. Allowing marketing claims that the Commission found to be misleading, unsubstantiated, and material to purchasing decisions is not in the public interest.⁴

stay, but rejects the majority's reasoning on factors one, three, and four to the extent that reasoning conflicts with her partial dissent.

⁴ Although ECM asserts that it will not continue to make unqualified biodegradability claims if the Commission stays the Final Order, see ECM

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On the issue of harm absent a stay, ECM claims that it will suffer two types of irreparable injury: first, damage to its business that will leave it financially unable to pursue its appeal and, second, injury to its First Amendment right to make truthful claims about its product. As noted above, the Commission already rejected ECM's claim of First Amendment harm in its decision on the merits and ECM's argument fares no better now. ECM, moreover, overstates the order's prohibitions: the Final Order does not prohibit all claims of biodegradability. ECM remains free to market its product provided that it adequately qualifies its claims so that they are not misleading.

Nonetheless, ECM makes a credible claim, supported by the declarations of its President and Chief Financial Officer, that in its unique circumstances it will be unable to fund an appeal of the Commission's decision if the Final Order is not stayed. Complaint Counsel do not seriously challenge that assertion. Because ECM's day in court may be foreclosed in the absence of a stay, we find ECM has made an adequate showing of irreparable injury that, along with the complex issues presented by this case, justifies the exercise of our discretion to stay the Final Order.

CONCLUSION

Our decision to stay the Final Order is a close one. But ECM has shown unique circumstances that, in our view, justify a stay pending appellate review. We therefore grant the stay. Accordingly,

IT IS ORDERED THAT Respondent ECM BioFilms' Application for Stay Pending Judicial Review and Motion for In Camera Treatment of Information in ECM's Application for Stay are **GRANTED**.

By the Commission.

Reply Br. at 18, we have found that its proposed qualifier – that there is no known precise rate of biodegradation – is inadequate to prevent consumer deception. See Opinion at 57.

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IN THE MATTER OF

LABMD, INC.

Docket No. 9357. Order, December 18, 2015.

Commission order increasing the word limit for respondent's answering brief, denying respondent's request to file an opening appeal brief, and granting complaint counsel leave to file a reply brief.

ORDER ADDRESSING AND RESOLVING APPELLATE BRIEFING ISSUES

In an Initial Decision and Order issued on November 13, 2015, Chief Administrative Law Judge D. Michael Chappell dismissed the complaint against Respondent LabMD, Inc., finding that Complaint Counsel failed to prove that the alleged conduct at issue caused or was likely to cause substantial injury to consumers. We address two motions filed by the parties relating to the ensuing appeal to the Commission.

On November 24, 2015, Complaint Counsel filed a Notice of Appeal of the Initial Decision. Despite having prevailed before the ALJ, Respondent filed a "Notice of Conditional Cross-Appeal" a week later, arguing that a "conditional, protective cross-appeal in response to Complaint Counsel's notice of appeal is proper even where, as here, the administrative law judge's initial decision and proposed order dismissed the complaint in its entirety." Cross-Appeal Notice at 1. Thereafter, on December 7, 2015, Complaint Counsel filed a "Motion to Enforce Limits on Appeal Briefing" arguing that LabMD's "cross-appeal" is improper and seeking an order requiring that LabMD present all of its arguments in support of the Initial Decision in its answering brief, including any alternate grounds for affirming. On December 14, 2015, LabMD filed its opposition to Complaint Counsel's motion; alternatively, LabMD seeks leave to file an over-length answering brief. LabMD also moved to strike Complaint Counsel's Notice of Appeal claiming it is too indefinite. On December 17, 2015, Complaint Counsel filed its opposition to LabMD's motion to strike.