

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

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

In the Matter of
ECM BioFilms, Inc.,
a corporation, also d/b/a/
Enviroplastics International

DOCKET NO. 9358

PARTIAL DISSENT OF COMMISSIONER MAUREEN K. OHLHAUSEN

By Commissioner Maureen K. Ohlhausen, for herself.

This matter presents challenging questions about consumer perceptions of the biodegradability of plastic, the appropriate standard for determining whether an unqualified biodegradable claim affected the perceptions of reasonable consumers, and the proper course forward when new information undermines the basis for previous Commission guidance on biodegradability.

Respondent ECM BioFilms, Inc. (ECM) made express claims that plastics treated with its “ECM Plastics” product would biodegrade within certain time periods. I support the majority’s conclusion that those express claims were unsubstantiated.¹

ECM also claimed that products using ECM Plastics were “biodegradable” without including a time period. Complaint Counsel alleged that this unqualified use of the word “biodegradable” conveyed an implied claim that such products would biodegrade in a year. The ALJ found that the evidence did not support this allegation. Relying on consumer survey evidence that the ALJ found insufficient, the majority now holds that ECM made an implied claim that the treated plastic products would biodegrade in a “reasonable” time period of between one and five years.²

¹ I agree with the majority that ECM’s express “9 months to 5 years” claim was material and unsubstantiated, that the related express establishment claim was also unsubstantiated, and that ECM’s “some period greater than a year” express claim was also unsubstantiated. I also agree with the majority that the ALJ’s pre-hearing discovery and evidentiary rulings below did not violate ECM’s due process rights.

² The Opinion does not contradict the ALJ’s finding that Complaint Counsel failed to prove that ECM had impliedly claimed that ECM Plastics completely biodegrade in a landfill *within a year*. Instead, the majority interprets the implied claim to convey complete degradation within five years. Opinion at 13. The majority finds this five-year

The record in this case suggests that although consumers are interested in buying biodegradable products, many consumers do not understand certain aspects of biodegradability. The key question, however, is whether ECM's unqualified claim *caused* reasonable consumers to believe that plastics treated with the ECM Plastics product would biodegrade either in a year (the time period in the Green Guides and Complaint Counsel's original position) or between one and five years (the Commission majority's interpretation of a reasonably short period). To answer this question, we must distinguish the effect of ECM's unqualified claim of biodegradability from pre-existing consumer misunderstanding about the biodegradability of plastic.³ The majority and I agree that this task calls for extrinsic evidence in the form of experimental consumer surveys. We disagree, however, on the strength of the submitted survey evidence (particularly the surveys rejected by the ALJ as unreliable) and how to weigh weak evidence that a minority of consumers perceived a particular claim.

I dissent from finding liability on the unqualified biodegradable claim because Complaint Counsel lacks reliable extrinsic evidence sufficient to prove that ECM's unqualified claim caused reasonable consumers to believe that treated products would biodegrade in either a year or in a period between one and five years. Furthermore, in finding that the extrinsic evidence supports Complaint Counsel's claim interpretation, the majority misapplies the Deception Statement's "significant minority" exception.

I. The available extrinsic evidence is insufficient to determine how consumers interpreted ECM's claims.

The majority and I agree with the ALJ that ECM's unqualified "biodegradable" claim on its face does not convey an implied rate of degradation.⁴ As such, ECM's alleged claims fall on the "barely discernible" end of the continuum of implied claims.⁵ For such claims, the Commission "will not find the ad to have made the claim unless extrinsic evidence allows that such a reading of the ad is reasonable."⁶ The extrinsic survey evidence offered in this case does not meet that standard.⁷

interpretation consistent with the complaint's general allegation that ECM claimed degradation within "a reasonably short period of time" and supported by Complaint Counsel's occasional references to a one- to five-year range as the "reasonably short period of time" at issue. *Id.* But see *infra* note 53 (discussing Complaint Counsel's contrary statement during oral argument). Thus, the majority addresses a different question than did the ALJ.

³ For example, one of the consumer surveys in the record indicates that approximately 13% of consumers believe that an untreated plastic bag biodegrades fully within one year, and 25% believe such a bag biodegrades fully within five years. CCX-860, App. A at 34.

⁴ See Opinion at 14; Initial Decision at 182.

⁵ See *FTC v. QT*, 448 F. Supp.2d 908, 958 (N.D. Ill. 2006)(quoting *F.T.C. v. Febre*, 1996 WL 396117 at *4 (N.D. Ill., July 3, 1996), *aff'd*, 128 F.3d 530 (7th Cir. 1997)).

⁶ Initial Decision at 182 (citing *Stouffer*, 1994 FTC Lexis 196, at *10).

⁷ Thus, I disagree with the ALJ to the extent he found that the extrinsic evidence shows that consumers interpreted ECM's unqualified biodegradable claim to mean a process without reference to any time period. See Initial Decision at 222. Instead, I believe the extrinsic evidence is insufficient to draw any conclusions about consumer interpretations of ECM's unqualified claims.

A. The consumer surveys all have significant methodological flaws.

In evaluating the evidence, we ought to weigh the results of each study based on its methodological soundness.⁸ Four surveys are in the record. Complaint Counsel’s expert, Dr. Frederick, based his results on a series of Google Consumer Surveys (GCS survey). ECM’s expert, Dr. Stewart, offered the results of a telephone survey (Stewart survey). The record also includes discussion and analysis of two older surveys – the APCO and Synovate surveys – submitted to the FTC during the development of the Green Guides. All four surveys are either methodologically flawed, unsuited to discerning consumer beliefs about ECM’s claims, or both.⁹

Moreover, I find it problematic that the majority shows no deference to the ALJ’s findings about expert witness credibility.¹⁰ Neither the majority nor I observed, as Judge Chappell did, the manner and tone in which the experts explained their theories and answered questions. That credibility assessment, which typically has a strong impact on a court’s interpretation of expert testimony, lies solely with the ALJ. Yet the majority ignores or at least underplays the ALJ’s finding that Dr. Stewart’s opinions are more credible than are those of Dr. Frederick.

1. Dr. Frederick’s GCS survey is flawed in methodology and application.

Dr. Frederick, Complaint Counsel’s expert witness, used Google Consumer Surveys to perform his research. GCS is a novel online consumer survey technique that has no track record in litigation and very little history in academic research.¹¹

The ALJ rejected the GCS survey, finding that it “fails to comport with generally accepted standards for survey research, as well as the legal standards used by the Commission, and is insufficiently reliable or valid to draw any material conclusions.”¹² For example, Complaint Counsel failed to prove that the GCS methodology provides a representative sample

⁸ See Dennis A. Yao and Christa Van Anh Vecchi, *Information and Decisionmaking at the Federal Trade Commission*, 11 J. PUB. POL’Y & MARKETING 1 (1992); *POM Wonderful*, 2013 FTC Lexis 6, at *49; *Stouffer*, 1994 FTC Lexis 196, at *29; Initial Decision at 190.

⁹ I agree with the ALJ and the majority that the APCO and Synovate surveys are fatally flawed and offer no reliable evidence to support Complaint Counsel’s allegation. Initial Decision at 67, ¶ 496 (citing FTC finding in Green Guides, describing their lack of controls and biased closed-ended questions, among other flaws); Opinion at 29-31. Given that the Green Guides relied on the APCO and Synovate surveys in defining “reasonably short period of time” as one year, 16 C.F.R. § 260.8, our unanimous conclusion that these two surveys are fatally flawed raises issues about the validity of this definition.

¹⁰ See e.g., Initial Decision at 46, ¶ 324 (“Having reviewed, evaluated, and weighed the opinions of both Dr. Stewart and Dr. Frederick, and the bases therefore, Dr. Stewart’s opinions are well supported and are more well reasoned, credible, and persuasive than the opposing opinions of Dr. Frederick.”); *id.* at 188.

¹¹ *Id.* at 201 (“There is no legal precedent for relying on the results of a Google Consumer Survey to establish a fact in litigation. Complaint Counsel does not point to any litigation – FTC or otherwise – in which a Google Consumer Survey was accepted as evidence and/or given any significant weight. In addition, the evidence fails to show that Google Consumer Surveys have been [*sic*] become generally accepted as a reliable research tool by market research professionals.”); *Id.* at 50, ¶¶ 361-62 (citing Stewart, Tr. 2683).

¹² *Id.* at 201.

of consumers.¹³ Most problematically, the record shows that GCS infers, rather than gathers, demographic data from participants, and that GCS produces *no demographic data at all* for approximately 30% of participants.¹⁴ Furthermore, the ALJ found that the GCS methodology likely suffers from disinterest bias because consumers are likely to give insincere or random responses to bypass the interruption of their web browsing.¹⁵ For these and other reasons, the ALJ concluded that even if the GCS survey were admissible evidence, it was so flawed that it should receive little, if any, evidentiary weight. I agree.

Complaint Counsel cites two independent sources in defense of the GCS methodology, but neither shows that GCS is reliable for our purposes.¹⁶ The first, a news article by a political pollster, briefly mentioned the relative accuracy of a specific GCS poll about the 2012 presidential election.¹⁷ The accuracy of a single political poll asking a closed-ended question about a nationwide election says little about the accuracy of a survey asking an open-ended question about biodegradable products, or about the overall reliability of the survey methodology.¹⁸ The second source, a study by the Pew Research Center, actually raised major

¹³ *Id.* at 197-200. The majority asserts that the GCS enables the use of substantially larger sample sizes. Opinion at 18. Yet, despite the majority's repeated references to "29,000 responses," Dr. Frederick did not take advantage of this alleged strength. Because Dr. Frederick only asked a single question to each respondent, his "survey" is more accurately characterized as 60 separate, much smaller, single-question surveys. Indeed, that is how Dr. Frederick himself characterized his analysis. *See, e.g.*, CCX-860 at 12 ("Sample sizes of each survey ranged from 72 to 1704.") Each of the experimental questions on which the majority relies received only between 200 and 268 responses, before coding. *See* CCX-860, App. 30-33 (questions 3C, 3D, 3E, 3J, 3K, 3M, and 3N). That is, the majority reaches its conclusions based on less than 6% of the approximately 29,000 responses Dr. Frederick collected and on questions with sample sizes approximately half the 400-person sample size of Dr. Stewart's telephone survey.

¹⁴ GCS infers demographics and, for various reasons explained by the ALJ, does not report any demographic information for approximately 30-40% of those polled. CCX-874 at 3. Although Complaint Counsel's expert defended Google's inferred demographics, he failed to explain how the GCS survey methodology is provably representative when it lacks demographic information for up to 40% of participants.

¹⁵ Initial Decision at 192-93. The majority asserts that the "obvious" protest answers are "1% of a 29,000 respondent sample," Opinion at 21, but as pointed out above, each of the questions on which the majority primarily relies had sample sizes of less than 1% of 29,000 respondents. *Infra* note 13. Furthermore, many protest answers might be less obvious. The majority also alleges: "[T]here is no reason to believe that 'disinterest bias' is of any greater concern in a Google survey" than in other survey methods. Opinion at 21. However, in a telephone survey or mall-intercept survey, disinterested persons can quickly end the interruption and return to their prior activity by hanging up or walking away, rather than answering. But in a GCS survey, "the user is blocked from access to the desired [website] content unless he or she answers the survey questions or pays for access to the desired content." Opinion at 16. Because the *easiest* way for a disinterested person to reach the content they desire is to answer the GCS survey, it is plausible that disinterested persons complete GCS surveys at a greater rate than other kinds of surveys.

¹⁶ Complaint Counsel also cites Google's own white paper on the GCS methodology. Opinion at n.25 (citing CCX-248). This study lacked independence and only looked at the representativeness of the GCS sample as compared to other online survey methodologies.

¹⁷ CCX-872 at 2.

¹⁸ Furthermore, a closed-ended nationwide presidential poll is unlikely to suffer from the same coding and sample problems as the survey used in this case.

concerns about flaws in the GCS survey sampling method that mirror the ALJ's concerns.¹⁹ Academic researchers have also raised concerns about the GCS methodology.²⁰

In addition to the general problems of the GCS methodology, Dr. Frederick's execution of his particular GCS survey also suffers from serious flaws. First, as the ALJ found, Dr. Frederick improperly coded answers to open-ended questions, throwing out 28% of all responses.²¹ This skews the results in Complaint Counsel's favor by over-representing responses that included a time element.

Second, although an experimental survey is the best way to assess the effect on consumers of ECM's unqualified biodegradability claims, Dr. Frederick's survey was not a well-designed experimental survey.²² As noted above, to assess how ECM's unqualified biodegradable claim affected consumer beliefs, we must control for previously existing consumer beliefs about the rate at which plastic biodegrades. In this case, what evidence we have suggests that as many as 25% of consumers believe – without any exposure to ECM's claims – that untreated plastic bags biodegrade within five years.²³ In such an environment, only a well-designed experimental survey can offer persuasive evidence about the effect of ECM's claims on consumer beliefs.

Dr. Frederick's survey, however, was not well designed to test the effect of ECM's unqualified claim. Although a few pairs of questions can be repurposed as an experimental test, none is well suited for this purpose. For example, two pairs of questions—3O and 3H²⁴ and 3P and 3I²⁵—compare pictures of plastic products with or without ECM "biodegradable" logos. These pairs would appear best suited to reveal how consumers' beliefs change when exposed to

¹⁹ Specifically, (1) GCS does not use the general public as its sampling frame; (2) it is not clear whether the GCS samples are fully representative of all Internet users; (3) demographic information is unavailable for approximately 30-40% of those polled; and (4) there can be substantial errors in how GCS classifies people with its inferred demographics. CCX-874 at 2-5. (noting that using GCS "few measures of demographic characteristics are available for analysis"; "It is also difficult to ask complex questions using [GCS] platform" due to character limits). *Id.* at 4.

²⁰ See e.g., Erin R. Tanenbaum, Parvati Krisnamurty, and Michael Stern, *How Representative are Google Consumer Surveys?*, 2013 JSM 2481 (2013) (finding that GCS survey about household cell phone use produced anomalous data, lacked inferred demographic data, thus supporting prior work that inferred demographics may not be fully accurate).

²¹ Initial Decision at 194-97. Discarded answers included accurate, if vague, answers such as "it depends."

²² In fact, Complaint Counsel never used Dr. Frederick's evidence as an experimental survey until we sought supplemental briefing.

²³ CCX-860 App. A at 34.

²⁴ Each asks, "What is your best estimate of the amount of time it would take for this container below to biodegrade?" over an identical picture of plastic containers except that the container in question 3H has ECM's biodegradable logo placed on it. CCX-860 at 31, 34.

²⁵ Each asks, "What is your best estimate of the amount of time it would take for this plastic bag to biodegrade?" over an identical picture of a plastic bag except that the bag in question 3I has ECM's biodegradable logo placed on it. CCX-860 at 32, 34.

the ECM biodegradable claim.²⁶ But Dr. Frederick criticizes these questions *which he created* because they used “not legible” logos.²⁷ In retrofitting his own analysis to answer experimental questions, he instead relies on questions that place extra emphasis on the term biodegradable in the question and thus muddies what stimulus affects consumer behavior – the ECM logo or the text of the question.²⁸ Thus, these question pairs also are not well designed for an experimental test of the effect of ECM’s claim on consumer beliefs.

2. The Stewart survey fails to control for consumers’ prior beliefs.

Because it lacks an experimental control, the Stewart survey cannot explain how ECM’s claim affected consumer beliefs. The survey allegedly has some methodological weaknesses,²⁹ although Dr. Stewart used a more traditional and well-established methodology than did Dr. Frederick.³⁰ However, even if the Stewart survey were a perfectly executed descriptive survey, it would still lack an experimental control group and thus could not control for consumers’ prior beliefs. An experimental control is particularly important in this case to distinguish preexisting consumer misunderstanding about all plastics’ biodegradability from any misunderstanding potentially caused by ECM’s unqualified biodegradable claim.³¹ Lacking such a control, the Stewart survey cannot support Complaint Counsel’s theory that ECM’s claims affected consumer beliefs.

²⁶ As discussed below, the responses to those pairs of questions suggest that the unqualified biodegradability claim had a negligible effect on consumer beliefs. *See infra* Section A2.

²⁷ CCSuppB, Frederick Dec. at 7 n.5.

²⁸ Dr. Frederick, when asked to analyze his survey as an experimental survey, compared control questions 3O and 3P to questions 3J and 3K. *Id.* at 8. 3J and 3K show the same pictures as their counterparts 3H and 3I, but the question is different: “What is your best estimate of the amount of time it would take for this [container or plastic bag] (which bears the symbol ‘ECM biodegradable’) to biodegrade?” CCX-860 at 30-34.

²⁹ For example, Complaint Counsel argues that the Stewart survey lacks a representative sample of consumers because such landline phone surveys skew older. CCApB at 17.

³⁰ Initial Decision at 216 (finding that the Stewart survey was designed and conducted in accordance with generally acceptable principles of survey research such as drawing a representative sample, use of open-ended questions, use of trained interviewers, and use of trained “blind” coders).

³¹ The majority disputes that “we must separate ad meaning from preexisting beliefs as a general matter.” Opinion at 31. The majority thus appears to believe that the Commission can deduce the existence and the effect on consumers of an *implied claim not facially apparent in an advertisement* without accounting for the level of knowledge of the audience. But the consumers’ level of knowledge matters to a deception inquiry, as the Deception Statement itself acknowledges. Deception Statement, 103 F.T.C. at 178 (noting that “ignorance or incomprehension” may cause some consumers to be misled by “a scrupulously honest claim.”) (quoting *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963)). Furthermore, a proper deception analysis evaluates representations “in light of the sophistication and understanding of the persons to whom they were directed.” *Id.* at 180 (quoting *Horizon Corp.*, 97 F.T.C. 464, 810 n.13 (1981)). For example, “[A] practice or representation directed to a well-educated group... would be judged in light of the knowledge and sophistication of that group.” *Id.* at 181. Logic and our precedent are clear: we cannot understand how the implied claim about the rate of biodegradation likely affects consumers’ beliefs or knowledge unless we know enough about consumers’ prior beliefs or knowledge to identify a likely change in belief or knowledge. Control questions are one of many tools that can help to identify and account for the prior beliefs of consumers.

B. Even ignoring the methodological flaws, the experimental survey data is inconclusive.

Leaving aside the serious flaws in methodology, neither Dr. Frederick's nor Dr. Stewart's surveys provide evidence sufficient to determine what consumers believe biodegradable means.

The massive amount of data collected by Dr. Frederick can be sliced and diced to support a wide range of results.³² At one extreme (Outcome A), the results chosen for comparison indicate that a "biodegradable" label causes only 5% more consumers to believe the bag will biodegrade within a year, or 10% to believe it would biodegrade within five years.³³ At the other extreme (Outcome B) the results chosen for comparison indicate that a "biodegradable" label could cause 41% of consumers to believe a plastic bottle would biodegrade within one year, and 52% of consumers to believe the bottle would biodegrade within five years.³⁴

Something is amiss when data in a single analysis supports two conclusions differing by a factor of eight. Assuming that the population answering each question was representative, the differences must be a result of the design of each scenario's questions. The questions in Outcome A better represent a consumer's actual exposure to ECM's claims and thus were better designed to measure how consumers react to these claims.³⁵ The Commission should be cautious in placing too much confidence in a methodology where the results appear to depend quite heavily on how questions are asked, rather than on consumer opinion. At the very least, the Commission must evaluate the evidence as whole rather than rely exclusively on analyses that show the highest impact on consumer beliefs.

Nor is the Stewart survey persuasive. The majority primarily relies on a single question in the Stewart survey that did not ask consumers about ECM's actual claim.³⁶ Furthermore, the majority's strongest conclusions ignore most of the gathered responses. For example, by discarding 217 of the 400 answers, the majority concludes that 64-65% of consumers believed

³² Dr. Frederick's methodology used Google Consumer Surveys to collect 29,000 responses in approximately 60 different one-question surveys. *See, e.g.*, CCX-860 at 12, App. A at 27-45.

³³ To calculate Outcome A: compare results from question 3I (estimated time for labeled plastic bag to biodegrade) to question 3P (estimated time for unlabeled plastic bag to biodegrade), but ignore Dr. Frederick's questionable coding and therefore include the full denominator. CCX-860 at App. A, 32, 34. The majority argues that question 3I underestimates the effect because Dr. Frederick designed the question poorly by using an illegible label, yet cursorily dismisses any criticism of bias in his design of question 3K, which produces results more favorable to the majority's case. *Opinion* at n.18.

³⁴ Compare question 3N (asking how long would it take a plastic water bottle to biodegrade) with question 3D (asking how long would it take for a plastic water bottle with a generic "biodegradable" label to biodegrade). CCX-860 at 30, 33.

³⁵ Outcome A uses the actual "ECM Biodegradable" label and claim, instead of a fictional label. *Id.* at 32, 34. Its question-pair asks identical questions ("What is your best estimate of the amount of time it would take for this plastic bag to biodegrade?"), with the only difference in the pair being whether or not the pictured plastic bag has the ECM logo. *Id.* In contrast, the questions in Outcome B are different, and only one question has an image. *Id.* at 30, 33.

³⁶ Question 4 asked participants, "If something is biodegradable, how long do you think it would take for it to decompose or decay?" RX-856 at 24, 28 & App. B (RX-847 at 16).

that biodegradation would occur in five years or less.³⁷ Perhaps recognizing the weakness of relying on a survey but then throwing out half the answers, the majority falls back to including those 217 answers, which dilutes the result to either 23% or 30%.³⁸ As I explain below, even ignoring the methodological unsuitability of the Stewart survey for evaluating ECM's claim, our case law does not support finding that a claim interpretation is reasonable based solely on such low percentages.

II. The majority misapplies the Deception Statement.

The majority finds, quite appropriately, that the “unqualified ‘biodegradable’ claim... in ECM’s marketing materials, including its tree logo, cannot reasonably be read to convey the alleged specific implied rate claim based on a facial analysis alone.”³⁹ Nonetheless, the majority concludes that Complaint Counsel’s alleged implied rate claim is a reasonable interpretation of ECM’s marketing materials based solely on extrinsic survey evidence (and testimony about that evidence) that a significant minority of consumers hold that interpretation. This approach conflicts with the Commission’s practice and precedent in applying the Deception Statement.⁴⁰ It also incentivizes cherry-picking data rather than considering results as a whole.

A. The Deception Statement’s “substantial minority” exception does not replace the “average listener,” the “typical buyer,” and the “general populace” test for reasonableness.

To be deceptive, an alleged interpretation of an advertisement must be reasonable: “The test is whether the consumer’s interpretation or reaction is reasonable.”⁴¹ The Deception Statement explains that an advertisement interpretation is reasonable if it is held by the “average listener,” or the “typical buyer,” or the “general populace.”⁴² Unreasonable interpretations are not deceptive, as “[s]ome people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim.”⁴³ Footnote twenty of the Deception Statement further explains that an interpretation *may* be reasonable even though fewer than 50% of reasonable

³⁷ Opinion at 26. This approach by the majority excluded the most common answer, given by 39% of respondents: it depends on the type of product. RX-856 App. D at 19.

³⁸ Opinion at 26, n.37. Less than 17% of respondents believed that biodegradation would occur in one year or less. See RX-856, App D at 19.

³⁹ Opinion at 14.

⁴⁰ *FTC Policy Statement on Deception*, 103 F.T.C. 174, 177 (1984) (appended to *In the Matter of Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984)) [hereinafter Deception Statement].

⁴¹ *Id.*

⁴² *Id.* at 179-80.

⁴³ *Id.* at 178 (quoting *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963)). Indeed, at least some consumers will misunderstand some aspect of any communication. See Jacob Jacoby, Wayne D. Hoyer and David A. Sheluga, *Viewer Miscomprehension of Televised Communication: a Brief Report of Findings* (1981); Jacob Jacoby & Wayne D. Hoyer, *The Comprehension and Miscomprehension of Print Communications* (1987). Limiting advertisers to communications that cannot be misunderstood may deprive the average consumer of useful information.

consumers hold that interpretation.⁴⁴ This exception means that if the Commission has otherwise determined a particular ad interpretation is reasonable, a defendant cannot rebut that conclusion by merely showing that only a minority of consumers hold that interpretation.⁴⁵ However, the footnote does not mean that a claim interpretation is necessarily reasonable simply if held by a “significant minority” (as low as 10%) of consumers.⁴⁶ Otherwise, the significant minority exception in the footnote would swallow the “average listener,” the “typical buyer,” and the “general populace” rule in the body of the Deception Statement.⁴⁷

B. The FTC has never used extrinsic evidence of a “significant minority” as a stand-alone basis to determine that a claim interpretation is reasonable.

The Commission has never relied solely on the significant minority exception to find an ad interpretation reasonable. In every case the majority cites to support its use of the significant minority exception, the Commission first established that the claim’s facial meaning was clear (and therefore reasonable), and then relied on extrinsic evidence, if at all, to bolster the facial finding.⁴⁸ For example, in *Telebrands*, the Commission relied on its facial analysis of the advertisement at issue, not extrinsic evidence. The Commission specifically stated that “it is not necessary to look beyond the four corners of respondents’ ads” and “extrinsic evidence was not required to find liability.”⁴⁹ Instead, reliance on the survey data merely confirmed the facial

⁴⁴ Deception Statement at 177, n.20 (“An interpretation *may* be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. *See Heinz W. Kirchner*, 63 F.T.C. 1282 (1963).”) (emphasis added). The majority asserts that we have often brought cases challenging far-fetched and facially implausible weight-loss claims. Opinion at n.22. But those cases generally involved express claims, not implied claims that the Commission has determined are not conveyed on the face of the ad.

⁴⁵ Indeed, this is precisely the fact pattern in *Telebrands*, 140 F.T.C. 278 (2005).

⁴⁶ The majority appears to interpret footnote twenty to mean “a significant minority of generally reasonable consumers,” *See* Opinion at 18 (arguing that because the polled individuals are “average or ordinary members of the adult population” they are therefore “reasonable consumers”). But rather than examine “whether the consumer’s *interpretation or reaction* is reasonable,” Deception Statement at 177 (emphasis added), the majority would have us examine whether the consumer *herself* is reasonable. And when the majority applies this faulty alternative test, it appears to *presume* that the consumer is reasonable: “[I]n the absence of any evidence to the contrary we conclude they are ‘reasonable.’” Opinion at 26. The majority cannot presume things Complaint Counsel is required to prove.

The more appropriate reading of the second sentence in footnote 20 is as a restatement of the entire deception standard, with “reasonable consumers” meaning “consumers with a reasonable interpretation,” as it does in the body of the Deception Statement. Understood in the context of the entire Deception Statement, the second sentence of footnote 20 is a clarifying restatement of the main text, not an alternate, conflicting test.

⁴⁷ The majority makes precisely this mistake, ignoring the larger context of the Deception Statement and reading footnote 20 alone as the rule. *See* Opinion at n.11.

⁴⁸ The majority cites *Thompson Medical*, 104 F.T.C. 648 (1984), where the Commission determined that for a narrow category of Aspercreme advertisements there was no clear facial interpretation, but then used consumer copy tests of the ads to derive a reasonable interpretation. Opinion at 32-33. However, the Commission in *Thompson* did not treat the reasonableness test as a simple matter of finding a large enough percentage of consumers to comprise a “significant minority.” In fact, the Commission there concluded that the copy tests showed that the advertisement “cause[d] average viewers to believe” the alleged claim. *Thompson Medical*, 104 F.T.C. at 805. Not only did the Commission in *Thompson* not apply the “significant minority” exception, it never even mentioned the term.

⁴⁹ *Telebrands*, 140 F.T.C. at 293, 329.

analysis.⁵⁰ Furthermore, the FTC did not rely on the significant minority exception when it adopted the Green Guides. Indeed, the Commission established the one-year interpretation based on the APCO survey, which claimed to reveal an interpretation held by a significant *majority* – 60%.⁵¹ And the Commission actually rejected the Synovate survey, which found the one-year interpretation to be held by 25% of consumers, because its results were biased toward shorter time frames.⁵²

I am not criticizing or discouraging the use of extrinsic consumer survey evidence in advertising cases. Indeed, the Commission must – and should – thoughtfully examine and address all such evidence provided by the parties. And generally speaking, the Commission itself should use reliable and persuasive extrinsic survey evidence. Reliable extrinsic evidence is particularly critical in advertising cases where, as here, the alleged implied claims fall on the “barely discernible” end of the continuum.

C. The majority’s “significant minority” standard for reasonableness facilitates cherry-picking data rather than considering results as a whole.

The Deception Statement and FTC precedent show that an interpretation is not reasonable simply because it is held by a small number of consumers. Yet, the majority’s approach of finding reasonableness by assembling enough consumers to comprise a “significant minority” risks reducing the reasonableness test to a mere game of stacking percentages.

Here, the majority achieves a significant minority by choosing the upper range of outcomes at nearly every turn and ignoring reasonable alternative analyses. First, the majority relies upon surveys with problematic or unproven methodological approaches – including a methodology that guesses at demographics, likely lacked demographic information for 30% of the participants, and discarded nearly one-third of the responses – even though biases of 10% or even 5% could materially affect the “substantial minority” calculation. Second, the majority interprets the complaint to focus on a five-year claim instead of a one-year claim, where the evidence supporting the one-year claim was too weak.⁵³ Third, the majority dismisses Dr.

⁵⁰ In *Firestone*, which preceded the Deception Statement, the Commission again relied on its facial analysis and rejected the reliability of the extrinsic survey evidence at issue. On appeal, the court referred to the survey findings as bolstering the significant deference owed the FTC’s facial analysis. *FTC v. Firestone*, 481 F.2d 246, 249 (6th Cir. 1973).

⁵¹ FTC, The Green Guides, Statement of Basis and Purpose at 121.

⁵² *Id.*

⁵³ Despite protest to the contrary, Opinion at 13, the majority has indeed revised Complaint Counsel’s original position, at Complaint Counsel’s urging upon appeal. During the oral argument, Chairwoman Ramirez asked Complaint Counsel, “So just so that I’m clear about this one versus five years, because there was certainly confusion in the briefing on that issue and the position that complaint counsel is taking, you are asking that the Commission interpret, based on the evidence, the word ‘biodegradable’ to impose a one-year limitation, is that right, or is it five years... what is your position?” Complaint Counsel responded, “The position is one year.” Tr. Oral Arg. 62-63. Complaint Counsel then argued that “even greater majorities – a majority of consumers would be deceived by even a five-year claim. Or five-year time frame.” Tr. Oral Arg. 63. The majority ultimately embraces the so-called “fallback position,” thus admitting that the record does not support Complaint Counsel’s original position alleging an implied one-year claim. Opinion at 13.

Frederick's coding issues, which again, adjust the percentages a small but relevant amount upward. Fourth, the majority relies on the most favorable questions / question pairs from the studies and dismisses the rest. The majority assembles this stack of percentages and concludes they have reached a "significant minority." But this fragile foundation cannot support the conclusion that the "average listener," "typical buyer," or "general populace" understood ECM's unqualified use of the word "biodegradable" to mean that ECM Plastic would biodegrade within five years.⁵⁴

III. Conclusion

There is much in this case that I support. But on the issue discussed above, the majority relies on flawed evidence regarding the unqualified biodegradable claim and inappropriately interprets the significant minority exception.

The majority's order establishes a standard that is unhelpful in clarifying the deep consumer confusion about biodegradability of plastic.⁵⁵ Moreover, our own Green Guides are based on anemic, flawed evidence about those underlying consumer beliefs. Truthful advertising could help consumers better understand the complexity of biodegradability. Rather than reinforce consumer ignorance by setting an arbitrary, unjustifiable five-year threshold that conflicts with our own previous guidance, we should start a proceeding to revise the Green Guides, seeking public comment and running our own well-designed consumer survey to inform the results.

⁵⁴ Furthermore, the record suggests that the majority's position could lead to absurd results. The GCS survey indicates that approximately 25% of consumers surveyed believed that a regular, untreated plastic bag breaks down fully within five years. CCX-860, App. A at 34. Under the majority's approach, where a claim is reasonable solely if believed by a "significant majority" of between 11% and 20%, is the unlabeled plastic bag manufacturer deceptively omitting information by failing to disclose that the bag is *not* biodegradable?

⁵⁵ I dissent from the order to the extent it conditions degradable claims about plastic products or products affecting the degradability of plastics on the complete decomposition of those products into elements found in nature within five years after customary disposal.