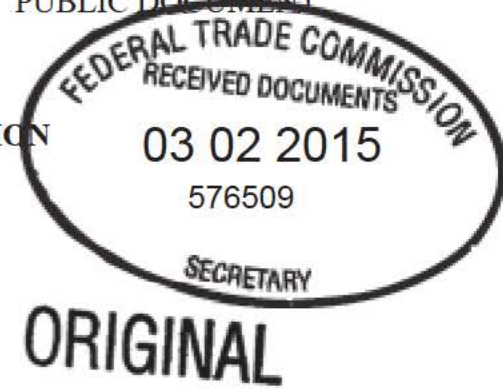


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



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

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

**RESPONDENT ECM BIOFILM’S OPPOSITION TO MOTION OF CALIFORNIANS
AGAINST WASTE FOR LEAVE TO FILE AMICUS CURIAE BRIEF**

Respondent ECM BioFilms (“ECM”), by counsel, hereby opposes the Motion of Californians Against Waste for Leave to File Amicus Curiae Brief, filed on February 27, 2015 in support of Complaint Counsel’s appeal. The brief depends upon extra record fact and new argument, which, if allowed, would prejudice ECM by depriving ECM of the right to a frozen record on appeal (in effect, initiating a new trial at the appellate level). For the following reasons, the Commission should summarily deny the motion for leave and strike the proffered amicus brief: (1) the proffered brief does not address or support the issues presented in Complaint Counsel’s Notice of Appeal; (2) the proffered brief relies extensively on extra record material; (3) the brief includes argument and opinion (and seeks relief) not presented below; (4) the brief is legally incompetent under Rules 3.52(c) and (j) because the brief fails to identify with requisite particularity the nature of the Amicus party, the reasons why an amicus brief would be desirable (16 C.F.R. § 3.52(j)), and the specific references to the record (16 C.F.R. § 3.52(c)(iv)).

Accordingly, to the extent the Commission considers or relies on any information in the proffered brief in support of Complaint Counsel's position, ECM will be prejudiced and denied its constitutional right to Due Process.

A. The Proffered Amicus Brief Does Not Address Issues in Complaint Counsel's Notice of Appeal:

An amicus brief that "supports" a party's position must satisfy the basic requirement that it actually address the arguments raised below. In its brief, the Californians Against Waste ("CAW") address broad policy issues not contained in the record below. In addition, those points are beyond the confines of Complaint Counsel's Notice of Appeal filed on February 10, 2015. Moreover, the proffered CAW brief does not support any particular content in Complaint Counsel's appellate brief (filed February 27, 2015). In short, the CAW brief seeks to relitigate this case at the appellate level based on facts, law, and argument not presented by Complaint Counsel or evaluated by the ALJ.

B. The Proffered Amicus Brief Relies Almost Exclusively on Material Not a Part of the Record and is Legally Deficient:

The CAW brief relies extensively (and almost exclusively) on extra record "evidence" not submitted in the proceeding below. Introduction of that "evidence" is in and of itself sufficient grounds to strike the submission without further ado. Due process of law requires that the Respondent be afforded "a meaningful opportunity to challenge new evidence" in the trial itself. *BNSF Ry. Co. v. Surface Transp. Bd.*, 453 F.3d 473, 486 (D.C. Cir. 2006) (quoting *Matthews v. Eldridge*, 424 U.S. 319, 349 (1976)). "[D]ue process requires that a defendant be given a fair and meaningful opportunity to refute the challenged adverse evidence to assure that the court's relevant findings are based on verified facts." *U.S. v. Grandlund*, 71 F.3d 507, 509-10 (5th Cir. 1995). The authority of the Commission as an appellate body extends only to review

of “**such parts of the record** as are cited or as may be necessary to resolve the issues presented...” *See* 16 C.F.R. § 3.54(a) (emphasis added). The Commission forbids new evidence or argument on appeal. CAW thus lacks authority to reach beyond the administrative record and, even if it did, basing any part of the Commission’s decision on evidence thrust before ECM for the first time on appeal would violate ECM’s constitutional and administrative rights.

The CAW brief attaches and relies on six wholly new exhibits (and eight total extra-record citations), that were thus not subject to ALJ evaluation and ECM cross-examination. That information includes biased presentation favoring new, extra-record scientific standards and even an entirely new and untested document purportedly containing survey data. The entirety of that information should be stricken (all of the exhibits). Because the CAW brief relies almost exclusively on that improper evidence, the brief in its entirety must be stricken. A non-party, the CAW has no standing to assert any argument in these proceedings and, in any event, made no attempt to appear by leave or introduce this information at the hearing.¹

The proffered brief also lacked citations to the record and the ALJ’s Initial Decision. Rule 3.52(c)(iv) requires that appellate briefs must clearly identify the “fact and law relied upon in support of the position taken on each question, with **specific page references to the record** and the legal or other material relied upon.” *See* 16 C.F.R. §3.52(c)(iv) (emphasis added). The CAW brief neglects except in very few instances any citation to the Initial Decision or the record. Of the exhibits cited, two were simply ASTM reference documents, and one exhibit—the FP International NAD Decision (CCX 28)—was cited for a purpose contrary to the ALJ’s

¹ The Complaint in this case was a public record, and followed a public press release by the Commission.

order on its limited admission. *See* Chappell, Tr. 1619, 1635.² The CAW brief relied on those documents (and statements therein) for the truth of the matter asserted, which was wholly improper and inconsistent with the ALJ's evidentiary rulings. That content should be stricken as well.

The failure to cite or rely on record evidence is particularly troublesome considering that this case involved more than 1,700 exhibits, over 3,400 proposed findings of fact, and at least 52 scientific tests (not including consumer perception data). Twenty nine witnesses (including eight experts) testified at deposition and at the hearing. Because the CAW brief is unsupported by the record, it amounts to nothing more than an unsupported and prejudicial opinion. For that reason, and as discussed below, the CAW brief is not "desirable" under Rule 3.52(j).

After the Commission excises the improper content from the CAW brief, nothing of utility remains. For that reason, too, the motion should be denied and the brief stricken.

C. The Proffered Amicus Brief Does Not Adequately Identify the Amicus Party's Interests, or the Reasons Why an Amicus Brief Is Desirable

Rule 3.52(j) requires amicus parties to identify the interest of the amicus, explain why the Commission's decision would affect the amicus, and explain why the amicus brief is desirable in this case. *See* 16 C.F.R. § 3.52(j). CAW explained that it has a commercial interest in the outcome of this case, to wit, it seeks to avoid competition with the recyclable plastic programs it favors. *See* CAW Mot. at 2. CAW is an industry organization that supports and advocates for

² The NAD decisions had little relevance, in part, because the claims in those proceedings were not subject to full litigation. ECM was not a party to the proceedings, the interests of the defending party were different, and evidence presented in those proceedings was but a very small fraction of the evidence and testimony received by the ALJ in this ECM matter. Reliance on those documents in this case is therefore arbitrary and capricious, and the exhibits are prejudicial and irrelevant.

recyclable technologies that compete with ECM's. In its motion, it claims that "the recycling industry is negatively impacted by additives in some biodegradable products, which degrade the quality of their finished product." *See* CAW Mot. at 2. So the CAW is not a financially disinterested amicus, a friend of the court, but instead a self-admitted financially biased party opposed to biodegradable technologies like those ECM sells. The ALJ correctly found that so-called "public interests" in competing technologies are actually private interests in competition with companies like ECM Biofilms that sell biodegradable plastics, and the CAW Motion admits as much. *See* ALJ Findings of Fact No. 1481.

In that regard, the CAW is a partisan advancing its own cause and agenda, an agenda that has no place in assessment of the merits of the FTC action or the appeals before this Commission. When combined with the clear errors of law and procedure identified above, the brief is unhelpful to a decision on the merits of this case. The CAW Motion thus fails to identify precisely why the unsupported "opinion" of the CAW will aid the Commission in evaluating the ALJ's Initial Decision. Rather, the brief prejudices ECM because, if it is allowed by the Commission, ECM would have to address facts, law, and argument raised for the first time on appeal by a financially interested non-party with no standing to appear and assert those arguments in this appeal.

D. The Proffered Amicus Brief Seeks Relief Beyond the Purview of the Administrative Complaint

The Complaint filed in October 2014 charged ECM with specific counts of false or deceptive advertising. The proposed order at the time (and still in Complaint Counsel's post-trial briefing) requested specific relief. The CAW brief strays beyond the scope of those documents, and actually asks the Commission to impose heightened requirements on ECM and industry that

are not supported by the record, to wit: a requirement that companies disclose proprietary test data on websites; a requirement for quantitative test data; and a requirement that industry rely on “standards” instead of “tests.” That type of action was not supported by the record evidence, nor has Complaint Counsel sought that type of relief in its briefs before the Commission. The CAW’s brief does not therefore “support” any position in the case. It is an unsubstantiated opinion of a competing industry member, which should be disregarded.

Here, again, the fact that CAW did not support its opinion with record evidence is determinative because—based on the evidence—the ALJ specifically rejected those theories. For instance, the CAW asks companies to state (falsely) that “no further biodegradation can be expected” based on the results of certain tests like the ASTM D5511. ECM’s experts testified that those very tests are predictive of biodegradation in landfills, and the ALJ found that biodegradation would, in fact, occur in light of the total expert evidence and opinion received. ALJFF Nos. 687-88, 729; ALJ Init. Dec. at 276-79. That point was supported by the ECM tests which revealed that, over time, biodegradation in the test environments had continued, particularly after re-inoculation. ALJFF Nos.1006-1465; ALJ Init. Dec. at 263-67, 284-85; RB at 79-80. The CAW therefore asks the Commission to disregard the ALJ’s findings without citing those findings or explaining through record evidence why those findings were incorrect. That problematic approach threatens to cloud this matter with misinformation and improper argument.

E. Conclusion

For the foregoing reasons, consistent with the FTC’s Rules of Practice and to protect ECM’s right to Due Process, the Commission should summarily deny the CAW’s motion to participate as an amicus curiae, and strike the motion (and exhibits) from the record in this case.

The CAW's opinions can be freely expressed in a citizen petition under 16 C.F.R. §§ 1.9 and 1.25, but they have no place here in an adjudicatory case on appeal.

Respectfully submitted,

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DATED: February 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of the foregoing Respondent's Opposition the CAW Motion for Leave to file Amicus Curiae Brief, and that on this February 27, 2015, I caused the foregoing to be served **electronically** through the FTC e-filing system to the following:

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Notice of Electronic Service for Public Filings

I hereby certify that on February 27, 2015, I filed via hand a paper original and electronic copy of the foregoing Respondent ECM's Opposition to the Californians Against Waste Motion for Leave to File Amicus Curiae Brief, with:

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