Before the
FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
Magnuson-Moss Warranty Act Rule Review	)	FTC Matter No. P114406
16 CFR Part 700	)	

ASHLAND INC. COMMENTS

Ashland Inc. ("Ashland") welcomes this opportunity to respond to the Federal Trade Commission's ("FTC" or "Commission") request for comment on the Commission's warranty-related Interpretations, Rules, and Guides ("Interpretations") under the Magnuson-Moss Warranty Act (the "Act").[1] Ashland lends its voice to those who have called upon the FTC to update Section 700.10 of its Interpretations to improve the effectiveness of the Act's tying prohibition. In particular, Ashland believes that the modifications to Section 700.10 of the FTC's Interpretations proposed by the Universal Standards in Automotive Products Coalition (the "USAP Coalition") would greatly improve the effectiveness of the Act's anti-tying rule.[2]

While the FTC has protected consumers from overt tying practices that are prohibited under the Act and the Interpretations, Ashland agrees with the USAP Coalition that the Interpretations have failed to evolve alongside industry practices since they were first promulgated and do not account for subtle conditioning practices that produce an indirect tying effect. For this reason, Ashland supports the USAP Coalition's recommendation to amend Section 700.10 to harmonize the Act with the Clean Air Act and to provide consumers with better knowledge of their rights under the Act and enhanced protection from warranty conditioning practices.

Ashland further proposes that the Commission specify the evidence of causation that a warrantor should have, and should provide to the consumer, in the event the warrantor intends to deny a warranty claim on the basis of the damage having been caused by the use of an aftermarket or otherwise "unauthorized" part or service. Ashland also urges the Commission to examine warranty and warranty-related marketing language for misleading performance claims

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1 76 Fed. Reg. 52596 (Aug. 23, 2011).

2 Ashland submits these comments to supplement the comments of the USAP Coalition, of which Ashland is a member. For brevity, Ashland does not repeat here all of the points made by the USAP Coalition, which Ashland hereby incorporates by reference.

and require that warrantors have adequate substantiation for any blanket statements that disparage the quality or adequacy of *all* aftermarket products as a group.

I. ASHLAND SUPPORTS THE USAP COALITION'S COMMENTS

Ashland Inc. is a leading producer of lubricants and has been service the needs of automotive and industrial customers around the globe for over 100 years. Today, Ashland formulates and offers a full line of motor oils and automotive fluids to meet the specific needs of different engine types and driving conditions and to provide maximum performance and prolonged engine life. Our products include Valvoline™ motor oil, which is sold in more than 100 countries globally; MaxLife™, the first motor oil specifically formulated for higher-mileage vehicles; and NextGen™, a partially recycled motor oil that surpasses API specifications. We also provide transmission fluids, gear oils, hydraulic lubricants, automotive chemicals, specialty products, greases and, cooling system products. Ashland also operates over 250 Valvoline Instant Oil Change™ service centers and through its wholly owned subsidiary Valvoline Instant Oil Change Franchising, Inc. franchises over 600 Valvoline Instant Oil Change service centers. Valvoline Instant Oil Change is the second-largest franchised quick-lube chain in the United States, with approximately 870 locations. With modern engines continuing to demand more and more from lubricants, Ashland has continue to invest in developing advanced products and actively pursue research and development in order to provide consumers with the best possible products.

In recent years, however, Ashland has noted with concern the rising prevalence of products being indirectly conditioned upon the use of a named product or service to the detriment of consumers. In the automotive warranty context consumers are especially vulnerable to such arrangements due to the growing complexity of modern automobiles and the fact that warranty coverage is predicated upon proper car maintenance. As a result, the average consumer is vulnerable to warranty statements that either directly or in effect impose a requirement to use a branded product or service or suffer the risk of losing warranty coverage. In particular, original equipment manufacturers ("OEMs") have begun introducing proprietary, branded lubricants intended to be used solely with a given make or model of cars, and stating in warranty documents and owner manuals that failure to use the branded product may void the consumer's warranty. As noted by the USAP Coalition, OEMs have provided in the car warranty and owner manuals that the cars "require" the use of the manufacturer's branded, proprietary engine oils

and automatic transmission fluids ("ATF"). Ashland agrees with the USAP Coalition that these practices have an *in terrorem* effect upon consumers that creates a tie in practice and should be prohibited under the FTC's Interpretations.

Part of the problem is that consumers are largely unaware of their rights under the Act. The Commission's recent Consumer Alert on Auto Warranties was an admirable restatement of consumers' rights under the Act and Interpretations.[3] Ashland, like the USAP Coalition, submits that the statements contained within that document provide a plain English summary of consumers' rights under the Act that should be adapted into a mandatory disclosure statement printed in the warranty and owner's manual. The burden associated with adding such disclosure language would be minimal since motor vehicle manufacturers are already required to provide consumers with a written warranty. Further, simply mandating conspicuous disclosure of the language adapted from the Commission's Consumer Alert on Auto Warranties would not substantively change existing law in any way, other than to provide consumers with clear and timely notice of their existing rights. Thus, Ashland fully supports the USAP Coalition proposal to amend Section 700.10 to account for indirect tying practices and provide consumers with better information with which to protect their rights under the Act. Ashland also supports the USAP Coalition's proposal that any denial of warranty coverage for damage allegedly caused by the use of an aftermarket or "unauthorized" service or part should be supported in writing.

Ashland requests that the Commission also clarify that the mere fact that an aftermarket or unauthorized part or service has been used does not constitute a sufficient *prima facie* justification of a warranty denial. Instead, warrantors should be required to support the denial with standard industry failure test results, which should also be supplied to the consumer. This would prevent denials of warranty coverage based merely on the presence of an aftermarket part. In practice, this forces the consumer to shoulder the burden of demonstrating that the aftermarket part *was not* the cause of the damage, the opposite of what is envisioned by the Act. Ashland notes that this practice is particularly prevalent in the case of ATF. Requiring real proof by standard industry tests would not place an undue burden on the manufacturer, but it would set a reasonable standard for the type of showing that must be made to support such a denial of

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[3] *See* Federal Trade Commission, Consumer Alert: Auto Warranties, Routine Maintenance, and Repairs: Is Using the Dealer a Must? (July 2011) ("Consumer Alert on Auto Warranties").

coverage and put a stop to arbitrary coverage denials that effectively reverse the burden of proof envisioned by the Act.

II. THE TYING EFFECT OF CERTAIN WARRANTY-RELATED LANGUAGE

There is clear evidence that the practices noted by the USAP Coalition have an tying effect upon consumers. In 2010, the Ashland commissioned a survey that demonstrates the anti-competitive and consumer harm that may be associated with even the *suggestion* that a given branded product is required in order to maintain warranty coverage. The Coalition enlisted a national research organization that provides public opinion research for decision making in public and corporate affairs to determine what the effect of suggesting that a branded product was required in order to maintain warranty coverage would have upon consumers.

In the survey, 453 respondents were asked a series of questions regarding their motor oil purchasing preferences in order to determine whether certain language regarding warranty coverage would materially impact their motor oil purchasing decisions. Specifically, consumers were asked the following:

> [A]ssum[ing] automobile manufacturer required that you use a particular brand *or an equivalent oil* made to their specifications in order to keep your warranty. And, assume there are two brands of oil and both meet the auto manufacturer's specifications, but one brand is licensed and officially approved by the manufacturer and the other brand is not. Which product do you feel confident buying for your vehicle to maintain your warranty?[4]

When faced with this question, which clearly included language that the use of an "equivalent oil" would not void the warranty, 75% of respondents still stated that they would feel confident only with a licensed oil. By contrast, only 8% of respondents said they would feel confident with an unlicensed oil and only 8% identified that they could use both or that it made no difference.[5] Thus, based upon the results of this survey, it appears clear that the use of certain language in connection with warranty coverage, such as the word "require," materially impacts consumers' motor oil purchasing decisions to consumers' detriment.

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4 Survey prepared by Baslice & Associates, Inc. (September 2010) (emphasis supplied), attached.

5 *Id.*

This evidence lends support to the USAP Coalition's proposal to extend the FTC's Interpretations to cover "indirect" tying practices wherein warrantors provide or imply that warranty coverage may be denied simply because the consumer purchased and used a non-OEM branded or licensed product. The survey also suggests that, since the current Interpretations do not explicitly prohibit such arrangements, that the Interpretations do not adequately provide consumers with the Act's basic anti-tying provision protection of "prohibit[ing] those tying arrangements imposed upon consumers by means of a penalty of loss of warranty coverage."[6] Indeed, as persuasively argued by the USAP Coalition, when the manufacturer employs language to suggest, directly or impliedly, that warranty coverage "requires" the use of a branded product or service, consumers are inappropriately denied the freedom to select a product of their choosing and competition is harmed. As the survey demonstrates, faced with such a choice, consumers are likely to use the "required" product in order to avoid the risk that they may later face potentially expensive repairs that may not be covered under their warranty. This practice results in a "tie" created *via* warranty that would be clearly prohibited if done overtly. As recommended by the USAP Coalition, the Commission should expressly prohibit these "indirect" tying practices.

III. THE FTC SHOULD REQUIRE SUBSTANTIATION FOR PERFORMANCE CLAIMS REGARDING NON-OEM PARTS AND SERVICES

Warranty documents and associated marketing materials often contain claims regarding the performance characteristics of "recommended" products relative to competitive after-market or non-OEM products or services. For example, in connection with GM's dexos™ specification, GM has made the claim that "[u]nlicensed product quality and suitability for GM vehicles cannot be guaranteed and, therefore, use of unlicensed products may result in lower levels of performance and engine damage not covered under warranty."[7] Similar language is found in GM's warranties: "Use of oils that do not meet the dexos specification, however, may result in reduced performance under certain circumstances."[8] Ashland submits that claims like these should be viewed as they truly are, as a marketing claim requiring prior substantiation.

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6 *In re Harmsco, Inc.*, 41 Fed. Reg. 34368, 34369 (1976).

7 *See* GM Dexos Information Center, *What You Need to Know About Dexos™, available at:* http://www.gmdexos.com/aboutdexos.html (last accessed Oct. 20, 2011).

8 *See* 2011 Chevrolet Impala Owners Manual, appended to USAP Coalition Comments.

As the FTC well knows, any party making an express or implied claims, however conveyed, is required to substantiate the objective assertions made about the item or service for which the claim is made.[9] This requirement applies to parties through the FTC Act's Section 5 prohibition on "unfair and deceptive acts" and the Lanham Act's similar prohibition of deceptive claims in commercial advertising or promotion. In addition to literally false statements, these provisions extend to "misleading" statements. That is, the FTC prohibits statements that are literally true or ambiguous but which nevertheless have a tendency to mislead or deceive the consumer.[10]

In addition Ashland submits that such blanket statements may also conflict with 15 U.S.C. § 2302(a). That provision states that "any warrantor warranting a consumer product to a consumer by means of a written warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty." This provision specifically contemplates that the Commission could prescribe the use of "words or phrases that would not mislead a reasonable, average consumer as to the nature or scope of the warranty."[11] Language that suggests that warranty coverage is or may be conditioned upon the use of a branded article or service, or that use of an unbranded article or service may cause damage without adequate substantiation for those statements, conflicts with this provision.

Here, to take the examples provided above, the statements provided make an express claim that the use of unlicensed products may result in reduced performance and may damage the car engine. A consumer reading this, or a similar phrase, would clearly believe that unlicensed products that claim to meet the dexos™ specification have material lower levels of performance than licensed products, that their vehicle's engine is at risk if they do not use a licensed product, and that use of the unlicensed product may void the warranty. As the FTC has noted, consumers would be less likely to rely on claims for products and services if they knew the advertiser did not have a reasonable basis for believing them to be true.[12] A party making

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9 *See FTC Policy Statement Regarding Advertising Substantiation*, appended to *Thompson Medical Co.*, 104 F.T.C. 648, 839 (1984), *aff'd* 791 F.2d 189 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1086 (1987).

10 *See e.g.*, *United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1182 (8th Cir. 1998).

11 15 U.S.C. §2302(a)(13).

12 *See FTC Policy Statement Regarding Advertising Substantiation*.

these sorts of claims should be required to provide substantiation for all the express or implied claims associated with these assertions.

Ashland submits that the Commission view warranty statements and statements made about warranty coverage to constitute a claim requiring substantiation and to take enforcement action where no reasonable basis for such a claim exists. In the case of motor oil performance claims, a "reasonable basis" for substantiation should require competent and reliable scientific evidence. It would be "unreasonable," for example, to make a performance or engine damage claim covering *all* motor oils unless competent and scientific evidence demonstrates that such a claim is not only hypothetically possible, but a realistic possibility. That is, a single example of engine damage being caused by *a single* unlicensed product cannot be said to provide sufficient substantiation for such a claim regarding *all* unlicensed products. Consumers should not be misled away from functionally equivalent products to the OEM's named products under the false pretense that the OEM's product offers superior performance or is better for the engine. Nor should evidence that a particular aftermarket part or service caused damage be provided as adequate substantiation for a general statement about all aftermarket parts or services. The FTC should reaffirm that claims made by warrantors in warranty statements and associated marketing materials require reasonable substantiation.

CONCLUSION

Ashland urges the FTC to update Section 700.10 of its Interpretations to account for the evolution of warranty tying practices. Ashland supports the recommendations set forth by the USAP Coalition which would protect consumers from indirect tying practices. Ashland also submits that the FTC should reaffirm that claims made by warrantors in warranty statements and associated marketing materials require reasonable substantiation. By making these updates, the FTC will dispel consumer confusion regarding warranty claims, providing consumers with a better understanding of their rights, and limit the use of warrantor tying practices.

Respectfully submitted,

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