

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT ARKANSAS

MAR 12 2014

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION**

JAMES W. McCORMACK, CLERK
By: *Jake Ramsey*
DEP. CLERK

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

ABERNATHY MOTOR COMPANY,
an Arkansas corporation,

WESLEY ABERNATHY, individually, and
as owner of Abernathy Motor
Company,

and

DAVID ABERNATHY, individually, and as
owner and an officer of Abernathy
Motor Company, and doing business
as Ab's Best Buys AMC Inc.
Affiliated,

Defendants.

Civil Action No. 3:14-cv-00063 BRW/BD

This case assigned to District Judge Wilson
and to Magistrate Judge Deere

**COMPLAINT FOR CIVIL PENALTIES, PERMANENT INJUNCTION,
AND OTHER RELIEF**

Plaintiff, the Federal Trade Commission ("Commission"), for its Complaint alleges:

JURISDICTION AND VENUE

1. Plaintiff brings this action arising under Sections 5(a)(1), 5(m)(1)(A), 13(b), and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), and 57b, and Section 110(c)(1) of the Magnuson-Moss Warranty – Federal Trade Commission Improvements Act ("Magnuson-Moss Act"), 15 U.S.C. § 2310(c)(1), to obtain monetary civil

penalties, injunctive and other relief for Defendants' violations of the Commission's Used Motor Vehicle Trade Regulation Rule (the "Used Car Rule"), 16 C.F.R. Part 455.

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), 1345, and 1355 and under 15 U.S.C. §§ 45(m)(1)(A) and 53(b).

3. Venue is proper in this district under 28 U.S.C. §§ 1391(b-c) and 1395(a), and under 15 U.S.C. § 53(b).

FEDERAL TRADE COMMISSION

4. The Commission is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. The Commission enforces Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair or deceptive acts or practices in or affecting commerce. The Commission also enforces the Used Car Rule, 16 C.F.R. Part 455, which prohibits unfair or deceptive advertising and business practices by used car dealers.

DEFENDANTS

5. Defendant Abernathy Motor Company is an Arkansas corporation with its principal office and place of business located at 3801 East Nettleton Avenue, Jonesboro, Arkansas 72401. Defendant Abernathy Motor Company transacts or has transacted business in this district.

6. Defendant Wesley Abernathy is an owner and majority shareholder of Abernathy Motor Company. Wesley Abernathy does business at 3801 East Nettleton Avenue, Jonesboro, Arkansas 72401. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Abernathy Motor Company, including the acts and practices set forth in this

Complaint. Defendant Wesley Abernathy resides and, in connection with the matters alleged here, transacts or has transacted business in this district.

7. Defendant David Abernathy is the President of Abernathy Motor Company. David Abernathy also does business as Ab's Best Buys AMC Inc. Affiliated with his principal office and place of business located at 3816 East Highland Drive, Jonesboro, Arkansas 72401. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Abernathy Motor Company and Ab's Best Buys AMC Inc. Affiliated, including the acts and practices set forth in this Complaint. Defendant David Abernathy resides and, in connection with the matters alleged here, transacts or has transacted business in this district.

COMMERCE

8. At all times material to this Complaint, Defendants have maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44.

DEFENDANTS' BUSINESS PRACTICES

9. Defendants engage in and have engaged in the sale of or the offering for sale of used vehicles to consumers.

10. Wesley Abernathy and David Abernathy own and operate Abernathy Motor Company. Abernathy Motor Company has four used car sales locations in Arkansas: two in Blytheville; one in Jonesboro; and one in West Memphis. David Abernathy operates an additional location doing business as "Ab's Best Buys AMC Inc. Affiliated," also known as "Ab's Best Car Buys," in Jonesboro, Arkansas.

Background

11. In 1975, Congress passed the Magnuson-Moss Act, which required the Commission to initiate a rulemaking in connection with used car warranties using both the authority granted by the Magnuson-Moss Act and the rulemaking procedures set forth in Section 18 of the FTC Act, 15 U.S.C. § 57a.

12. Pursuant to this authority, the Commission issued the Used Car Rule, which became effective on May 9, 1985, to create a remedy for oral misrepresentations and unfair omissions of material facts by used car dealers concerning warranty coverage, including untrue and unenforceable promises about dealers' responsibilities and willingness to make repairs after sale.

13. The Rule provides a uniform method for disclosing warranty information on a window sticker called the "Buyers Guide" that dealers are required to display on used cars offered for sale to consumers.

14. The Rule requires used car dealers to disclose on the Buyers Guide whether they are offering a used car for sale with a dealer's warranty and, if so, the basic terms and conditions of the offered warranty, including the duration of coverage, the percentage of total repair costs to be paid by the dealer, and the exact systems covered by the warranty.

15. The Rule also requires dealers to check a box marked "AS IS - NO WARRANTY" on the Buyers Guide if a used car is offered for sale without a warranty. An "as is" sale voids implied warranties that arise under state law, such as an implied warranty of merchantability (which may mean, among other things, that goods are fit for the purposes for which such goods are ordinarily used).

16. The Rule also requires certain other disclosures, including: a statement informing consumers to ask the dealer if a pre-purchase inspection is permitted; a warning against reliance on verbal promises and a recommendation that all promises be confirmed in writing; and a list of fourteen major systems of an automobile and the major defects that may occur in these systems.

17. The Rule provides that the Buyers Guide disclosures are incorporated by reference into the sales contract and govern in the event of an inconsistency between the Buyers Guide and the sales contract.

18. The Rule protects consumers from potential post-purchase problems in several ways. First, the Buyers Guide may prompt consumers to have a car inspected before purchase. Second, the Buyers Guide requires dealers to provide consumers with warranty information so that if consumers so wish, they can shop for a car with a warranty that protects them in the event that the car subsequently has mechanical problems. Third, the Buyers Guide warns consumers not to rely on verbal promises and to obtain assurances about a car from the dealer in writing.

Defendants' Sale and Offering for Sale of Used Cars to Consumers

19. From their five locations in Arkansas, Defendants sell or offer for sale used vehicles.

20. Since at least 2012, Defendants have failed to prepare, fill in as applicable, and prominently and conspicuously display a Buyers Guide on many or most used vehicles being offered for sale to consumers.

21. On November 26, 2012, the Federal Trade Commission inspected Defendants' Abernathy Motor Company's Jonesboro, Arkansas used car dealership.

22. On November 26, 2012, Defendants offered for sale to consumers used vehicles at Abernathy Motor Company's Jonesboro, Arkansas used car dealership.

23. On November 26, 2012, Defendants failed to display Buyers Guides on almost all of the used vehicles offered for sale at Abernathy Motor Company's Jonesboro, Arkansas used vehicle dealership.

24. On December 13, 2012, the Federal Trade Commission sent Defendant Abernathy Motor Company a letter informing it that almost all of the vehicles offered for sale at Defendants' business location failed to comply with the Used Car Rule's requirement of displaying a Buyers Guide.

25. Along with that letter, the Federal Trade Commission also sent Defendant Abernathy Motor Company a copy of the Buyers Guide and the FTC publication "Dealer's Guide to the Used Car Rule."

26. On May 15, 2013, the Federal Trade Commission inspected two of Defendants' used vehicle dealerships in Jonesboro, Arkansas.

27. On May 15, 2013, Defendants offered for sale at least 53 used vehicles at Abernathy Motor Company's Jonesboro, Arkansas used car dealership.

28. On May 15, 2013, Defendants failed to display a Buyers Guide on 51 used vehicles offered for sale at Abernathy Motor Company's Jonesboro, Arkansas used car dealership.

29. On May 15, 2013, Defendants offered for sale at least 25 used vehicles at Ab's Best Auto Buys AMC Inc. Affiliated's Jonesboro, Arkansas used car dealership.

30. On May 15, 2013, Defendants failed to display a Buyers Guide on 20 used vehicles offered for sale at Ab's Best Auto Buys AMC Inc. Affiliated's Jonesboro, Arkansas used car dealership.

VIOLATIONS OF THE USED CAR RULE

31. At all times material hereto, Defendants have been “dealers,” as that term is defined in the Used Car Rule, 16 C.F.R. § 455.1(d)(3), and have offered for sale and sold “vehicles” and “used vehicles” to “consumers,” as those terms are defined in the Used Car Rule, 16 C.F.R. §§ 455.1(d)(1), (2), and (4).

32. Section 455.2 of the Used Car Rule requires that, on a used vehicle offered for sale to a consumer, dealers prepare, fill in, and prominently and conspicuously display a Buyers Guide on the vehicle.

33. Pursuant to Section 110(b) of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2310(b), and Section 18(d)(3) of the FTC Act, 15 U.S.C. § 57a(d)(3), a violation of the Used Car Rule constitutes an unfair or deceptive act or practice in violation of Section 5(a)(1) of the FTC Act, 15 U.S.C. §45(a)(1).

COUNT I

34. At least since 2012, in numerous instances, Defendants failed to display a Buyers Guide on used vehicles offered for sale to consumers.

35. Defendants’ acts and practices, as described in paragraph 34, above, violated the Used Car Rule, 16 C.F.R. § 455.2, and therefore violated Section 5 of the FTC Act, 15 U.S.C. § 45(a).

MONETARY CIVIL PENALTIES AND INJUNCTION

36. Defendants violated the Used Car Rule, as described above, with actual knowledge or knowledge fairly implied on the basis of objective circumstances, as set forth in Section 5 (m)(1)(A) of the FTC Act, 15 U.S.C. § 45 (m)(1)(A).

37. Each instance in which Defendants have failed to comply with the Used Car Rule in one or more of the ways described above constitutes a separate violation of the Used Car Rule for the purpose of assessing monetary civil penalties. Plaintiff seeks monetary civil penalties for every violation of the Used Car Rule.

38. Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. § 45(m)(1)(A), and Section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461, as amended, authorizes this Court to award monetary civil penalties of not more than \$16,000 for each violation of the Used Car Rule.

39. This Court is authorized under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to grant injunctive and other relief to prevent and remedy violations of any provision of law enforced by the Commission.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Federal Trade Commission, pursuant to 15 U.S.C. §§ 45(a)(1), 45(m)(1)(A), 53(b), and 57b, and the Court's own equity powers, respectfully requests the Court:

A. Enter judgment against each Defendant and in favor of Plaintiff for each violation of the Used Car Rule alleged in this Complaint;

B. Award Plaintiff monetary civil penalties for each violation of the Used Car Rule alleged in this Complaint;

C. Enter a permanent injunction to prevent future violations of the Used Car Rule, 16 C.F.R Part 455, and Section 5 of the FTC Act, 15 U.S.C. § 45, by Defendants; and

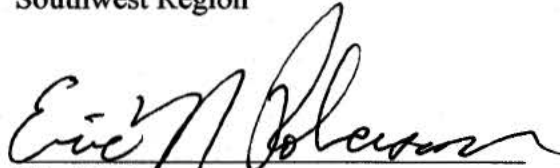
D. Award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may deem just and proper.

Dated: March 10, 2013
Dallas, Texas

Respectfully submitted,

JONATHAN E. NUECHTERLEIN
General Counsel

DAMA J. BROWN
Regional Director
Southwest Region



Eric N. Roberson
Attorney, Southwest Region
Texas Bar Number 00792803
Reid Tepfer
Texas Bar Number 2409444

Federal Trade Commission
1999 Bryan Street, Suite 2150
Dallas, Texas 75201
(214) 979-9362 (Mr. Roberson)
(214) 979-9395 (Mr. Tepfer)
(214) 979-9350 (Office)
(214) 953-3079 (Facsimile)

JS 44 (Rev. 12/12)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

Federal Trade Commission

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)
Eric N. Roberson, Reid Tepper,
Federal Trade Commission, Southwest Region
1999 Bryan Street, Ste. 2150, Dallas, Texas 75201 (214) 979-9362

DEFENDANTS

Abernathy Motor Co., Wesley Abernathy, and David Abernathy

County of Residence of First Listed Defendant Craighead, Arkansas
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)
Martin E. Lilly, Lilly Law Firm, P.A.
2400 E. Highland Drive, Suite 5000
Jonesboro, Arkansas 72403 (870) 935-7320

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input checked="" type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	CIVIL RIGHTS <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	PRISONER PETITIONS Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
 Federal Trade Commission Act, 15 U.S.C. § 45(a) and 57a, and the Magnuson-Moss Act, 15 U.S.C. § 2310(c)(1)
 Brief description of cause:
 Violation of the FTC Used Car Rule, 16 C.F.R. Part 455, promulgated per 15 U.S.C. § 45(a), 57a and 2310(c)(1).

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ _____ CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE _____ DOCKET NUMBER _____

DATE 03/10/2014 SIGNATURE OF ATTORNEY OF RECORD _____

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____