

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

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-63 BRW/BD

**STIPULATED ORDER FOR PERMANENT INJUNCTION
AND CIVIL PENALTY JUDGMENT**

Plaintiff, the Federal Trade Commission (“Commission”), filed its Complaint for Civil Penalties, Injunction and Other Relief (“Complaint”), for a permanent injunction, civil penalties, and other equitable relief, pursuant to Sections 13(b) and 19 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. §§ 53(b) and 57b. The Commission and Defendants stipulate to entry of this Stipulated Order for Permanent Injunction and Civil Penalty Judgment (“Order”) to resolve all matters in dispute in this action between them.

THEREFORE, IT IS ORDERED as follows:

FINDINGS

1. The Court has jurisdiction over this matter.
2. The Complaint charges that Defendants violated the Commission’s Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455, and Section 5 of the FTC Act, 15 U.S.C. § 45, while selling or offering for sale used vehicles to consumers.
3. Defendants neither admit nor deny any of the allegations in the Complaint, except as specifically stated in this Order. Only for purposes of this action, Defendants admit the facts necessary to establish jurisdiction.
4. Defendants waive any claim that they may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action through the date of this Order, and agree to bear their own costs and attorney fees.
5. Defendants and the Commission waive all rights to appeal or otherwise challenge or contest the validity of this Order.

DEFINITIONS

For purposes of this Order, the following definitions shall apply:

- A. “**Buyers Guide**” means the Buyers Guide as attached as “Attachment C.”
- B. “**Defendants**” means all of the Individual Defendants and the Corporate Defendant, individually, collectively, or in any combination.
 1. “**Corporate Defendant**” means Abernathy Motor Company, also doing business as Ab’s Best Buys AMC Inc. Affiliated, its successors and assigns.
 2. “**Individual Defendants**” means Wesley Abernathy and David Abernathy.

C. **“Used Car Rule”** means the Commission’s Used Motor Vehicle Trade Regulation Rule, 16 C.F.R. Part 455. Copies of the Used Car Rule and the FTC Publication “A Dealer’s Guide to the Used Car Rule” are attached hereto as Attachments “A” and “B,” respectively.

D. **“Used Vehicle”** means any vehicle driven more than the limited use necessary in moving or road testing a new vehicle prior to delivery to a consumer, but does not include any vehicle sold only for scrap or parts (title documents surrendered to the State and a salvage certificate issued).

ORDER

I. PROHIBITED BUSINESS PRACTICES

IT IS ORDERED that Defendants, Defendants’ officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the promoting or offering for sale any used vehicle, are permanently restrained and enjoined from:

A. Misrepresenting any material fact, expressly or by implication, including, but not limited to:

1. the mechanical condition of a used vehicle;
2. the terms of any warranty offered in connection with the sale of a used vehicle;
and
3. that a used vehicle is sold with a warranty when the vehicle is sold without any warranty.

B. Failing to disclose the material terms and conditions of any offer, including, but not limited to:

1. prior to sale, that a used vehicle is sold without any warranty, if no warranty is offered; and
2. prior to sale, the terms of any written warranty offered in connection with the sale of a used vehicle.

C. Before offering a used vehicle for sale to a consumer, failing to display a properly completed Buyers Guide, attached as Attachment “C,” prominently and conspicuously in any location on that used vehicle and in such a fashion that both sides are readily readable.

D. Failing to provide the buyer of a used vehicle with a properly completed Buyers Guide, attached as “Attachment C,” containing all the disclosures required by the Used Car Rule and reflecting the warranty coverage agreed upon.

E. Failing to include the following statement in each contract for the sale of a used vehicle to a consumer:

“The information on you see on the window form for this vehicle is part of this contract. Information on the Window Form overrides any contrary provisions in the contract of sale.”

F. For sales conducted in Spanish,

1. failing to provide in Spanish the buyer of a used vehicle with a properly completed Buyers Guide, as attached as “Attachment D,” containing all the disclosures required by the Used Car Rule and reflecting the warranty coverage agreed upon, and
2. failing to include in Spanish the following statement in each contract for the sale of a used vehicle to a consumer:

“La información que ve en el formulario de ventana para este vehículo es parte del contrato. Información en el formulario de ventana anula cualquier disposición contraria en el contrato de venta.”

II. MONETARY JUDGMENT FOR CIVIL PENALTY

IT IS FURTHER ORDERED that:

A. Judgment in the amount of Ninety Thousand Dollars (\$90,000) is entered in favor of the Commission against Individual Defendants and Corporate Defendant, jointly and severally, as a civil penalty.

B. Defendants are ordered to pay to the Commission Ninety Thousand Dollars (\$90,000) which, as Defendants stipulate, their undersigned counsel holds in escrow for no purpose other than payment to the Commission. Such payment must be made within 7 days of entry of this Order by electronic fund transfer in accordance with instructions to be provided by a representative of the Commission.

III. ADDITIONAL MONETARY PROVISIONS

IT IS FURTHER ORDERED that:

A. Defendants relinquish dominion and all legal and equitable right, title, and interest in all assets transferred pursuant to this Order and may not seek the return of any assets.

B. The facts alleged in the Complaint will be taken as true, without further proof, in any subsequent civil litigation by or on behalf of the Commission, including in a proceeding to enforce its rights to any payment or monetary judgment pursuant to this Order.

C. Defendants agree that the judgment represents a civil penalty owed to the government of

the United States, is not compensation for actual pecuniary loss, and, therefore, as to the Individual Defendants, it is not subject to discharge under the Bankruptcy Code pursuant to 11 U.S.C. § 523(a)(7).

D. Defendants acknowledge that their Taxpayer Identification Numbers (Social Security Numbers or Employer Identification Numbers), which Defendants previously submitted to the Commission, may be used for collecting and reporting on any delinquent amount arising out of this Order, in accordance with 31 U.S.C. § 7701.

IV. ORDER ACKNOWLEDGMENTS

IT IS FURTHER ORDERED that Defendants obtain acknowledgments of receipt of this Order:

A. Each Defendant, within 7 days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 10 years after entry of this Order, each Individual Defendant for any business that such Defendant, individually or collectively with any other Defendants, is the majority owner or controls directly or indirectly, and the Corporate Defendant, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees, agents, and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within 7 days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Defendant delivered a copy of this Order, that Defendant must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

V. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Defendants make timely submissions to the Commission:

A. One year after entry of this Order, each Defendant must submit a compliance report, sworn under penalty of perjury:

1. Each Defendant must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Defendant; (b) identify all of that Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Defendant (which each Individual Defendants must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Defendant is in compliance with each Section of this Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.
2. Additionally, each Individual Defendant must: (a) identify all telephone numbers and all physical, postal, email and Internet addresses, including all residences; (b)

identify all business activities, including any business for which such Defendant performs services whether as an employee or otherwise and any entity in which such Defendant has any ownership interest; and (c) describe in detail such Defendant's involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership.

B. For 10 years after entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Defendant must report any change in: (a) any designated point of contact; or (b) the structure of Corporate Defendant or any entity that Defendant has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.
2. Additionally, each Individual Defendant must report any change in: (a) name, including aliases or fictitious name, or residence address; or (b) title or role in any business activity, including any business for which such Defendant performs services whether as an employee or otherwise and any entity in which such Defendant has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

C. Each Defendant must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Defendant within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: “I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____” and supplying the date, signatory’s full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: FTC v. Abernathy Motor Company, FTC Matter No. X140020.

VI. RECORDKEEPING

IT IS FURTHER ORDERED that Defendants must create certain records for 10 years after entry of the Order, and retain each such record for 5 years. Specifically, Corporate Defendant and each Individual Defendant for any business that such Defendant, individually or collectively with any other Defendants, is a majority owner or controls directly or indirectly, must create and retain the following records:

- A. Accounting records showing the revenues from all goods or services sold;
- B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person’s: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

- C. Records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;
- D. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission; and
- E. Copies of the contract of sale of each used vehicle sold to a consumer.

VII. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Defendants' compliance with this Order, and any failure to transfer any assets as required by this Order:

- A. Within 14 days of receipt of a written request from a representative of the Commission, each Defendant must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.
- B. For matters concerning this Order, the Commission is authorized to communicate directly with each Defendant. Defendants must permit representatives of the Commission to interview any employee or other person affiliated with any Defendant who has agreed to such an interview. The person interviewed may have counsel present.
- C. The Commission may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities, to Defendants or any individual or entity affiliated with Defendants, without the necessity of identification or prior

notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Defendants, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. §1681b(a)(1).

VIII. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED this _____ day of _____, 2015.

BILLY ROY WILSON
UNITED STATES DISTRICT JUDGE

SO STIPULATED AND AGREED:

FOR PLAINTIFF:

FEDERAL TRADE COMMISSION

 Date: June 4, 2015

Eric N. Roberson,
Texas Bar Number 00792803
Attorney for Plaintiff
Federal Trade Commission
1999 Bryan Street, Suite 2150
Dallas, Texas 75201
(214) 979-9362 (Mr. Roberson)
(214) 979-9350 (Office)
(214) 953-3079 (Facsimile)

FOR DEFENDANTS ABERNATHY MOTOR COMPANY AND WESLEY ABERNATHY:



Date: 3/30, 2015

Dustin McDaniel
Arkansas Bar No.
Bart Calhoun
Arkansas Bar No. 2011221
McDaniel, Richardson, & Calhoun
1020 W. Fourth St., Suite 410
Little Rock, AR 72201
Phone: (501) 235-8336

Martin E. Lilly
Arkansas Bar No. 90098
Lilly Law Firm
P.O. Box 8035
Jonesboro, AR 72403-8035
Phone: (870) 935-7320
Fax: (870) 935-3762

Counsel for Defendants Abernathy Motor Company and Wesley Abernathy

FOR DEFENDANT DAVID ABERNATHY:




Donald L. Parker II
Arkansas Bar No. 89120
Parker, Hurst, & Burnett, PLC
PO Box 1733
Jonesboro, AR 72403-1733
(870) 268-7600

Date: March 31, 2015

Counsel for Defendant David Abernathy

DEFENDANTS ABERNATHY MOTOR COMPANY AND WESLEY ABERNATHY:


Wesley Abernathy, Individually, and as
an Officer of Abernathy Motor Company

Date: 3/30, 2015

DEFENDANT DAVID ABERNATHY:



David Abernathy

Date: 3-31-15, 2015