

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

)	
CONSUMERS FOR AUTO RELIABILITY)	
AND SAFETY, et al.,)	
)	
Plaintiffs,)	
)	
v.)	No. 1:17-cv-00540-KBJ
)	
FEDERAL TRADE COMMISSION,)	
)	
Defendant.)	
)	

**OPPOSITION OF THE FEDERAL TRADE COMMISSION
TO PLAINTIFFS’ MOTION FOR LEAVE TO FILE NEW MATERIALS**

The Federal Trade Commission respectfully opposes plaintiffs’ motion (ECF No. 26) seeking leave to file two new documents in opposition to the FTC’s pending motion to dismiss (ECF No. 17). As we explain in our motion, this case should be dismissed on four independent grounds. Plaintiffs’ motion should be denied as futile because their new documents would have no material effect on any of the bases for dismissal.

Plaintiffs’ new documents only pertain to one of the four grounds for dismissal—Article III standing—and even on that issue the documents fail to show that (1) plaintiffs will suffer the specific injuries alleged in their Complaint; (2) the FTC consent decrees at issue have caused that risk; or (3) a favorable ruling by this Court would redress the problem. As a result, plaintiffs’ new documents cannot establish the “irreducible constitutional minimum” for standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), or cure any deficiencies from their earlier briefing on that subject. The Court therefore should not accept them for filing.

BACKGROUND

Plaintiffs are nonprofit organizations that challenge FTC administrative consent decrees settling adjudications to which they were not a party. The consent decrees bar six used car dealers from claiming that their vehicles are safe, have been repaired for safety issues, or have been subject to a rigorous inspection unless either (1) the cars are free of unrepaired recalls, or (2) the companies clearly disclose that some of their cars have unrepaired recalls and explain how consumers can determine whether a vehicle is subject to an unrepaired recall. Plaintiffs allege that these consent decrees are too lenient and urge the Court to invalidate them.

The FTC seeks dismissal on four separate grounds: (1) the circuit courts have exclusive jurisdiction over challenges to FTC administrative cease-and-desist orders, 15 U.S.C. § 45(c)-(d); (2) Congress has barred nonparties (such as plaintiffs here) from challenging those orders, *id.* § 45(c);¹ (3) plaintiffs lack Article III standing; and (4) the FTC's approval of consent decrees is committed to agency discretion by law.

Plaintiffs now seek leave to file two "new" documents that they contend support their claim of Article III standing.² ECF No. 26 at 1. The argument is that the documents show that the consent decrees have "significantly increased [the] risk of injury to Plaintiffs' members"

¹ In addition to filing their Complaint in this Court, plaintiffs filed a petition for review in the D.C. Circuit. In 2017, the D.C. Circuit granted the FTC's motion to dismiss the petition for lack of jurisdiction, concluding that "Petitioners are not subject to the requirements of the consent orders at issue and therefore may not challenge those orders in this court." *See Consumers for Auto Reliability & Safety v. FTC*, 2017 U.S. App. LEXIS 12921, at *1 (D.C. Cir. Jul. 14, 2017).

² In truth, these are not recent documents. Exhibit A was published in October 2019 (ECF No. 26-1), and Exhibit B in April 2019 (ECF No. 26-2). Plaintiffs do not explain why they are bringing these materials to the Court's attention only now.

because car dealers have decided to sell “many thousands of hazardous used vehicles” that they otherwise would have repaired “prior to the challenged federal actions.” *Id.* at 4.³

ARGUMENT

Plaintiffs’ new documents are futile to their cause both because this case should be dismissed on any of the three grounds other than constitutional standing and because the documents do not support standing. “To have standing, a plaintiff must [1] have suffered or be about to suffer a concrete injury [2] fairly traceable to the policies he challenges and [3] redressable by the relief he seeks.” *Arpaio v. Obama*, 797 F.3d 11, 14 (D.C. Cir. 2015). We explained in our motion to dismiss why plaintiffs fail to meet any of the elements of standing. Plaintiffs’ new documents, if anything, only provide further confirmation that they lack standing.

As shown below, plaintiffs’ documents merely restate the undisputed point that certain dealers are selling used cars subject to open recalls. Plaintiffs’ documents in no way suggest that the FTC consent decrees at issue *caused* that problem, or vacating the decrees would *remedy* it, both of which are required for standing. On the contrary, both of plaintiffs’ documents explicitly identify other causes, including: (1) the fact that federal auto safety laws, which are not administered by the FTC, allow dealers to sell used cars with unrepaired recalls; and (2) the lack of available repairs or replacement parts for many automotive recalls. Because plaintiffs’ own documents show that their stated injuries stem from causes unrelated to the FTC consent decrees, a court order vacating those decrees will not redress any of plaintiffs’ injuries.

³ Plaintiffs also suggest that the new documents prove that the consent decrees amount to an “arbitrary and capricious policy.” ECF No. 26 at 2. But arbitrary-and-capricious review is based on the “evidence before the agency” at the time of its decision, not evidence generated years after the fact. *See, e.g., U.S. Sugar Corp. v. EPA*, 830 F.3d 579, 606 (D.C. Cir. 2016) (citation and quotation marks omitted).

Rather, invalidating the consent decrees would only *worsen* the problem. Against a legislative backdrop where dealers are free to sell used cars with open recalls, the FTC consent decrees prohibit dealers from making safety claims without prominently disclosing that their vehicles may be subject to recall. The decrees thus require the dealers to provide consumers with vital information allowing them to protect themselves from recall-related safety issues.

I. PLAINTIFFS’ AUTONATION STUDY FAILS TO DEMONSTRATE STANDING

Exhibit A (ECF No. 26-1) is a study conducted by plaintiffs finding that 28 AutoNation franchises—which are part of a national chain not subject to an FTC consent decree—offered used cars for sale online even though they had unrepaired recalls.⁴ *Id.* at 6. Although plaintiffs’ study briefly references the FTC consent decrees (*id.* at 19), it does not claim that those decrees had *anything* to do with AutoNation’s decision to sell used vehicles with open recalls. Far from it, the study points to other causes, including:

- The absence of a “federal law that specifically prohibits car dealers from selling used vehicles with an unrepaired safety recall.” *Id.* at 16.
- Pennsylvania and Tennessee statutes expressly allowing dealers to make such sales. *Id.* at 17.
- A dearth of “available” repairs for “[m]any used vehicles.” *Id.* at 12.

Manufacturers may take “weeks or months” to develop a suitable repair, produce and distribute the parts, and train technicians on how to perform the repair. *Id.*

The AutoNation study therefore fails to support plaintiffs’ claim that the company made a “fundamental change in practice ... *in response to the consent decrees challenged in this case.*”

⁴ Although plaintiffs describe Exhibit A as an objective “study or survey” (ECF No. 26 at 1-2), it is an advocacy document *prepared by plaintiffs themselves* that explicitly urges this Court to decide the current litigation in their favor. *See* ECF No. 26-1 at 19.

ECF No. 26 at 3 (emphasis added). That is pure fiction: nothing in the study even implicitly draws this connection. Instead, plaintiffs' study shows that AutoNation is selling used cars with open recalls for reasons *unrelated* to the FTC, demonstrating that plaintiffs' stated injuries are not "fairly traceable" to the consent decrees at issue in this case. *Arpaio*, 797 F.3d at 14. *See also* FTC Reply in Support of Motion to Dismiss, ECF No. 20, at 15 (describing other evidence showing that AutoNation changed its practices for reasons independent of the FTC).

Indeed, besides failing to support causation, plaintiffs' AutoNation study fails even to support the Complaint's theory of injury-in-fact. Plaintiffs allege that the FTC consent decrees "exposed [them] to the increased risk of injury" from unsafe cars because the orders do not require "dealers of 'certified' used cars" who clearly disclose information about recalls to fix all unrepaired recalls. ECF No. 7 (Am. Compl.) ¶¶ 5-14; *see id.* ¶¶ 1-2, 30, 35, 37-39, 42-43, 51, 53-55, 58, 66-67. According to plaintiffs, "certified" vehicles are "an indication that a qualified mechanic has vouched for the car and that a buyer can expect a vehicle that is almost as good as new." *Id.* ¶ 63. Yet Plaintiffs' data show that roughly 97 percent of "certified" used cars that the selected AutoNation franchises offered for sale did *not* have open recalls. ECF No. 26-1 at 12 (1 out of every 30 certified vehicles had a recall).

Accordingly, the study provides no support for plaintiffs' claim that the FTC consent decrees caused AutoNation to "flood[] the market" with "approximately 26,333 *additional*

unrepaired used cars ... every year.” *See* ECF No. 26 at 3 (emphasis in original).⁵ Plaintiffs’ AutoNation study is devoid of evidence showing that FTC consent orders have subjected plaintiffs to a “certainly impending” future injury, *Pub. Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1293 (D.C. Cir. 2007) (cleaned up), or that invalidating the consent decrees would in any way fix the problem.

II. THE CONSUMER REPORTS ARTICLE FAILS TO DEMONSTRATE STANDING

Plaintiffs’ Exhibit B (ECF No. 26-2) is even less helpful to their cause. It is a Consumer Reports article finding that used car dealers are selling vehicles with unfixed recalls. But the article does not mention the FTC consent decrees *at all*, much less blame them for this industry practice. Nor does the article explain whether any of the vehicles sold with unfixed recalls were advertised as “certified,” such that they could establish the injury alleged in the Complaint.

Plaintiffs thus cannot properly tout this article as evidence that “*in response to [the] FTC’s consent decrees ... many thousands of hazardous used vehicles are now being offered for sale*” that otherwise would have been fixed. ECF No. 26 at 4 (emphasis added). The article shows nothing of the sort. Instead, the Consumer Reports article, like plaintiffs’ AutoNation study, identifies many reasons— none involving the FTC—why used car dealers are selling vehicles with open recalls, including: (1) “no federal law requires [dealers] to check for open recalls or fix safety defects before they sell a vehicle” (ECF No. 26-2 at 4); (2) “replacement

⁵ Plaintiffs calculate this figure by taking their study’s finding that 1 of 9 used vehicles offered for sale by the selected AutoNation franchises had an unrepaired recall, and extrapolating that finding to the 237,000 used cars that all AutoNation dealerships sell each year. *See* ECF No. 26 at 3. However, plaintiffs’ study actually found that *under 5%* of the AutoNation cars with unfixed recalls were the “certified” vehicles that are the subject of plaintiffs’ Complaint. ECF No. 26-1 at 6 (explaining that of the 285 AutoNation vehicles with unrepaired recalls, only 14 were “certified”). Moreover, plaintiffs’ study fails to explain how they chose the sample population of 28 AutoNation franchises or explain why its findings are fairly generalizable to the company’s more than 360 franchises nationwide. *See id.* at 10, 22.

parts are not always available” (*id.* at 5); and (3) certain dealers find it “difficult[]” or “impractical to get all recalls repaired” (*id.* at 9).

CONCLUSION

For all the foregoing reasons, the Court should deny plaintiffs’ motion for leave to file new materials in opposition to the motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 23, 2020, the foregoing Opposition to Plaintiffs' Motion for Leave to File New Materials was filed electronically with the Clerk, United States District Court for the District of Columbia. Counsel for plaintiffs will be served by the CM/ECF system.

/s/Bradley Dax Grossman

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