



February 29, 2016

Via Web

Office of the Secretary
Federal Trade Commission
Suite CC-5610 (Annex D)
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Jim Koons Management Company – Consent Agreement
File No. 152-3104

Dear Secretary:

The National Automobile Dealers Association (“NADA”)¹ submits the following comments in response to the Notice entitled “Jim Koons Management Company: Analysis of Proposed Consent Order to Aid Public Comment” that the Federal Trade Commission (“FTC” or “Commission”) published in the *Federal Register* in the above captioned matter.²

In the Notice, the FTC states that it has entered into a proposed consent order with Jim Koons Management Company (“Respondent”) to resolve the Commission’s allegation that Respondent engaged in deceptive advertising under section 5 of the FTC Act (“Section 5”) by representing that the certified used vehicles it offered for sale had passed a “rigorous and extensive quality inspection,” but not disclosing that some of those vehicles were subject to an open safety recall. The FTC further states the actions that Respondent has agreed to undertake as part of the consent order. Among them is the inclusion of a disclosure in used vehicle advertisements that make a safety inspection claim stating that Respondent’s used vehicles may be subject to unrepaired recalls for safety issues and how consumers can determine a used vehicle’s recall status, as well as certain required point-of-sale disclosures.

The purpose of these comments is not to address the merits of the FTC’s allegations against Respondent or the full range of its remedial measures, but rather to state for the record NADA’s concerns with the process the Commission has employed to address this issue. (Indeed, with regard to the proposed consent order’s prospective disclosure requirements mentioned above, NADA will disseminate compliance guidance to its members concerning these requirements and encourage their adoption.)

¹ NADA represents over 16,000 franchised dealers in all 50 states who (i) sell new and used cars and trucks; (ii) extend vehicle financing and leases to consumers that routinely are assigned to third-party finance sources; and (iii) engage in service, repair, and parts sales. Our members collectively employ over 1 million people nationwide. Most of our members are small businesses as defined by the Small Business Administration.

² 81 Fed. Reg. 5,751 – 5,752 (Feb. 3, 2016).

In order to understand the nature of NADA’s process concerns, it is necessary to briefly recount (i) the mission of the FTC, (ii) the general tools it has available to further its mission, (iii) the instant practice that it wishes to address, and (iv) the manner in which it has chosen to address that practice.

The FTC seeks to “prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.”³ Stated differently, the FTC’s ultimate goal is to protect consumers and to employ sensible measures to produce that outcome. Thus, the measures that the Commission employs – including the use of enforcement actions – is a means to an end and not an end unto itself.

The broad array of measures that the FTC may utilize to protect consumers – and the fact that many of them do not involve the initiation of an enforcement action – clearly is designed to provide the Commission with the ability to pursue its mission in a proactive, non-punitive manner. Some of these measures include (i) conducting workshops and studies and producing reports; (ii) issuing rules, guides, advisory opinions, and enforcement policy statements; and (iii) issuing warning letters to businesses that may be engaging in actions that constitute a violation of federal law. While these measures can be and are applied to many of the laws and regulations that the Commission enforces, they are particularly apt when seeking to identify and proscribe unlawful conduct that it deems to be prohibited under the broad and vaguely defined prohibitions against unfairness and deception set forth in Section 5. And while each of these measures differs and is suitable in different sets of circumstances, they all serve the critically important purpose of alerting businesses to market conduct that may run afoul of federal law and thereby provide a basis for future enforcement action. In addition, because many of these measures are the product of public input and are not confined to the fact patterns of a limited number of market participants, they also benefit from a better developed factual record.

In the instant case, the FTC wishes to address the manner in which automobile manufacturers and dealers advertise certain used vehicles for sale, particularly in light of the National Highway Traffic Safety Administration’s (“NHTSA’s”) recent creation of a VIN lookup feature to help determine a vehicle’s safety recall status.⁴ More specifically, the FTC has focused on (i) used vehicle advertisements (ii) that contain statements indicating that the advertised vehicles are subject to multi-point or quality assurance inspections, (iii) in which some of the advertised vehicles are subject to an open safety recall, and (iv) the advertisements do not contain a statement to that effect. This is the FTC’s first examination of this specific area since the NHTSA lookup feature was created. Consequently, its examination of this conduct comes at the beginning – and not the end – of its development of a factual record on this topic and therefore is necessarily confined to the information acquired within the four corners of its investigations.

Against this backdrop, it is disappointing that the Commission failed to employ at least some of the other tools at its disposal that would have allowed it to develop a better understanding of this issue while providing notice to market participants that their conduct may

³ See <https://www.ftc.gov/about-ftc>.

⁴ NHTSA’s VIN lookup database, which was created in August 2014, is available at <https://vinrcl.safercar.gov/vin/>.

violate Section 5 and subject them to enforcement action.⁵ Indeed, such a measured approach has been pursued by the Commission on many occasions in the past.

A recent example of a more measured approach is the manner in which the FTC addressed the topic of “drip pricing.”⁶ On this issue, the FTC sought to address a longstanding practice in multiple industries that it believed constituted a deceptive practice under Section 5. It proceeded as follows: first, the FTC Bureau of Economics convened a full-day workshop to examine drip pricing and many of the issues associated with it;⁷ second, the Bureau of Economics issued a report on drip pricing;⁸ and third, at the same time, the FTC Bureau of Consumer Protection issued warning letters to 22 hotel operators it had investigated whose websites may have involved drip pricing in violation of Section 5.⁹ The warning letters provided a detailed description of the practice of drip pricing and then stated the following:

These practices may violate the law by misrepresenting the price consumers can expect to pay for their hotel rooms. We believe that online hotel reservation sites should include in the quoted total price any unavoidable and mandatory fees, such as resort fees, that consumers will be charged to stay at the hotel. While a hotel reservation site may breakdown the components of the reservation estimate (e.g., room rate, estimated taxes, and any mandatory, unavoidable fees), the most prominent figure for consumers should be the total inclusive estimate. We reviewed your website at _____ and found that in at least some instances mandatory resort fees are not included in the reservation rate quoted to consumers. We strongly encourage you to review your company’s website to ensure you are not misrepresenting the total price consumers can expect to pay when making a reservation to stay in your hotel. Please be advised that the FTC may take action to enforce and seek redress for any violations of the FTC Act as the public interest may require.¹⁰

⁵ To be sure, the Commission may need to take enforcement action without engaging in these important process steps in certain situations. However, in this instance, it is difficult to envision how the Commission’s mission would have in any way been compromised by first providing notice of its compliance expectations to market participants. This particularly applies here where a new feature had just been introduced into the marketplace.

⁶ The FTC describes “drip pricing” as “a pricing technique in which firms advertise only part of a product’s price and reveal other charges later as the customer goes through the buying process.” See <https://www.ftc.gov/news-events/events-calendar/2012/05/economics-drip-pricing>.

⁷ The FTC described the purpose of the workshop as follows: “Economists and marketing academics will be brought together to examine the theoretical motivation for drip pricing and its impact on consumers, empirical studies, and policy issues pertaining to drip pricing. The sessions will address the following questions: Why do firms engage in drip pricing? How does drip pricing affect consumer search? Where does drip pricing occur? When is drip pricing harmful? Are there efficiency justifications for the practice in some situations? Can competition prevent firms from harming consumers through drip pricing? Can consumer experience or firm reputation limit harm from drip pricing? What types of policies could lead to improved consumer decision making and under what circumstances should such policies be applied?” Id.

⁸ The Bureau of Economics Report, entitled *Economics at the FTC: Drug and PBM Mergers and Drip Pricing* (Dec. 2012), is available at https://www.ftc.gov/sites/default/files/documents/reports/economics-ftc-drug-and-pbm-mergers-and-drip-pricing/shelanskietal_rio2012.pdf.

⁹ The model warning letter used by the Bureau of Consumer Protection is available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-warns-hotel-operators-price-quotes-exclude-resort-fees-other-mandatory-surcharges-may-be/121128hoteloperatorsletter.pdf>.

¹⁰ Id.

The FTC thus approached the topic of drip pricing in a manner that (i) sought at least some form of public input, (ii) studied and reported on the matter, and (iii) defined for and warned market participants of the precise conduct that could result in enforcement action *before* holding them accountable for it.¹¹

Contrarily, the FTC has approached the types of advertisements at issue in the instant case in a manner that does not appear to have benefitted from *any* of these process steps. The Commission initiated investigations and announced proposed consent orders against three market participants (with more actions pending) apparently without (i) engaging in any form of public analysis of how certain used vehicle advertisements relate to open safety recalls, (ii) publicly defining its concerns and compliance expectations in this area, or (iii) issuing warnings to market participants about the possible consequences of continuing this longstanding conduct. Indeed, it is our understanding that FTC staff never sought information from Respondent during the investigation. Rather, the first time Respondent was contacted by the Commission was when it was served by Commission staff with a proposed complaint and consent order. Obtaining information about the company's policies and practices with regard to repairing safety recalls or providing notice to consumers might have been useful before concluding that a complaint and order were necessary and appropriate.

This raises questions as to why the Commission would opt to announce its compliance expectations in proposed consent orders rather than employing other routine, non-punitive measures that accomplish the same purpose.¹² Pursuing the latter course of action would have allowed the Commission to fulfill its consumer protection mission without unnecessarily penalizing unsuspecting market participants.

On a prospective basis, NADA encourages the Commission to work with it and others to gather information on new areas it is examining and – as it has done on numerous occasions in the past – to disseminate compliance guidance to the marketplace in a manner that allows market participants to respond to its compliance expectations.

¹¹ NADA recognizes that the Commission's approach to addressing drip pricing will not be feasible in all circumstances. However, the Commission can still engage in important outreach to educate itself and market participants on issues of concern under Section 5. One such example is the FTC's issuance of its *Statement of Policy Regarding Communications in Connection with the Collection of Decedents' Debts*. 76 Fed. Reg. 44,915 – 44,924 (Jul. 27, 2011). The policy statement provides guidance on methods debt collectors can appropriately use to collect debts incurred by deceased persons consistent with Section 5 and the Fair Debt Collections Practices Act. The process began with outreach by staff to solicit views from stakeholders, including the collections industry and consumer advocacy groups, followed by publication of a request for comments in the *Federal Register*. 75 Fed. Reg. 62,389 – 62,395 (Oct. 8, 2010).

¹² And ample opportunity existed for Commission staff to inform the market of its compliance expectations. NADA has a long and productive history of working with Commission staff to disseminate compliance guidance to its members on an array of consumer protection issues, including advertising compliance. Consequently, when NADA learned that the Commission was conducting investigations into this issue in the early summer of 2015, it reached out to Commission staff to learn of its compliance expectations so it could convey them to its members. Uncharacteristically, Commission staff would not meaningfully engage NADA in this process, nor would it issue its own guidance on the topic. This is unfortunate for several reasons, not the least of which is that it delayed the dissemination of compliance guidance on a matter involving public safety.

We appreciate the opportunity to comment on this matter. Please contact me if we can provide further information that would be useful to the Commission.

Sincerely,

Paul D. Metrey
Vice President, Regulatory Affairs