

**Consumers for Auto Reliability and Safety  
Advocates for Highway and Auto Safety  
California Public Interest Research Group (CALPIRG)  
Center for Auto Safety  
Connecticut Public Interest Research Group (CONNPIRG)  
Consumer Action  
Consumer Attorneys of California  
Consumer Federation of America  
Consumer Federation of California  
Consumers Union  
Courage Campaign  
Housing and Economic Rights Advocates (HERA)  
Maryland Consumer Rights Coalition  
Massachusetts Public Interest Research Group (MASSPIRG)  
National Association of Consumer Advocates  
National Consumer Law Center (on behalf of its low-income clients)  
National Consumers League  
Tennessee Citizen Action  
Trauma Foundation  
The Safety Institute  
U.S. Public Interest Research Group (U.S.PIRG)  
Virginia Citizens Consumer Council**

January 17, 2017

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

**RE: In the Matter of CarMax, Inc., File No. 142 3202 – Consent Agreement  
In the Matter of Asbury Automotive Group, Inc. File No. 152 3103 – Consent Agreement  
In the Matter of West-Herr Automotive Group, Inc., File No. 152 3105 – Consent Agreement**

Thank you for the opportunity to comment. We submit the following comments in response to the Federal Trade Commission's (FTC) proposed settlements with CarMax, Asbury Automotive Group, and West-Herr Automotive Group.

As the FTC states, "Unrepaired auto recalls pose a serious threat to public safety ... defects that have been the subject of recalls have led to severe injuries and even death for many consumers."<sup>1</sup> We agree with the tragic truth of this statement.

Yet, despite the FTC's acknowledgment of the imminent hazards that can be posed by unrepaired recalled vehicles, the proposed agreements would allow the respondent car dealers to advertise unsafe, unrepaired, defective recalled used cars with serious safety defects that have killed and injured people as **"safe," "repaired for safety issues,"** or **"subject to a rigorous inspection,"** *without* repairing the safety defects. They could do so if the advertising merely includes a contradictory, confusing, inadequate, and misleading disclaimer that the dealer sells cars that *"MAY* be subject to recalls for safety issues that have not been repaired" and the dealer subsequently provides other information that is also inadequate and much too late in the sales process to compensate for the initial false impression.

Instead of approving the proposed consent agreements, the FTC should withdraw and modify them so that they prohibit the dealers from engaging in false advertising regarding the safety of unrepaired recalled cars. As Chairwoman Ramirez wrote in the FTC's formal opinion issuing an order against the personal care product manufacturer California Naturel, in which the Commission rejected the advertising of sunscreen as "all natural," with a subsequent disclaimer about artificial ingredients, **"consumers should not have to search for and dig out information that contradicts what an advertisement expressly and prominently conveys."**<sup>2</sup> We agree.

Consumers who purchase used cars need, and deserve, to have at least the same level of protection against false advertising as consumers who purchase sunscreen. This is particularly true involving unsafe motor vehicles, which can place not only the purchasers, but also their passengers and others who share the roads, at risk of serious injury or death.

However, we are also concerned that the proposed consent orders with CarMax, Asbury, and West-Herr are flawed at a more fundamental level. As proposed, the complaints make the mistake of focusing on whether the respondents "clearly disclose the existence of unrepaired safety recalls," and completely miss the core issue that advertising unsafe, unrepaired, defective recalled used cars as "safe," "repaired for safety issues," or "subject to a rigorous inspection," is false, unfair, and misleading under Section 5 of the FTC Act.

The kind of contradictory doublespeak that would be allowed by the proposed agreements is dangerous and inherently false and misleading. Such advertising has been found repeatedly by courts to be unfair, deceptive, and/or fraudulent. See, for example, *Grabinski v. Blue Springs Ford Sales, Inc.*, 136 F.3d 565 (8th Cir. 1998) and *Grabinski v. Blue*

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1 Fed. Trade Comm'n, Analysis of Proposed Consent Order to Aid Public Comment, 81 Fed. Reg. 93931, 93933 (Dec. 22, 2016).

2 California Naturel, Docket No. 9379, 2016-2 Trade Cases ¶ 79848 (Fed. Trade Comm'n Dec. 5, 2016), Opinion of the Commission, by Chairwoman Edith Ramirez.

*Springs Ford Sales, Inc.*, 203 F.3d 1024 (8th Cir. 2000); *cert. denied*, 531 U.S. 825. In that case, the dealer verbally represented to the consumer that the car—which was purchased for approximately \$5,500, had never been wrecked, and had only one prior owner—was in “A-1 condition” and “ran perfectly.” Then the dealer’s employees tricked the consumer into signing a written disclaimer that said the vehicle was a salvage vehicle and was not safe for operation on the road. When the consumer questioned the dealership employees, they indicated that the disclaimer was obligatory and required by the state, and emphasized that the car was safe. In fact, the vehicle actually was a previously salvaged vehicle, was very unsafe, had four previous owners, and the engine died nine days after purchase. In part *because* of the disclaimer, the district judge and the United States Court of Appeals for the Eighth Circuit upheld the jury’s fraud judgment of over \$200,000 against the dealer, ultimately holding, in the second appellate decision, that “the defendants’ conduct was egregious and ... demonstrated a clear and disturbing disregard for Ms. Grabinski’s safety and her economic interests.”

According to common usage, as evidenced by the Merriam-Webster dictionary, the term “safe” means: “free from harm or risk ... secure from threat of danger, harm, or loss ... affording safety or security from danger, risk, or difficulty.” Advertising that cars are “**safe**,” “**repaired for safety issues**,” or “**subject to a rigorous inspection**,” clearly and prominently conveys, on its face, that the *entire* car is safe. However, vehicles that have unrepaired safety defects that are subject to a safety recall are NOT “safe.” They have NOT been “repaired for safety.” Quite the opposite. On those vehicles, the dealer has failed to repair the safety defect(s), which may be lethal. The vehicles also are NOT qualified to pass a “rigorous inspection.” Any claim they are “safe,” “repaired for safety,” or “subject to a rigorous inspection,” is facially and demonstrably false. Such obviously false claims would be laughable, if not for the serious consequences for the motoring public.

As the FTC opined *In the Matter of California Naturel, Inc.*: “Section 5 of the FTC Act prohibits ‘unfair or deceptive acts or practices in or affecting commerce.’ 15 U.S.C. § 45(a)...The deception standard is the same...[as that referenced in] POM Wonderful LLC, 2013 WL 268926, at \*18.n.5 (F.T.C. Jan. 16, 2013), *aff’d sub nom. POM Wonderful, LLC v. FTC*, 777 F.3d 478 (D.C. Cir. 2015); see also *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992). ‘An advertisement is deceptive if it contains a representation or omission of fact that is likely to mislead a consumer acting reasonably under the circumstances, and that representation or omission is material to a consumer’s purchasing decision.’ POM Wonderful, 2013 WL 268926, at \*18; FTC Policy Statement on Deception, 103 F.T.C. 174, 175 (1984) (‘Deception Statement’), appended to Cliffdale Assocs., Inc., 103 F.T.C. 110 (1984)...

A claim may be either express or implied; express claims are those that directly state the representation at issue. *Kraft, Inc. v. FTC*, 114 F.T.C. 40, 120 (1991). ‘In determining what claims may reasonably be attributed to an advertisement, the Commission examines the entire advertisement and assesses the overall “net impression” it conveys.’ POM Wonderful, 2013 WL 268926, at \*19 (citing Deception Statement, 103 F.T.C. at 178). Extrinsic evidence is unnecessary to establish the impression that consumers would take away from an ad if the claim is reasonably clear from the face of the advertisement.” *Id.*, at \*20....”<sup>3</sup>

The net impression conveyed by representations that vehicles are “safe,” “repaired for safety,” or passed a “rigorous inspection” or similar claims is clear; namely, that the cars are

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<sup>3</sup> *Id.* at 2-3.

actually safe to drive, that all of the safety defects have been repaired, and the cars are currently free from any safety defects. This plainly conveys to reasonable consumers that the vehicle is safe to drive. Subsequent disclaimers do “not excuse deception that has already occurred. See, e.g., *Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (6th Cir. 1965).”<sup>4</sup>

Indeed, the Commission can “expect consumers to rely on express statements”<sup>5</sup> such as “safe” and “repaired for safety” and similar representations at issue here, “and to interpret such statements as meaning what they say. See *FTC v. Skybiz.com, Inc.*, 2001 WL 1673645, at \*9 (N.D. Okla. 2001) (reasonable to expect that consumers could rely on express claims); *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 528 (S.D.N.Y. 2000) (“Consumer reliance on express claims is presumptively reasonable”)...”<sup>6</sup>

“The central question is whether the claim is likely to mislead; complaint counsel need not prove actual deception. See, e.g., *Jerk, LLC*, 2015 WL 1518891, at \*10 (F.T.C. Mar. 13, 2015). Moreover, ‘[t]he deception need not be made with intent to deceive; it is enough that the representations or practices were likely to mislead consumers acting reasonably.’ *FTC v. Verity Int’l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006)...Accordingly, ‘[a]n advertiser’s good faith does not immunize it from responsibility for its misrepresentations...’ *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 n.5 (D.C. Cir. 1977).”<sup>7</sup>

Under no circumstances does the First Amendment require the FTC to tolerate misleading or deceptive commercial speech. Regarding prior proposed consent orders, FTC staff raised the issue of whether the holding in *Pearson v. Shalala*, 164 F.3d 650 (D.C. Cir. 1999) might limit the FTC’s authority to prohibit the false advertising regarding the safety of unrepaired recalled cars. This is preposterous. Supreme Court precedent clearly recognizes the FTC’s the authority to ban inherently misleading advertising. See *In re R.M. J.*, 455 U.S. 191, 203 (1982) (“[m]isleading advertising may be prohibited entirely.”) Advertising a car as “safe,” “repaired for safety issues,” or “subject to a rigorous inspection,” when the car is subject to an unrepaired safety recall is inherently misleading advertising. The misleading nature of this practice cannot be cured by a qualified disclosure that there “may” be an unrepaired safety recall covering the car—if noticed, this may cause consumers to actually discount the risks posed by the safety recall.

Omnipresent concerns typically found in other misleading advertising—such as whether consumers fully understand the implications of related, written disclosures—are magnified in this case because the consequences extend far beyond the consumer making the purchasing decision, given the fact that motor vehicle defects often place others at risk. It would be a mistake to over-rely on the efficacy of written disclosures. Issues involving literacy and English language proficiency are among the reasons. The broader public safety concerns should require the FTC to consider the fact that any mandated, written disclosures, particularly those with contrary information, may not be fully understood by a significant portion of consumers, potentially putting them as well as the broader public in jeopardy.

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4 Id. at 4.

5 Id. At 6.

6 Id. at 7.

7 Id.

Further, even if the buyer fully comprehends that there is an unrepaired safety recall on the car, a large body of empirical work suggests that the integration of different types of complex information and values into a decision of this magnitude is a very difficult cognitive process that leads many people to use only a limited subset of variables when making a decision. See Judith H. Hibbard et al., *Informing Consumer Decisions in Health Care: Implications from Decision-Making Research*, 75 MILBANK Q. 395, 397-400 (1997). In large, complex transactions like purchasing a car, it is inevitable that consumers will discount some information.

We are concerned that consumers may be more likely to discount qualified information like a disclosure that a car “may” be subject to an unrepaired recall, and instead focus on more concrete variables when making the purchasing decision, like price and an assurance of quality and safety from the dealership. In these situations, the misleading nature of the claim would be amplified as consumers are unable to fully reconcile, appreciate, or integrate the gravity of the unrepaired safety recall. In fact, they may use the more concrete safety variable—the advertisement stating the vehicle is safe—as justification for excluding the more theoretical safety variable—the vehicle may be subject to a recall—from their considerations when purchasing a given vehicle.

This brings us full circle to the fact that reassuring claims of a vehicles safety are inherently misleading when that vehicle has an unrepaired safety defect. Such advertisements may cause consumers not to check the recall database when they would otherwise be more skeptical, and more likely, to check the recall database in the absence of such reassuring advertisements.

The proposed agreements are so dangerously flawed that they would allow dealers to falsely advertise that cars are “safe,” “repaired for safety,” or “passed a rigorous inspection” regardless of what level of risk the defective cars pose to the public. For example, the agreements would allow dealers to advertise cars that could explode into flames and immediately kill all of the occupants within minutes after they leave the lot as “safe,” “repaired for safety,” or “passed a rigorous inspection.” Even the sale of certain recalled Ford Escape vehicles would not necessarily be prohibited by these agreements, despite the fact Ford had issued a “do not drive” warning on the vehicles and offered to provide towing and loaner cars to owners, because of the high risk of the cars catching fire and the related bad publicity affecting new car sales.

These proposed agreements come in the midst of the largest safety recall in U.S. history, with tens of millions of vehicles under a safety recall due to defective Takata airbags which are prone to exploding with excessive force and causing fatalities and serious injuries such as blindness, but for which there are very limited repair parts available. According to automotive experts, given the immense volume of defective airbags, it will take years before the cars can be repaired.

In essence, these agreements provide dealers with a roadmap for fraud involving extremely dangerous vehicles that car buyers may find nearly IMPOSSIBLE to get repaired. The National Highway Traffic Safety Administration has issued a warning to the owners of older vehicles with Takata airbags that they pose such a great risk—a 50% chance of causing

a fatality or serious injury in an otherwise non-life-threatening crash—that the owners should not drive them at all, except to take them to a dealership for repairs.

Under the proposed consent agreements, the dealers could advertise that even those high-risk, hazardous cars are “**safe**,” “**repaired for safety issues**,” or “**subject to a rigorous inspection**,” and charge an extra premium for them, as dealers often do for so-called “certified” used cars.

Under the agreements, cars such as the recalled PT Cruiser that killed Raechel and Jacqueline Houck, two sisters ages 24 and 20, when the steering hose leaked fuel and caused an under-hood fire and loss of steering, could be advertised as “safe” or “repaired for safety.” The net impression that such a car is safe would clearly be false, yet it is what these agreements would permit.

The proposed consent orders would allow dealers to merely disclose the possibility of a recall and tell consumers how they can investigate the possibility. This language could just be added to every advertisement without checking whether a particular car was subject to recall or not, or without providing any information specific to an individual vehicle. Such a diffuse form of disclosure—appearing in generalized advertising, regardless of whether an individual vehicle has an unrepaired recall or not—is virtually meaningless. It also could be easily dismissed by the claim, “we have to put that notice in all our ads, and on all our cars.”

By allowing dealers the option of advertising unsafe vehicles as passing a rigorous inspection and qualifying to be sold as “certified” with a contradictory “disclosure,” the proposed settlements would protect unscrupulous, reckless auto dealers instead of consumers. The proposed settlements would also be contrary to existing federal and state consumer protection laws and the well-established public policy of protecting the public from unsafe, recalled products, including vehicles.

The consent orders further propose to exempt from disclosure requirements vehicles that were “not listed as subject to an open recall for a safety issue, as of the date of the purchase, on the Original Equipment Manufacturer’s recall database, on the National Highway Traffic Safety Administration’s [www.safercar.gov](http://www.safercar.gov) database, or on a database with information on vehicle recalls that is generally accepted based on the expertise of professionals in the relevant area to yield accurate and reliable results...” This would leave open a dangerous loophole.

That exemption would allow the deceptive sale of dangerous and defective recalled vehicles not covered by the NHTSA database, such as recalled vehicles produced by manufacturers that produce fewer than 50,000 vehicles per year, even when the dealer has actual knowledge that the vehicle is subject to an unrepaired recall at the time of sale. The exemption could also allow the deceptive sale of recalled vehicles not reported to various commercial databases—such as Carfax or AutoCheck, which may or may not include safety recall records in a timely fashion, depending upon changeable private contracts with various manufacturers or other sources—leaving potentially millions of defective vehicles undetected.

For the reasons stated above, the initial deception and falsity of the express advertising would also not be adequately addressed by the FTC’s requirement that the defendants must

provide additional information about unrepaired safety recalls to the used car buyer “prior to the consummation of the sale.” The safety recall notice made available by the National Highway Traffic Safety Administration is generally available only in English. These notices and the other “additional information” referenced above often are written in highly technical language and typically fail to state pertinent information clearly. This missing information can include: the numbers of fatalities and injuries caused by the safety defect(s); the level of risk posed by the defect(s); the likelihood of a crash, fire, carbon monoxide poisoning, or other life-threatening event; how long it will take before repair parts are available; or whether the manufacturer has issued a “do not drive” warning and offered to provide towing or a loaner vehicle. The absence of this information renders such disclosures virtually meaningless to millions of used car buyers, particularly consumers who are not proficient at interpreting highly technical language.

Also, under the proposed consent orders, this additional information could be provided hours after the consumer has entered the car lot, with the promise of purchasing a “certified” car that is “safe” or “repaired for safety,” and after the consumer has already taken the car for a test drive, negotiated the terms, agreed to purchase the vehicle, and signed the sales documents, but not yet taken delivery of the car. This would be too late in the transaction to adequately address the initial falsity and deception.

The FTC states that the consent agreements would allow dealers to “continue conducting their inspection programs and truthfully advertising them,” stating further in a footnote that “[d]ealer inspection programs often involve checking that vital components of a car, like the brakes and drivetrain, are working properly and thus can provide important consumer benefits.”<sup>8</sup> Yet the consent agreements fail to require that the inspections result in lethal safety defects being fixed.

It is important to note that there already exists a well-established, generally recognized common law duty for dealers who sell used vehicles to consumers to exercise reasonable care, including performing a thorough inspection. Also, as the FTC states, the advertising about inspections either expressly represents, or implies, that the systems and components that are checked “are working properly.”<sup>9</sup> However, under the proposed consent agreements, that impression is patently false, regarding the lethal safety defects that led to a safety recall.

The inspections are primarily valuable to consumers to the extent they create a true impression that the car has not had any defects, or and the defects and other problems that were identified have been repaired. Otherwise, advertising about the inspections, and how thorough and complete they are, is nothing more than another form of deception.

In addition, these misguided consent orders threaten to harm consumer confidence in purchasing used vehicles from dealerships, particularly “certified” vehicles, which could affect the used car market in profound ways. News reports have already featured stories about fatalities and injuries occurring in used vehicles sold by dealers who failed to get the safety recalls repaired. More tragic incidents could damage dealers’ reputations, manufacturers’ brands, and the perception that “certified” vehicles have additional value and offer the

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8 Fed. Trade Comm’n, Analysis of Proposed Consent Order to Aid Public Comment, 81 Fed. Reg. 93931, 93933 n.6 (Dec. 22, 2016).

9 Id.

advertised “peace of mind.” These consent orders also could have a negative impact on employment levels by reducing the number of workers who perform needed safety recall repairs.

Finally, we also include with these comments the following documents:

- The comments that many consumer and safety organizations and the International Association of Machinists and Aerospace Workers filed on February 29, 2016, regarding the FTC’s proposed consent orders with General Motors, Lithia, and Koons, and the polling results commissioned by the CARS Foundation, which were filed at the same time, showing that the American public would find the proposed consent agreements to be deceptive and misleading.<sup>10</sup> Many, if not all, of the same points made in the February 2016 comments apply to the proposed agreements with CarMax, Asbury, and West-Herr.
- The comments filed by the Center for Auto Safety on February 29, 2016, regarding the FTC’s proposed consent orders with General Motors, Lithia, and Koons.<sup>11</sup>
- The letter sent to the Chairwoman of the Federal Trade Commission and the Administrator of the National Highway Traffic Safety Administration by Senators Schumer, Durbin, Nelson, Markey, and Blumenthal, calling the FTC’s proposed agreements with GM, Lithia, and Koons “anti-safety” and “anti-consumer” and calling upon the FTC to modify them accordingly.<sup>12</sup>

Thank you again for the opportunity to comment. Should you have any questions regarding these comments, please contact: Rosemary Shahan, President, Consumers for Auto Reliability and Safety.

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10 Posted at: <https://www.ftc.gov/policy/public-comments/2016/02/29/comment-00081>

11 Posted at: <https://www.ftc.gov/policy/public-comments/2016/02/29/comment-00086>

12 Posted at: <http://www.blumenthal.senate.gov/imo/media/doc/2016%2007%2014%20Letter%20to%20NHTSA%20FTC%20re%20Deceptive%20Used%20Car%20Advertisements.pdf>