ORAL ARGUMENT NOT YET SCHEDULED

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CONSUMERS FOR AUTO RELIABILITY AND SAFETY, *et al.*,	)	
Petitioners,	)	
v.	)	No. 17-1038
FEDERAL TRADE COMMISSION,	)	
Respondent.	)	

OPPOSITION OF FEDERAL TRADE COMMISSION TO MOTION TO HOLD CASE IN ABEYANCE AND CROSS-MOTION TO DISMISS FOR LACK OF JURISDICTION

The Federal Trade Commission opposes petitioners' motion to hold this case in abeyance and moves to dismiss the petition for review. The case should be dismissed because the FTC orders at issue here are not subject to challenge by petitioners. Congress allowed judicial review of FTC cease-and-desist orders only at the request of persons subject to the orders, and petitioners are not subject to the orders they challenge. Petitioners also lack Article III standing. And as the products of the agency's prosecutorial discretion, the orders are not subject to judicial

review at all. The case should not be held in abeyance because no other court would have jurisdiction over the orders and abeyance would serve no purpose.

BACKGROUND

Car manufacturer General Motors and two auto dealerships, Jim Koons Management Co. and Lithia Motors, Inc., advertise used cars for sale. Their marketing materials touted the rigor of their safety inspections, but allegedly failed to adequately disclose that some of their cars were subject to unrepaired safety recalls. In administrative complaints, the FTC charged the companies with violating the FTC Act's prohibition on "unfair or deceptive acts or practices." 15 U.S.C. § 45(a). Rather than litigate the matter, the companies settled with the FTC and agreed to the entry of cease-and-desist orders restricting their future marketing practices. Under the orders, which last for 20 years, the companies may not claim that their used cars are safe, have been repaired for safety issues, or have been subject to a rigorous inspection unless the cars are free of unrepaired safety recalls, or unless the

companies clearly disclose that some of their cars have unrepaired recalls. [1]

Before the cease-and-desist orders became final, they were published in the Federal Register for public comment, along with an FTC-supplied "Analysis to Aid Public Comment" describing the terms of the orders and the allegations of the complaint. 81 Fed. Reg. 5752 (Feb. 3, 2016). More than 70 parties filed comments, petitioners among them. In petitioners' view, disclosure of unrepaired safety recalls is insufficient to protect consumers. They asked the FTC to instead broadly prohibit the companies from describing any car as "certified" if it has any unresolved safety recall.[2]

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[1] Further, the orders prohibit the companies from misrepresenting the recall status or safety of their used cars, and also require the companies to warn consumers who recently purchased one of their used cars that the vehicle may have an open recall. The three consent orders at issue appear on this Court's docket at Doc. 1665061.

[2] *See* https://www.ftc.gov/policy/public-comments/initiative-638. The Consumers for Auto Reliability and Safety, US Public Interest Research Group, Inc., California Public Interest Research Group, Inc., Connecticut Public Interest Research Group, Inc., and Massachusetts Public Interest Research Group, Inc., joined by other organizations (collectively "CARS"), submitted a joint comment. The Center for Auto Safety ("CAS") wrote separately.

On December 8, 2016, after careful consideration of and individual responses to the comments received,[3] the Commission adopted the proposed cease-and-desist orders without modification. The Commission also issued a separate statement explaining its decision.[4] Responding specifically to petitioners' comments, the Commission explained that the required disclosures would "counteract the specific unlawful conduct that [the complaints] allege[d] – the [companies'] failure to disclose adequately that some of their cars were subject to open recalls when making the inspection claims detailed in the complaints – to avoid giving consumers a misleading impression." Letter to CARS, at 3 (Dec. 8, 2016); Letter to CAS, at 2 (Dec. 8, 2016).

Petitioners now seek judicial review of the Commission's final orders. They allege that the consent orders were issued in violation of Sections 5(a) and 18 of the Federal Trade Commission Act, 15 U.S.C.

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[3] The responses are available at https://www.ftc.gov/system/files/documents/cases/161215_general_motors_lithia_jim_koons_letters_to_commenters_0.pdf.

[4] The Statement of the Federal Trade Commission Concerning Auto Recall Advertising Cases is available on the FTC's public website at https://www.ftc.gov/system/files/documents/cases/161216_six_auto_recall_cases_statement_of_the_commission_0.pdf.

§§ 45(a), 57a, the Administrative Procedure Act, 5 U.S.C. § 706, and the Commission's procedures governing issuance of trade regulation rules. *See* 16 C.F.R. §§ 1.7 - 1.20. One month after they filed their petition, petitioners asked the Court to hold the case in abeyance pending their filing of a complaint raising the same allegations in federal district court. For the reasons set forth below, the Court should allow the case to go forward and should dismiss it with prejudice for lack of jurisdiction.

ARGUMENT

1. The Court lacks jurisdiction over this case for three independent reasons. First, Congress limited challenges to FTC cease-and-desist orders to the parties subject to those orders. Petitioners are not subject to the orders on review and therefore may not challenge them. Second, even if the Court could review the orders, petitioners lack standing to challenge them because they have suffered no injury and any relief they could get is speculative. Third, an enforcement agency's decision to settle litigation is a quintessential matter "committed to agency discretion by law" (5 U.S.C. § 701(a)) and thus unreviewable.

a. In the FTC Act, Congress set forth the exclusive method for judicial review of FTC cease-and-desist orders. Section 5(c) of the Act enables "[a]ny person, partnership, or corporation required by an order of the Commission to cease and desist from using any * * * act or practice [to] obtain a review of such order in the court of appeals of the United States." 15 U.S.C. § 45(c). Once a petition is filed, the court has jurisdiction "concurrently with the Commission," *id.*, but "[u]pon the filing of the record * * * the jurisdiction of the court of appeals * * * shall be exclusive." 15 U.S.C. § 45(d). The "any person" provision "only allows judicial review for parties subject to an FTC cease and desist order." *Consumer Fed'n of Am. v. FTC*, 515 F.2d 367, 369 (D.C. Cir. 1975). By the plain terms of the statute, others who are not subject to the order may not challenge it.

Petitioners are not subject to the cease-and-desist orders they challenge, and they therefore may not challenge those orders. Their participation in the administrative proceedings by submitting comments does not confer on them a right to review of the Commission's final orders. *Cf. N.Y. Reg'l Interconnect, Inc. v. FERC*, 634 F.3d 581, 586 (D.C. Cir. 2011) (participants in administrative proceedings have no

right of review of agency decision under provisions that limit such review to persons who have a direct stake in the outcome of the litigation). The Court therefore lacks jurisdiction over the petition for review. *See Consumer Fed'n of Am.*, 515 F.2d at 370; *Texaco, Inc. v. FTC*, 301 F.2d 662 (5th Cir. 1962) (per curiam).

b. Petitioners also lack standing. To have standing under Article III, petitioners must have suffered an injury in fact that was caused by the FTC's orders and would be redressed by reversal of those orders. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 937 (D.C. Cir. 2004). Where, as here, the alleged injury arises from the government's regulation (or purported lack of regulation) of a third party, it is "substantially more difficult" for a plaintiff to establish standing. *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 938 (quoting *Lujan*, 504 U.S. at 562). In such cases, the necessary elements of causation and redressability hinge on the independent choices of third parties. It is the plaintiff's burden to show that "those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Id.* (quoting *Lujan*, 504 U.S. at 562).

Petitioners' apparent claim of injury is that their members would decrease their future safety risk if the FTC had forbidden these companies from describing their cars as "certified" if any of those cars had been recalled. For an injury to satisfy Article III, however, it must be "actual" or "imminent" and not "speculative," "conjectural," or "hypothetical." *Lujan*, 504 U.S. at 560. "Allegations of possible future injury do not satisfy the requirements of Art[icle] III. A threatened injury must be certainly impending to constitute injury in fact." *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 (D.C. Cir. 2007) (quotation marks, citation, and emphasis deleted).

Nor can petitioners show that any potential future injury suffered as a result of GM and the dealerships describing cars with open recalls as "certified" is traceable to the consent orders. "Causation, or traceability, examines whether it is substantially probable that the challenged acts of the defendant, not of some absent third party, will cause the particularized injury of the plaintiff." *Microwave Acquisition Corp. v. FCC*, 145 F.3d 1410, 1412 (D.C. Cir. 1998) (quotation omitted). Any alleged injury stemming from these companies continuing to describe cars with open recalls as "certified" would be due to the actions

of the companies themselves, not to the Commission's consent orders, which prohibit them from engaging in deceptive conduct.

Finally, vacating the Commission orders would simply allow these companies to unlawfully represent their cars as safe or rigorously inspected without clearly disclosing open recalls, and thus would not redress any injury. To the contrary, as the Commission explained, "[w]ithout [the consent orders], [the] car dealers could not only continue to sell used vehicles subject to open recalls (a practice currently permitted under federal product safety law), but could also make misleading inspection claims masking this fact – without in any way disclosing the possibility of recalls." Letter to CARS, at 4 (Dec. 8, 2016); Letter to CAS, at 3 (Dec. 8, 2016).

Petitioners could get the ultimate relief they seek – a prohibition on describing any car with open recalls as "certified" – only if the FTC chose to bring another enforcement case alleging such conduct to be unlawful, litigated the matter, secured such relief in the administrative tribunal, and won on any appeal by the car dealers. That speculative chain of events does not nearly support standing. The possibility of

"better odds" of the desired outcome "plainly falls far short of the mark" for redressability. *Nat'l Wrestling Coaches Ass'n*, 366 F.3d at 942.

c. The Administrative Procedure Act excludes from judicial review "agency actions that are committed to agency discretion by law" and "agency actions that are subject to a statute that precludes judicial review." 5 U.S.C. § 701(a). The FTC Act precludes judicial review for the reasons discussed above. But even if review were permissible under the FTC Act, it is also precluded under the APA's "committed to agency discretion" test.

An agency's decision to settle a case, and the terms of the settlement, amount to "an exercise of its complete discretion . . . to decide how and when to enforce" its statute. *Schering Corp. v. Heckler*, 779 F.2d 683, 687 (D.C. Cir. 1985) (quotation marks omitted); *accord Association of Irritated Residents v. EPA*, 494 F.3d 1027, 1031-32 (D.C. Cir. 2007). The exercise of enforcement discretion is ordinarily not subject to judicial review because "a court would have no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). An agency's enforcement decisions are akin to a prosecutor's, which have "long been regarded as

the special province of the Executive Branch." *Balt. Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001).[5]

Those principles apply foursquare here. The Commission explained why it chose the settlement it did: the disclosures it required would "counteract the specific unlawful conduct that [the complaints] allege[d] – the [companies'] failure to disclose adequately that some of their cars were subject to open recalls when making the inspection claims detailed in the complaints – to avoid giving consumers a misleading impression." Letter to CARS, at 3 (Dec. 8, 2016); Letter to CAS, at 2 (Dec. 8, 2016). Although petitioners would prefer the Commission to have required a settlement that imposed different restrictions, that decision was for the Commission to make in the exercise of its discretion as an enforcer.

[5] Petitioners may not seek review under Section 18(e)(1) of the FTC Act, 15 U.S.C. § 57a(e). *See* Motion for Stay, at 2. That statute applies only to "a limited category of FTC rules, known as 'trade regulation rules,' that 'define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce.'" *Nat'l Auto. Dealers Ass'n v. FTC*, 670 F.3d 268, 271 (D.C. Cir. 2012) (quoting 5 U.S.C. § 57a(a)(1)(B)). This case, by contrast, involves specific enforcement cases against particular parties.

2. The Court should deny the motion to hold this case in abeyance pending resolution of a yet-to-be-filed district court complaint. To begin with, petitioners should not be entitled to shop for the best forum to hear their case and they have provided no reason why this case cannot go forward even if they file another one. In any event, a district court complaint will be fruitless.

First, as described above, Congress has crafted a specific path for judicial review of FTC cease-and-desist orders, granting the courts of appeals "exclusive jurisdiction" over challenges to such orders. The district court therefore would lack any authority over the orders challenged by petitioners. Where a statute "vests jurisdiction in a particular court," it thereby "cuts off original jurisdiction in other courts in all cases covered by that statute." *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); *see also Elgin v. Dept. of Treasury,* 132 S. Ct. 2126, 2133-34 (2012) (where it is fairly discernible from the text and structure of a statute that Congress intended review to proceed exclusively through the statutory review scheme, that statute precludes courts from exercising jurisdiction outside the prescribed procedures).

Second, petitioners would lack standing in the district court for the same reason they lack standing here.

Finally, as unreviewable acts committed to agency discretion, the cease-and-desist orders are unreviewable by a district court. Where a matter falls within an exception to the APA, the district court must dismiss the complaint for failure to state a claim. *Oryszak v. Sullivan*, 576 F.3d 522, 525 (D.C. Cir. 2009).

There is no basis for this Court to wait while petitioners shop for a different forum. Nor is it in the "interest of justice" for this Court to transfer this matter to the district court under 28 U.S.C. § 1631. Transfer, with the attendant expenditure of judicial and agency resources, is not in the public interest.

CONCLUSION

For the foregoing reasons, the Court should deny petitioners' motion to hold this case in abeyance and dismiss the petition for review with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2017 the foregoing Opposition of Federal Trade Commission to Motion to Hold Case in Abeyance and Cross-Motion to Dismiss for Lack of Jurisdiction was filed electronically with the Clerk, United States Court of Appeals for the D.C. Circuit, by using the Court's CM/ECF system. Counsel for Petitioners and Movant-Intervenor, General Motors LLC, will be served by the CM/ECF system.

/s/Leslie Rice Melman
LESLIE RICE MELMAN