

November 11, 2003

Honorable Timothy J. Muris
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Dear Chairman Muris:

The Independent Lubricant Manufacturers Association (“ILMA”) requests that the Federal Trade Commission (“FTC” or “Commission”) investigate and take all necessary enforcement action against the DaimlerChrysler Corporation (“DCC”)(or its appropriate division or affiliate) for violations of the “tie-in prohibitions” under the Magnuson-Moss Warranty Act (“Act”)(15 U.S.C. 2301 *et seq.*) and the rules of the FTC promulgated under the Act (16 C.F.R. Part 700) for the automaker’s “ATF+4®” transmission fluid (Type MS-9602). The facts and the reasons supporting ILMA’s complaint are set forth below.

Introduction of ILMA

ILMA, established in 1948, is a national trade association of 142 manufacturing member companies, consisting largely of small businesses, ranging in size from fewer than 10 to more than 200 employees. As a group, ILMA member companies blend, compound and sell over 25 percent of the United States’ lubricant needs and over 75 percent of the metal removal fluids utilized in the country.

A lubricant is a liquid or solid substance used to reduce the friction, heat and wear between solid surfaces. ILMA members manufacture automotive, truck, marine, aircraft and industrial engine oils; transmission fluids; hydraulic fluids; greases; general industrial oils; power equipment oils; process oils; metal removal, treatment, protecting and forming lubricants; and rolling oils.

In order to manufacture a lubricant, ILMA member companies purchase oil and synthetic lubricant base stocks and a wide range of additives. ILMA member companies then compound and blend the base stocks with the correct additives in the proper proportions to produce a lubricant with the desired characteristics for a particular job.

ILMA members are diverse. A large proportion of our membership manufactures automotive lubricants for original equipment manufacturers and for the retail market, either under their own labels or through contract packaging arrangements. Many produce lubricants for metalworking and heavy industrial machines, while others supply lubricants for mining, textiles, food processing, electronics, as well as many other industries.

Independent lubricant manufacturers by definition are neither owned nor controlled by companies that explore for or refine crude oil to produce lubricant base stocks. Base oils are purchased from refiners, who are also competitors in the sale of finished products. Independent lubricant manufacturers succeed by manufacturing and marketing high-quality, often specialized, lubricants. Their success in this competitive market also is directly attributable to their tradition of providing excellent, individualized service to their customers.

ILMA members historically have marketed transmission fluids and other lubricants that meet and/or exceed the automakers' or original equipment manufacturers' ("OEMs") performance and warranty requirements. In some instances, the transmission fluids or lubricants are licensed. ILMA members have provided competitively-priced products to car dealerships and the motoring public throughout the Association's 55-year history.

DCC's Illegal Tie-In

On October 22, 1999, DCC issued a "Technical Service Bulletin" ("TSB") to its Chrysler dealers, indicating that the Company had begun using a new automatic transmission fluid – ATF+4 – for certain model vehicles. DCC said that the new fluid would be used for additional Chrysler vehicles during 2000. A copy of this TSB is attached. The TSB states, in part:

Effective immediately, it is recommended that all vehicles with Chrysler automatic transmissions except for 1999 and earlier minivans be serviced with ATF+4®. ATF+3 should continue to be used for 1999 and earlier minivans because of the potential for torque converter shudder during break-in. For all other applications the ATF+4® fluid offers significant benefits as outlined below.

* * * *

Mopar ATF+4® is a World Class Fluid having exceptional durability.

On June 29, 2001, DCC issued a complete revision of the TSB, noting that the ATF+4 fluid applies to all Chrysler vehicles equipped with automatic transmissions, except 1999 and earlier minivans.

It is understood from these TSBs issued to Chrysler dealers that, while not an authorization for automatic transmission repairs, the use of ATF+4 was and is required for any and all warranty work. In fact, according to the TSBs, ATF+4 should be used as the replacement or top-off fluid in all Chrysler vehicles, except the noted minivans.

Because many ILMA members supply ATF+2 and ATF+3 fluids, these companies sought to manufacture or purchase and market competitive ATF+4 fluids that meet DCC's performance and MS-9602 warranty requirements. In discussions with DCC, these ILMA members were told that the specifications were not available. However, DCC repeatedly promised that a licensing program would be forthcoming for its ATF+4 fluid. As of the date of this letter, no such licensing program has been initiated by DCC to the best of ILMA's knowledge.

ILMA members also have approached the additive companies, seeking to obtain the "chemistry" so that they could manufacture and market competitive ATF+4 fluids. It is typical

for automakers or original equipment manufacturers to issue performance specifications and then the additive companies have independent testing laboratories “approve” their additive chemistry against the specification. Once approved, the product could be sold and, in some cases, a license obtained from the automaker or OEM. DCC has not created such an approval process by issuing the specification for ATF+4.

From ILMA members’ discussions with DCC and the additive companies, Lubrizol is the only additive manufacturer with the ATF+4 chemistry. However, Lubrizol informed the Association that it does not own the formulation – that is, it is proprietary to DCC. As a result, Lubrizol is not in a position to sell the ATF+4 additive “package” to ILMA members or other third parties without DCC’s permission.

ILMA understands that Ethyl (HiTEC 487), Pennzoil and Valvoline have all developed “performance capable” products that they will stand behind in the marketplace. However, these companies, according to marketplace information, have not been able to “get an audience” with DCC.

ILMA members also have sought to purchase and resell the finished ATF+4 fluids by contacting the two oil companies (ChevronTexaco and Petro-Canada) that formulate and manufacture the automatic transmission fluid for DCC. These companies have refused to resell the product, citing its contract with DCC.

As discussed above, DCC requires the use of ATF+4 for warranty repairs in all Chrysler vehicles with automatic transmissions, except for certain minivans; it refuses to issue a product specification or approval process for ATF+4; and, it has contractually prevented the additive company from selling the “chemistry” and the fluid formulator from reselling finished product to third parties, including ILMA members. As a direct result of DCC’s actions, ILMA members have lost longstanding accounts with Chrysler dealers across the country.

DCC has taken its anticompetitive actions on ATF+4 one step further into the area of motor oils. DCC is actively promoting a “Mopar Bulk Oil/ATF+4” program with its dealers to take motor oil business away from ILMA members and others who have and continue to offer similar programs for car dealers and other automotive repair businesses. A copy of a DCC marketing brochure to its dealers is attached. As part of the program, the dealer must buy bulk quantities of a Mopar 10W-30 and at least one other grade of motor oil. DCC also includes ATF+4 in its bulk program. However, DCC states in its brochure:

ATF+4® is not offered in bulk without the purchase of bulk motor oil. However, ATF+4® is available in packaged goods separately.

The message being sent by DCC to its dealers through its “Mopar Bulk Oil/ATF+4” program is simple – if you want to continue to buy motor oil from someone other than DCC, you will be only able to purchase the needed and necessary ATF+4 fluids as packaged goods

(*i.e.*, small containers) at a much higher price, thereby cutting into any margin on transmission service and repairs. Stated differently, the Chrysler dealer who needs the ATF+4 fluid can get a “good price” only if it enters into an agreement to participate in the Mopar Bulk Oil/ATF+4 program. DCC has made itself the only source for the ATF+4 fluids and is now using that position to gain market share for its Mopar-branded motor oils.

ILMA has made “good faith” efforts to raise its ATF+4 concerns with DCC. The Association sent a December 17, 2002, letter to the automaker. ILMA did not have the courtesy of a reply to that correspondence, which requested a meeting. Subsequent telephone calls to DCC were not returned. ILMA wrote DCC again on September 11, 2003, through counsel. As of the date of this letter, the Association has not had the courtesy of a response to that correspondence.

Discussion of the Act

The Act is intended to protect consumers from deceptive or unfair warranty practices, including those for automobiles. Section 102(c) of the Act prohibits warrantors from conditioning warranty coverage on the consumer’s “using, in connection with warranted product,” an article or service, including automobile transmission fluid, identified by brand, trade, or corporate name, unless the warrantor provides the article or service without charge. The legislative history to the Act mentions types of tying arrangements that are prohibited, including “(u)nder this prohibition, for example, no automobile manufacturer may condition his warranty of an automobile on the use of a named motor oil or on the use of its own automobile parts unless he shows that any other motor oil or automobile parts which are available will not function properly and will not give equivalent performance characteristics in the automobile.” H.R. Rep. No. 93-1107, at 36-37 (1974). Mopar-branded automatic transmission fluids, such as ATF+4, fit within this prohibition.

It is clear from the TSBs cited above that warranty coverage for automatic transmission repairs on Chrysler vehicles with automatic transmissions is conditioned on the use of ATF+4 fluids. DCC does not provide the ATF+4 free of charge to consumers for top-offs and flushes that are done to maintain warranty coverage. Instead, DCC has neither licensed its ATF+4 fluids nor has created an approval process so that other companies can offer a competitive product that meets the automaker’s performance and warranty requirements. Further, DCC has contractually prevented its ATF+4 suppliers from reselling either the chemistry or finished fluids to third parties, including ILMA members.

The effects of DCC’s tying arrangements and actions are clear for consumers – that is, it has eliminated consumers’ purchase options with respect to both warranted and non-warranted automatic transmission service for their Chrysler vehicles. A consumer cannot shop for the best price for service for his or her vehicle because the Chrysler dealer is the only source of ATF+4 fluid needed to maintain warranty coverage. Further, a consumer is likely to pay a higher price for automatic transmission service where the Chrysler dealer does not participate in the Mopar Bulk Oil/ATF+4 program. The consumer simply cannot go elsewhere for the work. These

reasons alone are sufficient for the FTC to bring an enforcement action under the Act and the Commission's regulations against DCC.

As noted above, ILMA has made "good faith" efforts to raise the issues in this letter with DCC. Given the lack of response from the automaker for nearly a year, it is clear that DCC in embarked on a clear path to eliminate competition and, in the long run, harm consumers. ILMA and its members are very concerned that, if DCC's tying arrangements and actions are not stopped immediately, it will embolden other automakers and OEMs to adopt similar tactics. Accordingly, ILMA requests that the Commission take immediate action on this matter.

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ILMA and its members are available to meet with you or FTC staff to discuss further the facts that underlie this complaint or any other issue associated with this matter. The Association recognizes that the Commission has a busy workload and limited resources, so it does not make this complaint and request lightly. Accordingly, ILMA appreciates the FTC's time and attention to this matter.

Sincerely,

Celeste M. Powers, CAE
Executive Director

Attachments

cc: ILMA Board of Directors