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Supreme Court of California
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S267576

IN THE SUPREME COURT OF CALIFORNIA

TANIA PULLIAM,
Respondent,

v.

TD AUTO FINANCE, LLC
Petitioner.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FIVE
CASE NO. B293435

RESPONDENT TANIA PULLIAM'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

Respondent Tania Pulliam submits this consolidated response to the three amicus briefs filed in support of Petitioner TD Auto Finance – the brief by Westlake Services, LLC (Westlake Br.), the brief by the American Bankers Association, American Financial Services Association, California Financial Services Association, and Consumer Bankers Association (collectively "Bankers Association Br."), and the brief by the Chamber of Commerce of the United States of America (Chamber of Commerce Br.) (collectively "TDAF's amici").

DISCUSSION

I. The definition of "recovery" advanced by TDAF's amici has a clear weakness – statutory attorney fees, like those awarded to Pulliam, are costs of litigation awarded post-judgment.

Each of the cited definitions of the term "recovery" used by TDAF's amici emphasize that the term encompasses that which is awarded in a judgment or verdict. (Bankers Association Br. at 17; Westlake Br. at 26-27; Chamber of Commerce Br. at 14.) What these definitions fail to clarify is whether litigation costs are also included within the definition of recovery as used by the FTC. This Court should rule they are not.

A. In California, statutory attorney fees are costs of litigation.

Black's Law Dictionary defines litigation costs or legal costs as: "The expenses of litigation, prosecution, or other legal transaction, esp. those allowed in favor of one party against the other. *Some but not all* *states*[1] *allow parties to claim attorney's fees as a litigation cost*." (Black's Law Dictionary (11th ed. 2019), italicization added.)

Just as Black's Law Dictionary specifies, while not all states include attorney's fees as costs, in California, Code of Civil Procedure section 1033.5(a)(10)(B) identifies statutory attorney's fees as an item of allowable costs that may be awarded under Code of Civil Procedure section 1032. To be awarded, any such "allowable costs shall be *reasonably necessary* to the conduct of the litigation," and that they must "be *reasonable* in amount." (Code Civ. Proc. §§ 1033.5(c)(2), (3), emphasis added.) That costs statute also instructs exactly how statutory attorneys' fees, as costs, are to be awarded:

> If a statute of this state refers to the award of "costs and attorney's fees," attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a)… [statutory attorney's fees] may be fixed as follows: (i) upon a noticed motion, (ii) at the time a statement of decision is rendered, (iii) upon application supported by affidavit made concurrently with a claim for other costs, or (iv) upon entry of default judgment.

(*Id.* § 1033.5(c)(5).)

Here, Pulliam as the prevailing party under both the CLRA and Song-Beverly causes of action, was entitled to mandatory costs,

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[1] The fact that not all states view statutory attorney fees as costs may help explain the FTC's 2019 comments on attorneys' fees. If the FTC considered attorneys' fees to be punitive in nature as they are in other states, and not as costs to be awarded to the prevailing party, that *would* be subject to the limitation in the Holder Clause. But that is not the case in California where statutes and this Court view statutory attorney awards as incidental to the judgment not part of the recovery, and not punitive in nature.

expenses and attorney's fees. (See Answering Br. at 26-30.) Neither TDAF nor its amici advocate that their interpretation of the Holder Rule somehow preempts California's statutory scheme for the award of litigation costs. Nor can they. TDAF and its amici cannot find support to argue that the FTC, through its silence, has preempted California law on what costs of litigation may be awarded by state courts.[2]

This Court's holdings on the nature of statutory costs should be determinative. Statutory attorney fees and costs are both incidental to the litigation, and not part of the recovery owed to a plaintiff, nor part of the damages sought by a plaintiff when filing suit. "It is established that the right to costs is statutory and that costs 'are allowed *solely as an incident of the judgment* given upon the issues in the action...They constitute no part of a judgment at the moment of its rendition.'" (See *Folsom v. Butte County Assn. of Gov'ts* (1982) 32 Cal.3d 671, 677, emphasis added.) Our Courts of Appeal also agree that awards of litigation costs, including statutory attorney fees, are *not* considered part of the damages verdict or judgment rendered. "When authorized by statute, awards of attorney's fees are expressly defined as costs, not damages." (*Elton v. Anheuser–Busch Beverage Group, Inc.* (1996) 50

[2] Practically speaking, the only thing the FTC's regulation mandates is that consumer credit contracts must contain the Holder Clause notice as a term in the contract. (16 C.F.R. § 433.2 ["…[I]t is an unfair or deceptive act or practice within the meaning of section 5 of that Act for a seller, directly or indirectly, to: (a) Take or receive a consumer credit contract *which fails to contain the following provision* in at least ten point, bold face, type…"], emphasis added.) That's it. How that contractual term is enforced is a matter of state law. Taking this a step further, if the regulation only mandates the inclusion of the Holder Clause in consumer credit contracts, nothing in that regulation conflicts with section 1459.5's directive on attorneys' fees.

Cal.App.4th 1301, 1308; see also *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606.)

This Court has also clarified that: "Statutory attorney fees are not of course intended to compensate the 'prevailing party' for damages suffered." (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 586.) An award to a party's attorney of statutory attorney fees cannot be considered punitive damages against the defendant because they are not part of the damages awarded to the plaintiff. (*Ibid.*) Statutory attorney fee awards are properly made to plaintiffs' attorneys rather than to plaintiffs themselves. (*Serrano v. Priest* (1977) 20 Cal.3d 25, 47.)[3]

As these authorities make clear, the hyperbolic arguments raised by TDAF and its amici are ill-founded. First, the argument that affirming *Pulliam v. HNL Automotive Inc.* (2021) 60 Cal.App.5th 396 (*Pulliam*) will expose holders to "unlimited" attorney fees or "unlimited liability" is a non-starter. California's statutory framework is clear that our courts must only award those attorney fees and costs that the court deems *reasonable* and *necessary* for the conduct of litigation, as well as

[3] Again, in its 2019 Rule confirmation, it is possible the FTC viewed attorney fees like those under Ohio's consumer protection statute in *Reagans v. Mountainhigh Coachworks*, *Inc.* (2008) 117 Ohio St. 3d 22. The Ohio statute in *Reagans*, only permits a *discretionary* award of attorney fees against a seller and only against sellers who intentionally violate the statute. (*Reagans, supra*, 117 Ohio St. 3d at p. 32.) Unlike Ohio's CSPA, California's CLRA and Song-Beverly Act do not condition an award of fees on evidence there was a knowing violation. Attorney fees and costs under our consumer statutes are not a punishment, but rather a *mandatory* statutory remedy available to the prevailing plaintiff or the prevailing defendant (if the prosecution was not in good faith) and are available as costs. (Civ. Code section 1780(e); Code Civ. Proc. § 1033.5(a)(10(B).)

reasonable in amount. (Code Civ. Proc. §§ 1033.5(c)(2), (3).) It is the requesting party's burden to demonstrate that the request is reasonable in amount and that each item requested was necessary. (See *Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99, 104.) Then, our courts have near-unbridled discretion on the amounts to be awarded as informed by their first-hand observation of how the litigation was conducted. (See *Doppes v. Bentley Motors, Inc.* (2009) 174 Cal.App.4th 967, 998.) Second, the relative blameworthiness or innocence of the holder is also irrelevant – in California, statutory attorney fees are not punitive in nature, they are merely costs, and large cost awards can be avoided through quick resolution of these actions. If the holder, as a mere litigant, wants to fight the lawsuit filed by the consumer, there are costs associated with that fight and whatever the trial court deems reasonable costs must be awarded to the prevailing party (whether it be the consumer or the holder) according to state law.

B. Statutory attorney fees and costs are awarded by the court *after* a verdict and *after* a judgment has been rendered.

Statutory attorney fees and costs for a prevailing party are only awarded after there has been a determination in the case through judgment, settlement or dismissal. A notice of motion to claim statutory attorney's fees "for services up to and including the rendition of judgment in the trial court…must be served and filed within the time for filing a notice of appeal under rules 8.104 and 8.108 in an unlimited civil case…" (Rule of Court 3.1702.) Thus, a motion for statutory fees must be filed 60 days after notice of entry of judgment, or otherwise concurrent with the deadline for filing a notice of appeal. This is necessarily after a verdict and *after* a judgment or dismissal has been entered. Likewise, a prevailing party's memorandum of costs must be filed 15 days after notice of entry of judgment. (Rule of Court 3.1700.)

Adopting the definitions of recovery proposed by TDAF's amici compels affirmance of *Pulliam*. If "recovery" includes the "amount awarded from a court's judgment" or "obtaining of right to something by verdict or judgment" or "an amount awarded by or collected as a result of a judgment or decree," then the amounts awarded post-judgment as costs, are not part of the "recovery." (Banker's Association Br. at 17-18, n. 6, Chamber of Commerce Br. at 14, Westlake Br. at 26-27.) Statutory attorney fees, costs, and expenses are all incidental to, and not part of, the "recovery" the FTC alluded to in the Holder Clause. These are merely incidental to the recovery awarded through the judgment, verdict or decree.

C. Even the Court of Appeal in *Lafferty II* agreed that costs and prejudgment interest are separate awards not subject to the Holder Clause's limitation on "recovery."

Lafferty v. Wells Fargo Bank, N.A. (2018) 25 Cal.App.5th 398 (*Lafferty II*) agreed there is a difference between a plaintiff's recovery of damages and her to entitlement to litigation costs and prejudgment interest as the prevailing party. That court stated: "As the language of Code of Civil Procedure section 1032, subdivision (b), makes clear, costs are awarded to the prevailing party *in an action* rather than on a cause-of-action basis…The Holder Rule itself is silent about cost awards under state law to a prevailing party in an action. Consequently, the trial court did not err in awarding costs." (*Id.* at p. 415.)

Following *Lafferty II*'s reasoning on costs, the Holder Rule is also silent about attorneys' fee awards under state law to a prevailing party in an action. If statutory costs are available and not expressly barred by the Rule, so too are statutory attorneys' fees. The *Lafferty II* court simply did not consider statutory attorneys' fees as recoverable costs under Code of Civil Procedure section 1033.5(a)(10)(B), this was error.

Pulliam correctly noted that the Rule and its use of the word "recovery" does not expressly address attorneys' fees. (*Pulliam,* at p. 413.) Nowhere in the Rule, in its Statement of Basis and Purpose, or in the FTC's comments before 2019, did the FTC ever mention anything about attorneys' fees in conjunction with the Rule.

The Rule does not expressly state a prevailing party *is not* entitled to recover attorney's fees and costs. "'[O]ne should not read into the statute allowing costs a restriction which has not been placed there. 'In general, a court should not look beyond the plain meaning of a statute when its language is clear and unambiguous, and there is no uncertainty or doubt as to the legislative intent.'" (*Brown v. Desert Christian Center* (2011) 193 Cal.App.4th 733, 738 [citations omitted].) *Lafferty II* correctly held the Rule does not "cap" (foreclose) an award of costs or prejudgment interest to the prevailing party.[4]

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[4] Just days before this brief was to be filed, the Second Appellate District, Division 3 issued an unpublished opinion in *Hernandez v. Westlake Services, LLC* (Appeal No. B308288), agreeing with *Pulliam* and specifically discussing costs and prejudgment interest in this context. There, the trial court, supposedly following *Spikener,* had denied all fees, costs and prejudgment interest, even from the defaulted seller. Pulliam's counsel will be requesting publication of that opinion. As mentioned in Respondent's Answer to the Petition for Review, there are currently at least 8 other pending appeals on this same issue making their way through our courts of appeal. In all except one of

While this Court should disagree with *Lafferty II's* reasoning on attorney fees, its reasoning on the availability of costs and prejudgment interest awards regardless of the Holder Clause's limitation should be preserved and expanded to allow proper and reasonable awards of statutory attorney fees.

D. Adopting the reasoning of TDAF's amici exposes a disparity in the law – holders would still be able to sue and recover their own "uncapped" attorney fees and costs when they bring claims against consumers.

Adopting TDAF and amici's interpretation of the Rule would result in a lopsided application of California's cost statutes whereby holders would be awarded costs from the consumer if they prevail in an action, but consumers would be foreclosed from any award of costs regardless of their status as the prevailing party. This would be contrary to our Legislature's intent when it enacted Civil Code section 1717, making one-sided contractual attorney fees provisions reciprocal.[5] What TDAF's amici propose is a reversion to a time when one-sided attorney fee provisions withstood muster. That goes against settled California law since the 1960's.

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those pending cases, the trial courts found the Holder Clause foreclosed or limited any award of statutory attorney's fees. Most trial courts also denied plaintiffs' requests for costs.

[5] Civil Code section 1717 states: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs. Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract…"

Our Legislature enacted Civil Code section 1717 in 1968. (Stats.1968, ch. 266, § 1, p. 578.) It is one of several similarly worded statutes which are recognized as being "part of an overall legislative policy designed to enable consumers and others who may be in a disadvantageous contractual bargaining position to protect their rights through the judicial process by permitting recovery of attorney's fees incurred in litigation in the event they prevail." (*Milman v. Shukhat* (1994) 22 Cal.App.4th 538, 543 citing *Coast Bank v. Holmes* (1971) 19 Cal.App.3d 581, 597, fn. 3.) This is all in line with the FTC's goals in 1975 ensuring that consumers could bring affirmative claims against holders. These protections would be turned on their heads if the Rule were to be used, as proposed by TDAF's amici, to revive one-sided contractual attorney fee provisions.

While not addressed in the Court of Appeal's opinion, another way of looking at this issue is framing it as an action to enforce the Holder Clause as a contractual claim. The Holder Clause is undisputedly a term in the contract between the consumer and the holder. Bringing an action to enforce the Holder Clause against the holder is an action on the contract and governed by Civil Code section 1717. Because the contract at issue contains a one-sided attorney fees provision, [6] the prevailing party, whether it be the consumer or holder, could seek an award of attorney fees under that statute.

[6] The Retail Installment Sale Contract used in California contains the following term in paragraph 3.c: "If you pay late or break other promises…you may have to pay collection costs. You will pay our reasonable costs to collect what you owe, including attorney fees, court costs, collection agency fees, and fees paid for other reasonable collection efforts. See Reynolds & Reynolds Co., LAW 553-CA-ARB-EP 7/ 13: RETAIL INSTALLMENT SALE CONTRACT – SIMPLE

If consumers are then limited to only recovering the amounts paid under the contract without the possibility of any award of reasonable attorney fees or costs, but holders are free to recover their own fees and costs under the contract – without any limitation – this creates an unjust disparity in the law. This Court can avoid such a disparity by affirming the Court of Appeal's opinion, and further finding that our long-standing cost statutes are not preempted by the FTC's comments that are not owed any deference.

II. When disagreeing with *Spikener,* this Court should also make clear that Civil Code section 1459.5 is not preempted by the Holder Clause or the FTC's rule confirmation.

TDAF's amici understandably advocate for full deference to the FTC's 2019 commentary on attorney's fee. As discussed in the Answering Brief, those comments are not owed deference, Civil Code section 1459.5 is not preempted because the FTC is not authorized to bar state law, and section 1459.5 does not conflict with the Holder Rule. TDAF's amici's arguments in favor of preemption must fail. In 1975, the FTC explicitly left it up to the states to craft their own statutes[7]

FINANCE CHARGE (WITH ARBITRATION PROVISION) (2013), http://support.dataconsultants.com/553/LAW553_CA_ARB_0713.pdf [https://perma.cc/ABS6- GLH5].

[7] See Budnitz, *The Development of Consumer Protection Law, the Institutionalization of Consumerism, and Future Prospects and Perils* (2010) 26 Ga. St. U. L. Rev. 1147, 1164–1165 ["No matter how greatly the FTC might have wished to enforce the law, however, its resources were limited to whatever amounts Congress appropriated and had to be shared with the FTC's anti-trust responsibilities. Furthermore, the scope of its authority is restricted to enforcement actions in the public interest. (15 U.S.C.A § 45(b).) Consequently, it was crucial to consumer protection that statutes such as TILA include provisions to facilitate individual lawsuits such as a private right of action, actual and statutory damages, and attorney fees."].

that support the intent of the Rule, and that is exactly what section 1459.5 does in addition to our long-standing costs statutes.[8] This Court should affirm *Pulliam* and disagree with the *Spikener* to find section 1459.5 is not preempted.

The *Spikener* court concluded that the FTC's 2019 commentary on attorney fees showed its "clear intent to prohibit states from authorizing a recovery that exceeds" the amounts paid on the contract. (*Spikener v. Ally Financial* (2020) 50 Cal.App.5th 151,162 (*Spikener*).) As discussed in the Answering Brief, there is no congressional authorization to support that conclusion, nor has the FTC ever stated its intent to preempt state law on cost awards. However, if "recovery" is separate from statutory attorney fees and costs of litigation, perhaps that sentence of *Spikener*'s reasoning is correct, insofar as the recovery a consumer is entitled to (the amount of the judgment or verdict being sued for) is limited to the amounts paid under the contract. The litigation costs necessary to achieve that recovery are wholly separate and either available or unavailable depending on state law.

Even if this Court were to give some deference to the FTC's 2019 comments on attorney fees, section 1459.5 would not be preempted because it does not conflict with the purpose and policy behind the Rule itself – the protection of consumers against deceptive and unfair business practices through the mandated inclusion of the Holder Clause notice in consumer credit contracts. (See *ante,* fn. 2.)

Alternatively, this Court can also find that Civil Code section 1459.5 is superfluous given that the application of the Holder Clause's

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[8] As described in the Answering Brief, section 1459.5 was enacted by our Legislature in an effort to swiftly abrogate *Lafferty II*.

limitation on "recovery" has no bearing on what statutory attorney fees and costs may be awarded to a consumer as the prevailing party through our long-standing costs statutes.

III. This Court's reasoning in *Reilly v. Marin Housing Authority* supports affirmance.

In their briefs, both Westlake and the Chamber of Commerce mention this Court's recent opinion in *Reilly v. Marin Housing Authority* (2020) 10 Cal.5th 583 (*Reilly*). (Westlake Br. at 16; Chamber of Commerce Br. at 18.) That case supports the Court of Appeal's analysis finding that the 2019 comments on attorney fees within the FTC's Rule Confirmation are not owed deference. In *Reilly*, this Court found that courts need not defer to an agency's interpretation when an " 'alternative reading is compelled by the regulation's plain language or by other indications of the [agency's] intent *at the time of the regulation's promulgation*.' " (*Reilly, supra,* at p. 603 [emphasis in original.].)

That is precisely the approach the Court of Appeal took in in this case when finding that the FTC's 2019 comments on attorney's fees, after over 40 years of silence on this issue, were not owed deference. This Court's recent deference analysis should yield the same result and the Court of Appeal's opinion should be affirmed.[9]

[9] In *Reilly,* this Court asked HUD to file an amicus brief clarifying its position. (*Reilly, supra*, at p. 602.) That approach may also be beneficial in this case. The FTC is following this case and an amicus brief may clarify any outstanding ambiguity – *not as to the meaning of the terms in the Holder Clause* – but as to whether its 2019 Rule Confirmation intended to preempt state law.

IV. Public policy supports the Court of Appeal's holding.

TDAF's amici, like TDAF itself, try to conjure up a parade of horribles that will purportedly result if the Court of Appeal's decision is not reversed. They claim that consumer credit will become more difficult to find for the most vulnerable consumers, that credit will become even more expensive, and that small business will be hurt if they can't sell their goods without credit. However, TDAF's amici, a sub-prime lender[10], large bank associations, and the Chamber of Commerce, are not who one would naturally turn to for inspiration on consumer rights. It is true that if this Court affirms, holders may have to pay a few thousand dollars here and there when consumers are defrauded by sellers who go out of business before or during litigation, but these lenders gain a lot more through their already excessively priced, long-term, high-interest loans. (See generally, Kirk, *Subprime Auto Loans the Rising Menace of Wall Street's Latest Darling* (2014) 18 J.Consumer & Com. L. 72 [subprime loans can have annual interest rates approaching 30 percent].)

Auto lending is the fastest growing consumer credit market. (Levitin, *The Fast and the Usurious: Putting the Brakes on Auto Lending Abuses* (2020) 108 GEO. L. REV. 1257, 1260.)[11] Auto finance companies profit despite borrower default through a slew of abusive and deceptive sales, repossession, and collections tactics. (Schmidt,

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[10] Scott, *The Opposite Sides of Subprime Auto Lending*, KCRW (Jan. 8, 2020), available at: https://www.kcrw.com/news/shows/greater-la/subprime-auto-lending-is-booming-in-la/the-opposite-sides-of-subprime-auto-lending.

[11] From 2011 to 2019, the total balance on auto loans grew by 89% in nominal terms, a more dramatic growth than even student loans.

Pump the Brakes: What Financial Regulators Should Consider in Trying to Prevent A Subprime Auto Loan Bubble (2019) 107 Cal. L. Rev. 1345, 1355.) Auto lenders can extract value using these tactics at each stage in the process: sales, financing, repossession, and collections. (*Ibid.*) Each practice that unfairly profits subprime lenders at the expense of borrowers in default provides a financial incentive for lenders to make more and more high-risk subprime loans. These tactics simultaneously increase the harm for individual consumers and the risk of default in the entire market. (*Ibid.*)

TDAF's amici's interpretation of the Rule leads to only one outcome – if consumers are to sue the holder when they have been victimized by a seller who routinely does business with the holder, they may get their money back eventually, but they will also owe far more in attorney fees and costs incurred in that litigation. Holders have every incentive to prolong litigation especially in lower damages lawsuits. Consumers better not sue.

In its regulatory history, the FTC was firmly focused on protecting consumers and rectifying a situation which heavily disfavored them. The Rule was formulated first and foremost as a regulation for the benefit of consumers, consumers who were routinely cheated by businesses and ignored by financing companies, and still made to pay for misrepresented or valueless goods. Westlake and the Bankers Association argue the Rule leaves consumers better off because they can recover the amounts paid on their contracts, something they were not entitled to before the Rule was promulgated. However, as long as holders can litigate to the bitter end or drag their feet on settlement with zero liability above a simple refund of what the consumer paid, no consumer benefits from the Rule.

TDAF and its amici never once show how their interpretation of the holder clause allows consumers to file claims against holders without getting deeper in debt. Nor do they show how this could ever result in a positive outcome for a consumer. They ask this Court to ignore the real-world application of their reading of the Rule as completely irrelevant. But then what is the purpose of having this rule at all? Their fallback is the oft-repeated excuse that consumer protections only harm consumers because they result in increased prices.

However, the structure of the indirect auto lending market (where consumers are financed through third-party holders) means that holders are not competing for consumers' business directly; they are competing for dealers' business. (Levitin, *supra,* 108 GEO. L. REV. 1257, 1264.) The dealer is the indirect auto lender's customer, not the consumer. (*Ibid.*) Indirect auto lenders compete for dealers' business primarily using the size of the dealer markup on the vehicle's price, where a lower buy rate enables a greater markup. (*Id.*) So, unlike in other markets, competition does not drive down prices in indirect auto lending; rather than resulting in a lower loan rate for the consumer, a lower buy rate simply enables the dealer to impose a higher markup for the vehicle being sold to the consumer. (*Id.*)

TDAF's amici also argue that any policy considerations must be addressed by regulators, not courts. However, the auto dealer and auto lenders' lobbies are so powerful that they carved out an exception for themselves from being regulated by the Consumer Finance Protection

Bureau (CFPB). (Foohey, *Consumers' Declining Power in the Fintech Auto Loan Market* (2020) 15 Brook. J. Corp. Fin. & Com. L. 5, 8 ["[A]uto sellers, which often partner with auto lenders or are one in the same, are not subject to the CFPB's rulemaking, supervision, or enforcement authority. This carveout serves to insulate auto loans from regulation by the federal agency designed to address problematic practices that research had identified in the a variety of consumer lending markets, including auto loans."]; see also Balleisen & Jacoby, *Consumer Protection After the Global Financial Crisis* (2019) 107 Geo. L.J. 813, 824-30 [discussing the lobbying that led to this carveout and the intertwining of car sales and loans].)

Being made liable for reasonable attorneys' fees should encourage holders to be leery of doing business with disreputable merchants. This in turn should force these disreputable merchants to be, hopefully, a little less fraudulent so they may keep selling their goods to consumers who need financing. This was the intent behind the Rule in the first place. What TDAF's amici want is zero liability and zero responsibility for anything their business partners, auto dealers, do. They want to keep as much of the benefit from the fraud committed against the consumer as they can.

TDAF's amici also feign ignorance of holders' ability to settle a consumer's claim early on, and that they can then go after the seller or its principal for any money spent.[12] This ignorance is convenient because if their argument prevails, holders will have carte blanche to litigate as much as they want and then walk away owing nothing to the

[12] Holders protect themselves through dealer financing agreements, indemnity clauses, and guarantees.

consumer for attorney fees and costs. This in turn will discourage *any* litigation against holders. That is obviously the goal of all financial institutions who may face liability as holders. If holders are not liable for fees, and fraudulent sellers can easily close their business without facing any liability for the fraud committed against consumers, fraud will become more and more prevalent. Holders in turn will be left free to collect payments on the fraudulently sold good as long as the consumer is willing to pay. Then, if the consumer stops paying, she risks ruining her credit, losing her only form of transportation, and becomes liable to the holder for breach of contract. Consumers are left in a no-win situation, and that directly benefits TDAF, its amici, and the entire financial industry.

Finally, TDAF's amici argue consumers should just be grateful to get anything under the Rule because they were much worse off before the Rule was promulgated. According to TDAF's amici, the Rule protects consumers sufficiently without allowing them to recover attorneys' fees and costs. Again, they completely side-step holders' responsibility in forcing consumers to litigate in the first place, and the attorneys' fees and costs that are incurred because of this prolonged litigation against the "innocent" or "blameless" holder.

The Court of Appeal saw beyond the self-serving arguments of financial institutions and interpreted the terms within the Holder Clause in the only way that ensures its intent and purpose is fulfilled. *Pulliam's* reasoning aligns with California's consumer protection statutes, with our cost statutes, and with this Court's opinions. The Court of Appeal's opinion should be affirmed.

CONCLUSION

The Court of Appeal got it right. The decision is right in terms of statutory construction. It is right in terms of legislative purpose and history. And it is right in terms of public policy. The amicus briefs do not show otherwise.

Dated: December 20, 2021 ROSNER, BARRY & BABBITT, LLP

By: */s/ Arlyn L. Escalante*
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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the foregoing **RESPONDENT TANIA PULLIAM'S CONSOLIDATED ANSWER TO AMICUS CURIAE BRIEFS** is produced using 13-point Century Schoolbook and contains approximately 5,006 words, which is less than the words permitted by rule. Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: December 20, 2021 ROSNER, BARRY & BABBITT, LLP

By: */s/ Arlyn L. Escalante*
Arlyn L. Escalante

CERTIFICATE OF SERVICE

Tania Pulliam v. HNL Automotive, Inc. et al.
Supreme Court Case No. S267576

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is: 10085 Carroll Canyon Road, Suite 100, San Diego, California 92131.

On December 20, 2021, I served the following document(s):

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[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on December 20, 2021, at San Diego, California.

Leslie Rivera Mason

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 12/20/2021 by Celia Wong, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/20/2021

Date

/s/Leslie Mason

Signature

Mason, Leslie (Other)

Last Name, First Name (PNum)

Rosner, Barry & Babbitt, LLP

Law Firm