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Supreme Court of California
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No. S267576

**IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA**

TANIA PULLIAM,
Plaintiff and Respondent,

v.

TD AUTO FINANCE, LLC
Defendant and Petitioner.

From a Published Decision of the Court of Appeal, Second Appellate District, Division Five, No. B293435

Appeal from the Superior Court of Los Angeles County
Hon. Barbara M. Scheper, Judge Presiding
Case Number BC633169

ANSWER TO PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Counsel hereby submits, on behalf of Plaintiff and Respondent, TANIA PULLIAM, there are no interested entities or persons that must be listed in this Certificate under rule 8.208.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Dated: March 30, 2021 ROSNER, BARRY & BABBITT, LLP

By: *<u>/s/ Hallen D. Rosner</u>*
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INTRODUCTION

The court of appeal in this case disagreed with two prior court of appeal opinions, both of which were subject to Petitions for Review denied by this Court. Those two opinions, *Spikener v. Ally Financial, Inc.* (2020) 50 Cal.App.5th 151 (*Spikener*) and *Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398 (*Lafferty*), are so detrimental to California consumers that Respondent Pulliam agrees that this Court should grant review to settle this important area of law and find that both *Spikener* and *Lafferty* were wrongly decided, while this opinion, *Pulliam*, is correct.

Rather than oppose this Petition, Respondent requests that this Court: (1) order that *Pulliam* remains precedential while on review to limit the detrimental effect of *Spikener* and *Lafferty*, and (2) consider two additional issues for review.

STATEMENT OF ADDITIONAL ISSUES

1. Whether this Court will order that *Pulliam* retain its precedential effect while on review.

2. Whether the FTC exceeded its authority by prohibiting state action through comments in its 2019 Confirmation of the Holder Rule.

3. If the FTC did not exceed its authority, whether Civil Code section 1459.5 is conflict preempted.

I. RESPONDENT REQUESTS THAT THIS COURT ORDER THAT *PULLIAM* RETAIN ITS PRECEDENTIAL EFFECT WHILE ON REVIEW

Under Rules of Court, rule 8.1115(e)(3), this Court may order that a published opinion remain precedential while under review. (See *People v. Meraz* (2017) 215 Cal.Rptr.3d 3; *In re Humphrey* (2018) 19 Cal.App.5th 1006.) If this Court grants review, such relief is requested here. This relief is necessary and appropriate for at least two reasons:

- Allowing *Pulliam* to retain its precedential effect will limit the detrimental impact on consumers inflicted by *Spikener* and *Lafferty* and will facilitate settlements in these cases instead of prolonging litigation at the consumer's expense.
- Given that most consumers' vehicle fraud cases are compelled to arbitration, with no possibility for review of the arbitrator's award, the continued precedential effect of *Pulliam* is crucial so that consumers may argue their entitlement to reasonable statutory attorneys' fees in arbitration.
- Because consumers had previously requested the publication of prior opinions allowing attorney fee awards from holders and had also requested the depublication of both *Lafferty* and *Spikener,* only to be denied – fairness dictates that *Pulliam* should retain its precedential effect now.

A. *Pulliam* encourages early settlement of these cases.

If *Pulliam* were to lose its precedential effect, defendants in these cases will continue to litigate consumer claims until the bitter end without any liability to pay attorney's fees – that is the effect of *Spikener* and *Lafferty.* Trial courts will continue to be bound by the

erroneous conclusions of *Spikener* and *Lafferty* when deciding motions on attorneys' fees and costs, even if *Pulliam* remains citable for its persuasive and non-precedential effect. This outcome discourages any early and fair settlement of consumer claims.

If *Pulliam* were to retain its precedential effect, it is likely that trial courts will adopt *Pulliam*'s reasoning and award appropriate and reasonable statutory attorney's fees to consumers. Trial courts would at very least have the option to decide which reasoning to follow. This incentivizes defendant-holders to settle cases early on when attorney's fees are low, instead of litigating a case to trial where they may be held jointly and severally liable for much greater amounts of attorney's fees, costs and prejudgment interest.

If *Pulliam* loses its precedential effect, trial courts will remain bound by *Lafferty* and *Spikener,* only. Those trial court cases will continue to make their way through the courts of appeal and to this Court. Currently, there are at least eight cases working their way through the courts of appeal on this same question.[1]

The uncertainty Petitioner and Amicus fear (PFR at 16; Amicus Let. at 5) will facilitate settlement in these cases. With *Spikener* and *Lafferty*, defendant-holders are encouraged to holdout on settling these

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[1] These are: *Reyes v. Beneficial State Bank,* Fifth App. Dist. Appeal No. F080827; *Melendez v. Westlake Services, LLC,* Second App. Dist. Appeal No. B306976; *Hernandez Flores v. Westlake,* Second App. Dist. Appeal No. B308288; *Guevara v. Westlake,* Second App. Dist. Appeal No. B308365; *Garcia v. 3rd Generation Inc.,* Fourth App. Dist. Appeal No. D078426; *Sanchez v. Westlake,* Second App. Dist. Appeal No. B308435; *Contreras v. Generation Motors, Inc.*, Second App. Dist. Appeal No. B309417; and *Granados v. Bravado Auto, Inc.* Second App. Dist. Appeal No. B310436.

claims while running-up a consumer's (unrecoverable) attorney's fees all the way to trial or arbitration, thus eviscerating *any* potential recovery for the consumer. This tactic is designed to harm consumers and *increases* litigation rather than promoting early settlement.

B. The continued precedential effect of *Pulliam* will be crucial in the arbitration context where no review is possible.

Because the Retail Installment Sales Contract used for vehicle sales contains an arbitration clause, most of these car fraud cases are compelled by defendants into arbitration rather than litigated in our trial courts. This is another reason why the continued publication and precedential effect of *Pulliam* is so crucial – with no review possible after arbitration, it is only with precedential caselaw that consumers will be able to argue to arbitrators that *Spikener* and *Lafferty* were wrongly decided.

Unless *Pulliam* retains its precedential effect while on review, consumers already forced into the unequal playing field of arbitration will be further without recourse forced to arbitrate their claims without the possibility of an award of attorneys' fees and without the ability to seek review of the arbitrator's award. These are not far-fetched hypotheticals; this is the current reality of consumer protection litigation.

C. Fairness and unpublished precedent dictates that this opinion remain precedential.

Prior to the *Lafferty* opinion, trial courts, arbitrators, and courts of appeal had regularly found a holder liable for attorneys' fees and costs under the holder clause and California's consumer protection

statutes. (See e.g. *Music Acceptance v. Lofing* (1995) 32 Cal.App.4th 629 [awarding attorney's fees against holder without reviewing the limitation issue]; *Alarcon v. Fireside Bank* (Cal. Ct. App., Mar. 8, 2010, No. A117148) 2010 WL 769690 [rejecting holder clause limitation arguments]; *Duran v. Quantum Auto Sales, Inc.* (Cal. Ct. App., Dec. 12, 2017, No. G053712) 2017 WL 6334220 [finding holder liable for attorney's fees and costs above amount paid on contract]; *Medina v. South Coast Car Co., Inc.* (2017) 15 Cal.App.5th 671 [finding holder liable for reasonable attorney's fees per settlement].)

When *Lafferty* and *Spikener* were published, consumers petitioned this Court for review and depublication of these anti-consumer opinions to no avail. Further, after *Lafferty,* the Legislature also joined its voice when it passed Civil Code section 1459.5, an attempt to abrogate *Lafferty.* The Legislature's attempt to protect consumers was thwarted by *Spikener*'s flawed preemption analysis.

Now, with *Pulliam,* a court of appeal has finally published an opinion agreeing that the FTC's Holder Rule (the Rule) is meant to protect consumers, and that the barring of attorney's fees as advanced by *Lafferty* and *Spikener* accomplishes the total opposite of the FTC's intent. To withdraw the precedential effect of this case while on review would be yet another blow to Californian consumers.

If this Court grants review, Respondent respectfully requests that the Court exercise its power to order that the *Pulliam* opinion retain its precedential effect.

II. THE FTC EXCEEDED ITS AUTHORITY WHEN IT PROHIBITED STATE ACTION THROUGH ITS 2019 COMMENTARY.

Spikener held that the FTC's 2019 comments in its confirmation of the Rule "demonstrates a clear intent to prohibit states from authorizing a recovery that exceeds" the amounts paid on the contract "on a Holder Rule claim." (*Spikener, supra,* at p. 162.) Such prohibition is beyond the FTC's authority. While neither the *Spikener* nor the *Pulliam* courts were presented with this argument, this is a valid proposition this Court should consider especially when it comes to deciding whether the FTC's comments are owed deference and whether Civil Code section 1459.5 is preempted by those comments.

California has the power to pass statutes such as Civil Code section 1459.5 to protect consumers by allowing them to sue holders and recover attorneys' fees and costs under state law. (See *Diamond Multimedia Sys., Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1064 [California "has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices."].) Indeed, California has every right to allow the recovery of attorneys' fees when consumers bring state law claims against a holder to recover what they are owed under the contract. (See *Jankey v. Lee* (2012) 55 Cal.4th 1038 1038, 1054 (*Jankey*) ["Absent *congressional intervention*, California has every right to adopt whatever [attorney] fee regime it deems appropriate upon invocation of state law remedies."], emphasis added.)

In contrast, the FTC is not authorized by Congress to block state law. (See *California State Bd. of Optometry v. F.T.C.* (D.C. Cir. 1990) 910 F.2d 976, 980 ["There is nothing in the language of [the FTC Act] to indicate that Congress intended to authorize the FTC to reach the 'acts

or practices' of States acting in their sovereign capacities… We can find nothing in the language or history of subsequently adopted amendments to support a finding that Congress has expanded the FTC's jurisdiction to embrace state action."].)

The Rule and its contemporaneous comments in 1975 and 1976 specifically provide that nothing in the Rule is meant to supplant state law: "Appropriate statutes, decisions, and rules in each jurisdiction control." (41 Fed.Reg. 20024.) But the FTC's 2019 comments prohibiting states from enacting laws making holders liable for attorneys' fees do just that – supplant state law.

By its own regulatory history, after the Rule was promulgated, states were then free to expand consumer protections. (40 Fed.Reg. 53521 ["this rule will serve as a model for further state legislation and give states which lack legislation the impetus to act."] and 41 Fed.Reg. 20024 ["Appropriate statutes, decisions, and rules in each jurisdiction will control."].) Contrary to the Rule, the FTC's 2019 comments seek to block states from passing further protections, such as the award of statutory attorneys' fees from a holder, if the holder's liability stems from the seller's misconduct. (84 Fed.Reg., *supra,* at p. 18713. ["We conclude that if a federal or state law separately provides for recovery of attorneys' fees *independent of claims or defenses arising from the seller's misconduct*, nothing in the Rule limits such recovery."], emphasis added.)

The FTC's 2019 comments overstep the FTC's authority by attempting to bar state law without the rightful authorization from Congress. These comments are unlawful, are not owed deference and cannot preempt state law.

III. EVEN IF THE FTC DID NOT EXCEED ITS AUTHORITY, CIVIL CODE SECTION 1459.5 DOES NOT CONFLICT WITH THE RULE.

This Court has found no preemption of state law in two opinions closely analogous to our facts here – *Jankey v. Lee* (2012) 55 Cal.4th 1038 (*Jankey*) and *Viva! Internat. Voice for Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929 (*Viva*). Both cases however, deal with acts of Congress, the Americans with Disabilities Act (ADA) and the Endangered Species Act, while here we deal with an agency regulation and a 44 years-later interpretation of that regulation.

In 1975, the FTC delegated authority over the Rule's application to the states—explicitly allowing states to enact legislation which would provide for "a larger affirmative recovery" against the holder. (41 Fed.Reg. 20022 at 20023-24.) That is exactly what our Legislature did by enacting Civil Code section 1459.5.

Even if the FTC's comments did not overstep its authority and were entitled to some deference, under this Court's preemption analysis in both *Viva* and *Jankey*, Civil Code section 1459.5 cannot be preempted.

1. Civil Code section 1459.5 as a response to *Lafferty*

The *Lafferty* decision was the first published opinion to decide on the unavailability of attorneys' fees beyond the amounts a consumer paid under a contract even when the consumer is the prevailing plaintiff under the CLRA (which has a mandatory attorneys' fees provision). (See Civil Code § 1780(e).) Because of this anti-consumer holding, the Legislature passed Assembly Bill 1821, codified in Civil

Code section 1459.5. Section 1459.5, which went into effect on January 1, 2020, states:

> A plaintiff who prevails on a cause of action against a defendant named pursuant to Title 16, Part 433 of the Code of Federal Regulations or any successor thereto, or pursuant to the contractual language required by that part or any successor thereto, may claim attorney's fees, costs, and expenses from that defendant to the fullest extent permissible if the plaintiff had prevailed on that cause of action against the seller.

The legislative materials of AB 1821 clarify the new bill was intended to ensure "fairness and legal recourse to defrauded consumers." (See Respondent's Request for Judicial Notice (RJN), Ex. 1.)

As explained by our Legislature, from 1975 until *Lafferty's* publication in 2018, holders were found by California courts to be liable for consumers' attorneys' fees and costs under California's fee-shifting consumer protection statutes, as fees and costs are not considered part of the consumer's "recovery." (RJN, Ex. 1, p. 4 ["Fees and costs are not included in the consumer's ["recovery" under the Rule]. [The Rule notice] is, rather, intended to make clear that lenders are not liable for punitive and consequential damages that stem from the seller's misconduct."].)

Section 1459.5 is consistent with the history, purpose, and intent of the Rule, and is consistent with California's interest in protecting its consumers and deterring fraud. As discussed below, under this Court's preemption analysis, section 1459.5 is not preempted.

2. The Rule specifically allows for further state action – there is no express preemption.

To determine whether section 1459.5 is preempted, the first question is whether Congress has made clear and manifest its intent to preempt state law with federal law. (*Jankey, supra,* 55 Cal.4th at p. 1048 (citation omitted).)

Here, however, we deal with agency action and this Court has stated: "We are especially reluctant to infer obstacle preemption based on agency actions as opposed to statute." (*Viva, supra*, 41 Cal.4th at p. 946.) With agency action, the party arguing for preemption "must show in the history it relies on an 'authoritative' message of a federal policy against" state regulation (citation) and 'clear evidence of a conflict' between state and federal goals (citation)." (*Id.*)

As stated above, the Rule expressly *allows* for further state laws to implement the purpose of the rule. (40 Fed.Reg. 53521 ["this rule will serve as a model for further state legislation and give states which lack legislation the impetus to act."] and 41 Fed.Reg. 20024 ["Appropriate statutes, decisions, and rules in each jurisdiction will control."].) Next, is the question of implied preemption through conflict, field, or obstacle preemption. (*Jankey*, *supra,* 55 Cal.4th at p. 1048.)

3. The Rule is a floor, not a ceiling – there is no implied preemption.

It cannot be disputed that there is no field preemption on consumer protections here, *i.e.*, where "Congress' intent is to pre-empt all state law in a particular area." (*Viva, supra*, 41 Cal.4th at p. 936.)

Conflict preemption will be found when simultaneous compliance with both state and federal directives is impossible. (*Viva*, *supra* at p.

936.) Obstacle preemption arises when the state law stands as an obstacle to the purposes and objectives of the federal law. (*Jankey*, *supra*, at p. 1054.) "What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 815 (*Olszweski*) (citation omitted).)

In both *Viva* and *Jankey* this Court turned to legislative history to determine whether the federal law intended to preempt state law or whether the laws contemplated that states would expand on those protections and thus insulated state law from preemption. (*Viva,* at p. 941; *Jankey,* at p. 1050.)

In *Viva*, this Court found no conflict or obstacle preemption, as it was not physically impossible to simultaneously comply with both federal law, which as a floor matter, in its Endangered Species Act allowed kangaroo trade, and state law, which imposed a higher standard and prohibited the trade. (*Viva,* at p. 944.) *Viva* found that although there was no current federal regulation of kangaroo because federal goals were met, that did not preempt further state efforts to protect endangered species. (*Viva* at p. 950.)

In *Jankey,* this Court found no conflict or obstacle preemption of a state law that allows reciprocal attorneys' fees for suits brought to enforce disability rights, even though similar statutes under the ADA only allow attorneys' fees for prevailing plaintiffs. (*Jankey*, *supra*, at pp. 1053-1056.) This Court found that the ADA insulated further state action, and that the state law did not conflict with nor pose a barrier to congressional objectives even though the state law allowed defendants to recover attorney fees and that was not in furtherance of disability rights – plaintiffs had the option of proceeding with only the federal

claim, or adding the state claim which exposed them to reciprocal fees. (*Id.*) States can go beyond the floors set by federal law.

The holding in *Spikener,* mainly relying on this Court's analysis in *Olszewski*, found Section 1459.5 conflicted with the 2019 comments and was preempted. (*Spikener, supra,* 50 Cal.App.5th at p. 161.) *Olszewski* is the wrong case to focus on because there, as a condition for accepting federal funds, California had agreed to abide by requirements imposed by federal law. (*Olszewski, supra,* 30 Cal.4th at 804, 817.) This Court found the California law did not abide by the explicit conditions set by Congress and thus was in direct conflict with federal law. (*Id.* at 822-824.) *Olszewski* is inapposite to our facts.

Here, there is no physical impossibility in complying with the FTC's minimum consumer protections and California's more robust ones, and nothing under the FTC's regulations binds California to any limit set by the FTC.

In *Viva,* when analyzing conflict/obstacle preemption, this court also found that "every action falls within one of three possible federal categories: an action may be prohibited, it may be authorized, or it may be neither prohibited nor authorized." (*Viva, supra*, at p. 952.) Here, the Rule itself does not prohibit nor authorize the recovery of attorneys' fees when a consumer must sue a holder under state law to recover what the consumer paid under the contract. The 2019 comments do make that prohibition, but, as discussed above, the FTC exceeded its authority by making that prohibition. California is thus allowed to enact statutes that address the situation here as our Legislature did with section 1459.5. The *Spikener* court was wrong in concluding that the comments' "clear intent to prohibit states from authorizing a

recovery that exceeds" the amounts paid on the contract must be adhered to by our Legislature.

If this Court accepts review of *Pulliam*, Respondent respectfully requests that the Court review these two additional issues.

IV. *PULLIAM* CORRECTLY DISAGREED WITH *LAFFERTY* AND *SPIKENER*.

While Respondent agrees that this Court should grant review of the issues posed by Petitioner, review should be granted so that this Court may affirm *Pulliam* and overrule *Spikener* and *Lafferty*.

A. *Pulliam* follows the rules of statutory construction.

Generally, the same rules governing statutory interpretation apply to the interpretation of administrative regulations. (*Regents of the University of California v. Public Employment Relations Bd.* (2020) 51 Cal.App.5th 159, 187.) *Pulliam* followed the correct steps in its interpretation of the Rule and the terms used in the holder clause.

Pulliam rejects the out-of-state and out-of-context definition of "recovery" used by the *Lafferty* court, which was then espoused by *Spikener*. *Pulliam's* definition is consistent with the idea that statutory attorney's fees are costs of suit not part of a plaintiff's damages or recovery. Contrary to Petitioner's assertion that *Pulliam* stitched together the dictionary definition of "recovery", because courts have interpreted the word "recovery" differently, *Pulliam* took the definition and then properly reviewed the regulatory history of the Rule to examine which definition is consistent with the Rule's original intent and purpose. *Pulliam*'s analysis is correct.

B. *Pulliam's* interpretation of the term "recovery" is consistent with how courts view statutory attorney's fees – as costs of suit, not part of a plaintiff's recovery.

Attorney's fees and costs are not a part of a consumer's damages, they are not part of a judgment, they are *costs* incidental to the litigation. "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).) Statutory attorney's fees are allowable as costs under Code of Civil Procedure section 1033.5.

Code of Civil Procedure section 1033.5(a)(10)(B) identifies attorney's fees, when authorized by statute, as allowable costs. As such, a prevailing party is entitled to recover his costs, including statutory attorney's fees, as a matter of right "[e]xcept as otherwise expressly provided by statute." (Code Civ. Proc. § 1032(b).)

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).)

Under California's fee-shifting statutes such as the Consumers Legal Remedies Act (CLRA) (Civ. Code § 1750 *et seq*.), and the Song-Beverly Consumer Warranty Act (Civ. Code § 1792 *et seq*.), attorney's fees are not "recovered" by consumers. For example, Civil Code section 1780(a) identifies the remedies available to an injured consumer for a

CLRA violation, *and separately*, section 1780(e) mandates a prevailing consumer is entitled to their attorney's fees and costs. Similarly, Civil Code section 1794(d) is a separate provision from the Song-Beverly Act's express and implied warranty remedies that creates the entitlement to attorney's fees and costs to a prevailing car buyer. Attorney's fees are never part of a consumer's damages, they are not paid to the consumer, and they are not part of a consumer's recovery. Attorney's fees and costs under these statutes are *incurred* in the litigation to *recover* a consumer's monetary damages after being defrauded or being sold an unmerchantable good.

Petitioner's argument that if attorneys' fees are recoverable through *Pulliam*'s definition of "recovery," then the Rule's limitation is rendered a nullity, is misguided. Petitioner completely ignores the first sentence of the holder clause which makes the holder liable for *all* claims a consumer has against the seller, these claims would expose the holder to additional liability for such things as punitive damages, consequential damages and civil penalties, without the limitations placed by the second sentence. "Recovery hereunder," for the claims against the seller is thus limited to only the amounts paid under the contract, but *Pulliam* is correct, as discussed above, that this limitation does not involve the costs of litigation including statutory attorney's fees.

C. In 1975, the FTC did not reach a "compromise" with the Rule, it firmly weighed in favor of consumer protection over the interests of financial institutions and delegated further action to the States.

The Rule was not a "compromise" or "balance" between consumer protection and the availability of consumer credit as suggested by

Petitioner. (PFR at pp. 7, 8, 16, 25.) The purpose of the rule was to reallocate the risks of seller misconduct from the consumer to the holder-creditor who is in a better position to return the risk to the sellers. (40 Fed.Reg. 53506, at p. 53523.) The FTC was concerned that when a consumer is cheated in the marketplace, "[r]edress via the legal system is seldom a viable alternative for consumers," specifically where the consumer litigant "must undertake the further risk that his defendant will prove insolvent or unavailable on the day of legal reckoning." (*Id.* at 53523.)

It was in this context that the FTC's provided a guiding principal for future state legislation: "[T]he creditor is always in a better position than the buyer to return seller misconduct costs to sellers, the guilty party. This is the reallocation desired, a return of costs to the party who generates them." (40 Fed.Reg. 53506 at p. 53523.) The FTC found that creditors financing transactions are in a better position to return misconduct costs to sellers because they:

> (1) Engage in many transactions where consumers deal infrequently;
> (2) Have access to a variety of information systems which are unavailable to consumers;
> (3) Have recourse to the contractual devices which render the routine return of seller misconduct costs to sellers relatively cheap and automatic; and
> (4) Have the means to initiate a lawsuit and prosecute it to judgment where recourse to the legal system is necessary.

(*Ibid.*)

The stance of holders since *Lafferty*'s holding is that they do not have to do any of the above – they do not have to protect themselves

from potential liability from a seller's misconduct because they are not liable for anything above what they received from the consumer.

The FTC believed that if creditors were compelled "to either absorb seller misconduct costs or return them to sellers," this would "discourage many of the predatory practices and schemes" it had observed were prevalent against consumers. (*Ibid.*) It would then be up to the creditors to not accept the risks generated by the truly unscrupulous merchants. (*Ibid.*) "The market will be policed in this fashion and … [t]he creditor may also look to a "reserve" or "recourse" arrangement or account with the seller for reimbursement. (*Ibid.*)

The same day the Rule went into effect, the FTC published further guidelines to respond to the "many inquiries about the interpretation and application of the Rule." (41 Fed.Reg. 20022.) These guidelines specifically addressed what the Rule's limitation referred to – a consumer may not assert against "the creditor any rights he might have against the seller for additional consequential damages and the like." (41 Fed.Reg. 20023.) That is the meaning of the words "recovery hereunder" and it does not encompass attorneys' fees which are costs incidental to the litigation the holder rule explicitly permits.

The FTC's 1976 guidelines further specify that the limitation does not eliminate a larger affirmative recovery against a creditor as a matter of state law, and that the words "Claims and Defenses" are not given any special definition, but simply incorporate those things which as a matter of other applicable law constitute legally sufficient claims. (41 Fed.Reg. 20023.) Appropriate statutes, decisions, and rules in each jurisdiction control. (41 Fed.Reg. 20024.) That is the *only* way to effectuate the Rule's purpose and intent of "reallocating the costs of the seller's misconduct from the consumer back to the seller and creditor."

The term "recovery" in the holder clause must not be inclusive of fees and costs; otherwise, the purpose of fee-shifting provisions in consumer protection statutes—to allow consumers with valid claims to vindicate their rights—would be defeated.

Petitioner or Amicus somewhat acknowledge that consumers cannot bring actions against holders unless they may recover their reasonably incurred statutory attorney's fees as the costs of litigation against the holder, or that they will be in a worse off position if they attempt to litigate against the holder. Petitioner and Amicus frame this situation as though it is a necessary evil against consumers created by the FTC to strike a delicate balance with the interests of financial institutions. However, neither Petitioner nor Amicus points to anything in the Rule's regulatory history where the FTC considered this type of delicate "compromise" in favor of financial institutions, and necessary evil against consumers. This supposed delicate balance and compromise is a fiction created by financial institutions themselves.

D. The second sentence of the holder clause limits its application, but it does not hobble the Rule's purpose.

While the FTC clearly stated what the limits of the holder clause referred to, "consequential damages and the like" (41 Fed.Reg. 20023, May 14, 1976), if this limitation extends to the recovery of the costs of litigation and attorney's fees, the purpose of the Rule is not *limited,* it is completely hobbled. The purpose of the Rule is to allow consumers to affirmatively sue to recover what they have paid whether or not they could prove the holder had knowledge of the seller's misconduct.[2]

[2] The regulatory history of the Rule specifies that it is meant to address the situation where it was often "impossible for a consumer to prove the

As demonstrated with this case, *Lafferty,* and *Spikener*, if the consumer is forced to bring a lawsuit against the holder to recover the amounts she paid under the contract, the costs of suit far outstrip any recovery under the contract. The longer the litigation, the less the consumer will recover, if anything at all. By effectively barring statutory attorneys' fees through the second sentence of the holder clause, holders such as Petitioner have every incentive to holdout from paying anything and litigate as much as they want because their liability remains the same. The end goal is for consumers to stop bring these cases against the holder at all because they end up being much more costly than anything the consumer will recover.

For example, under the CLRA, "[t]he provision for recovery of attorney's fees allows consumers to pursue remedies in cases as here, where the compensatory damages are relatively modest. To limit the fee award to an amount less than that reasonably incurred in prosecuting such a case, would impede the legislative purpose underlying section 1780." (*Graciano v. Robinson Ford Sales, Inc*. (2006) 144 Cal.App.4th 140, 150. (citation omitted).) Because the Rule is premised on the fact creditors are in a better position than consumers to protect themselves against unscrupulous sellers and to bear the cost of seller misconduct, the Rule's purpose would be frustrated if attorney

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creditor holding his credit contract had actual knowledge of the gross seller misconduct." (*Id.* at 53508.) And that the Rule was necessary because "although some states had done away with the 'holder in due course rule' and allowed the consumer to assert against the holder the same claims and defenses it had against a seller, these rules did not allow consumers to bring *affirmative* claims against the holder." (*Id.*, emphasis added.)

fees were not recoverable from the insolvent seller *nor* the creditor-assignee.

Pulliam's interpretation and thorough analysis of the Holder Rule is its only and correct application.

E. The FTC's 2019 comments are not owed deference – *Spikener's* analysis is wrong.

The *Pulliam* court engaged in a much more thorough review of the *Kisor v. Wilkie* (2019) _U.S._, 139 S.Ct. 2400 (*Kisor*), deference analysis than the court did in *Spikener*. *Pulliam*'s conclusions are correct – the FTC's 2019 comments barring consumers from claiming attorney's fees for litigation pursuant to the holder clause in their contract are not owed deference.

While citing to *Kisor, Spikener*'s deference analysis is limited to three sentences: the first, stating that the FTC's comments are reasonable because they follow *Lafferty*'s reasoning; second, stating that the FTC's comments are published in the Federal Register and are, therefore, official; and third, that the FTC asked for comments prior to confirming the Rule and thus this is evidence that the FTC's comments were well-reasoned. (*Spikener, supra,* at p. 159.)

The *Pulliam* court was not so persuaded. (*Pulliam, supra,* at p. 566.) The *Pulliam* court focused on two factors that weigh against finding that deference is owed to the FTC's 2019 comments. *Pulliam*'s reasoning is sound and should be affirmed on review.

1. The FTC's 2019 position as to whether attorney's fees are recoverable from a holder is not definitively within the FTC's substantive expertise.

The *Pulliam* court reviewed the history of the FTC's rule confirmation and the comments the agency received for and against the confirmation of the Rule. (*Pulliam*, at p. 565.) In December 2015, the FTC requested public comment on "the overall costs and benefits, and regular and economic impact" of the Rule "as part of the agency's regular review of all its regulations and guides." (80 Fed.Reg. 75018.) The request for comment identified 15 questions on which the FTC sought comment, including whether the Rule should be modified in any way, but asked no questions specifically about attorney's fees. (80 Fed.Reg. 75019.) Only 6 of the 19 comments the FTC received mentioned attorney's fees. (*Pulliam*, at p. 565.) After reviewing these comments, the FTC's Rule confirmation states: "The Commission does not believe that the record supports modifying the Rule to authorize recovery of attorneys' fees from the holder, based on the seller's conduct, if that recovery exceeds the amount paid by the consumer." (*Id.*)

Pulliam concluded that the FTC's comments on attorney's fees do not fall within the FTC's substantive expertise for two reasons:

First, *Pulliam* asserts that as to the availability of attorney's fees, "[r]esolution of the issue may turn on the particular state statute providing for attorney's fee recovery at issue, and whether that statute is intended to be punitive against the payor or simply to make the payee whole." (*Pulliam*, at p. 566.) This makes sense. California "has a legitimate and compelling interest in preserving a business climate free

of fraud and deceptive practices." (*Diamond Multimedia Sys., Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1064; see also *Jankey v. Lee* (2012) 55 Cal.4th 1038, 1054 ["Absent congressional intervention, California has every right to adopt whatever fee regime it deems appropriate upon invocation of state law remedies."].) The Rule's own regulatory history confirms that states are free to expand their consumer protections based on the Rule. (40 Fed.Reg. 53521 ["this rule will serve as a model for further state legislation and give states which lack legislation the impetus to act."] and 41 Fed.Reg. 20024 ["Appropriate statutes, decisions, and rules in each jurisdiction will control."].)

Second, "[a]s illustrated by the FTC's request for comments which led to the Rule confirmation, the FTC sought to exercise its judgment *based on data* regarding the effect of the rule (or any proposed rule change) on consumers and businesses." (84 FR 18711, emphasis added.) The FTC specified that *no commenter provided it with data* on the costs and benefits to consumers or businesses in different jurisdictions based on the availability of attorney's fees or any limitations placed on them. (*Ibid.*)

One of the letters the FTC considered, specifically addressed the *Lafferty* opinion, and the FTC's position on attorneys' fees mirrors the holding in *Lafferty*. But, analysis of case law, as a general rule, falls squarely outside the expertise of agencies. (*Hymes v. Bank of America, N.A.* (E.D.N.Y. 2019) 408 F.Supp.3d 171, 192, citing *New York v. Shalala* (2d Cir. 1997) 119 F.3d 175, 180 ["[A]n agency has no special competence or role in interpreting a judicial decision."]; *cf. Kisor*, 139 S. Ct. at p. 2417 ["Some interpretive issues may fall more naturally into a

judge's bailiwick."].) Thus, if the FTC took the holding of *Lafferty* as evidence of how the Rule should be applied, it did so wrongly.

The FTC's comments barring attorney's fees regardless of state law was not an exercise of its substantive expertise, but simply a position taken after limited arguments were made on each side without the necessary evidence of costs and benefits that a rule modification would require. Further, these comments exceeded the FTC's authority. (See, *ante,* Sec. II.)

2. The FTC's comments are not within the bounds of reasonable interpretation of the Rule and are not based on its "fair and considered judgment".

"[An] agency's reading [of its own regulations] must fall 'within the bounds of reasonable interpretation.' And let there be no mistake: That is a requirement an agency can fail." (*National Lifeline Association v. Federal Communications Commission* (D.C. Cir. 2020) 983 F.3d 498, 507 quoting *City of Arlington, Tex. v. FCC* (2013) 569 U.S. 290, 296.) The Supreme Court has also cautioned that deference should only "rarely" be given when an agency's new interpretation conflicts with a prior one. (*Thomas Jefferson Univ. v. Shalala* (1994) 512 U.S. 504.)

Pulliam found that "given the informal nature of the FTC's consideration of the issue– one that followed a request for comments that did not mention attorneys' fees," the confirmation did not "truly represent the FTC's " 'fair and considered judgment' [necessary] to receive ... deference." (*Pulliam,* at p. 566, citing *Kisor,* at p. 2416.)

The *Pulliam* court found it significant that the FTC had not previously spoken on the issue of attorney's fees and chose to express

its opinion without seeking formal input. Had the FTC issued a modification based on an analysis of submitted data, or after consideration of arguments submitted in response to an express notice, it would have made a stronger case for deference. Instead, the FTC, based on no data and limited argument, spoke on an issue on which it had previously remained silent for decades, and had not given notice of an intent to speak.

This falls short of the type of considered analysis entitled to dispositive deference. "[W]hether a court should give such deference depends in significant part upon the interpretive method used and the nature of the question at issue." (*Barnhart v. Walton* (2002) 535 U.S. 212, 221-222.) This is particularly so when the issue involved is not exclusively one of federal law, but rather an issue of the intersection of federal law and state law of remedies. (Cf. *Kisor, supra,* 139 S.Ct. at p. 2417 ["Some interpretive issues may fall more naturally into a judge's bailiwick. Take one … concerning the award of an attorney's fee, see *W. Va. Highlands Conservancy, Inc. v. Norton* (4th Cir. 2003) 343 F.3d 239."].)

Pulliam correctly found that although the FTC's position taken in the Rule confirmation was not exactly a change in interpretation – as the FTC had not previously interpreted the rule *at all* – it did, "in fact, address an issue never previously addressed, and undermined the existing practice in those jurisdictions in which attorney fees in excess of the cap had been, and were being, imposed as a matter of course." (*Pulliam,* at p. 566.)

Petitioner argues that the FTC's new interpretation on attorneys' fees is not an "unfair surprise." (PFR at 24.) This position is meritless. The holder clause is a notice to creditors, sellers and consumers that all

three parties will be regulated according to the Rule. The new interpretation of the holder clause's second sentence thus came as a significant surprise to California consumers and anyone involved in the sales transactions governed by the Rule. As the legislative history of Civil Code section 1459.5 makes clear (See Respondent's Request for Judicial Notice), prior to the *Lafferty* opinion in 2018, California lower courts and courts of appeal (in unpublished decisions) interpreted the Rule the same way the *Pulliam* court interprets it now.

The FTC's 2019 interpretation, following *Lafferty*, is an about-face of the Rule's application in California and other jurisdictions. The FTC's comments are not based on the reasoned analysis necessary for the reinterpretation of a longstanding rule.

CONCLUSION

If this Court grants review, Respondent requests this Court order that *Pulliam* retain its precedential effect while on review, thus limiting the anti-consumer effect of the *Spikener* and *Lafferty* opinions, and review the additional issues of whether the FTC overstepped its authority with its 2019 comments and whether Civil Code section 1459.5 is preempted.

Dated: March 30, 2021   ROSNER, BARRY & BABBITT, LLP

By: */s/ Hallen D. Rosner*
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CERTIFICATE OF WORD COUNT

Counsel of Record hereby certifies that pursuant to Rule 8.504(d)(1) of the California Rules of Court, the foregoing **ANSWER TO PETITION FOR REVIEW** is produced using 13-point Century Schoolbook type and contains approximately 6,557 words, which is less than the 8,400 words permitted by rule. Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: March 30, 2021 ROSNER, BARRY & BABBITT, LLP

By: *_/s/ Hallen D. Rosner_*
Hallen D. Rosner
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CERTIFICATE OF SERVICE

Tania Pulliam v. HNL Automotive, Inc.
Second Appellate District Court of Appeal Case No. B293435
Los Angeles Superior Court Case No. BC633169

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ANSWER TO PETITION FOR REVIEW

on the interested parties in this action addressed as follows:

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Executed on March 30, 2021, at San Diego, California.

Richard Garcia, Jr.

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Supreme Court of California

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