

Interlocutory Orders, Etc.

IN THE MATTER OF
ALTRIA GROUP, INC.,
AND
JUUL LABS, INC.

Docket No. 9393. Order, June 30 2022

Order granting respondent's motion to reschedule the oral argument in this matter.

ORDER RESCHEDULING ORAL ARGUMENT

On May 27, 2022, the Commission issued an order scheduling the Oral Argument in this matter for July 14, 2022. On June 2, 2022, Respondents filed a Motion to Reschedule Oral Argument ("Motion") to a date after July 31, 2022, stating that Altria's lead counsel would be out of the country on July 14 and would be unable to participate absent the extension. Motion at 1. The Motion states that Complaint Counsel consent to the relief sought. *Id.*

The Commission has determined to reschedule the Oral Argument in this matter for September 12, 2022, commencing at 11:30 a.m. EDT. The argument will be conducted virtually, by video conferencing. Pursuant to Commission Rule 3.52(h), 16 C.F.R. § 3.52(h), public access to the argument, to the extent permitted by any *in camera* orders and for monitoring purposes only, will be provided via telephone or live web streaming.

Each side will be allotted forty-five minutes to present its argument. Complaint Counsel will have the opportunity to open the argument and may reserve time for rebuttal. If either side wishes to provide the Commission with a short written or electronic compilation of material to facilitate its presentation during the Oral Argument, any such compilation may contain only public information that is already in the record of the proceeding, and copies must be filed with the Secretary of the Commission and provided to opposing counsel no later than September 6, 2022, at 5:00 p.m. EDT.

By the Commission.

RESPONSES TO PETITIONS TO QUASH OR LIMIT COMPULSORY PROCESS

DEBT COLLECTION COORDINATION PROJECT

FTC File No. P064803 – Decision, March 14, 2022

RESPONSE TO NATIONAL DEBT HOLDINGS, LLC’S PETITION TO QUASH A CIVIL INVESTIGATIVE
DEMAND DATED DECEMBER 20, 2021

By PHILLIPS, Commissioner:

National Debt Holdings, LLC (“National Debt”) petitions to quash a civil investigative demand issued on December 20, 2021, on the grounds that the Commission’s leadership structure is unconstitutional. Alternatively, the company objects to the CID’s request for its balance sheets and income statements on the grounds that the request is unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence. For the reasons below, we deny the petition to quash.

I. Background

National Debt’s business involves the purchase and sale of debts that companies have “charged off” their books. Pet. 1. On December 20, 2021, the Commission issued a CID for information in support of an investigation into whether the company has engaged in deceptive or unfair practices or otherwise unlawful acts in connection with (a) its marketing and sale of “Debt Portfolios” or (b) debt collection activities, in violation of Section 5 of the FTC Act, 15 U.S.C. § 45 or the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692a-1692p, and whether an action seeking monetary relief would be in the public interest. Pet. Ex. A.¹

The CID’s return date was January 19, 2022; however, because of complications in rendering service, National Debt was not served until January 10, 2022. The company contacted Commission staff on January 19, and a meet-and-confer was held January 24. During that meeting, Commission staff advised National Debt that they would recommend extending the return date to February 9, 2022, and that they were amenable to a rolling production schedule. National Debt also raised concerns about producing documents containing consumers’ sensitive PII or privileged materials, requested that the CID’s document requests be limited to three years, and raised general concerns about the breadth of the CID. Although Commission staff understood that National Debt would follow up with a proposed production schedule, the company instead filed its Petition to Quash on January 31, 2022, and that same day sent a letter to staff in which it elaborated its objections.

¹ The CID was authorized by an April 15, 1999, Commission Resolution permitting the use of compulsory process in agency investigations into possible violations of the FDCPA and the FTC Act.

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Through continued engagement, Commission staff and National Debt's counsel have resolved all but two of the company's objections to the CID. The objections that remain are (1) National Debt's contention that the CID should be quashed because "the Supreme Court's decision in *Seila Law LLC v. CFPB* renders the FTC's leadership structure unconstitutional, and by extension invalidates its ability to issue and enforce the CID," Pet. 2; and (2) the company's objection to the CID's request for its balance sheets and income statements, see Pet. 7 & Pet. Ex. A at 6.

II. Analysis

Neither of National Debt's remaining objections to the CID is well taken. As we have explained, in *Seila Law v. CFPB*, 140 S.Ct. 2183 (2020), the Supreme Court expressly declined to revisit its ruling in *Humphrey's Executor* that the removal protections afforded commissioners under FTC Act are constitutional. Because National Debt does not support its objection to producing its balance sheets and income statements with any facts or argument, it has failed to establish that complying with the CID would pose an undue burden, and we find the requested information may be relevant to the Commission's investigation.

A. The Supreme Court has not overturned its precedent upholding the FTC Act's constitutionality.

National Debt argues that the FTC lacks authority to issue or enforce the CID because the agency's leadership structure—specifically, the for-cause removal protections afforded FTC Commissioners²—is unconstitutional. Pet. 2-4. Although the Supreme Court upheld the constitutionality of those same provisions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), National Debt argues that the Court's decision in *Seila Law* "limited *Humphrey's Executor*'s holdings to multimember expert agencies that do not wield substantial executive power." Pet. 3 (quotation marks omitted).

We addressed this issue in our resolution of another motion to quash, filed by Beam Financial in 2020. See *In re: Civil Investigative Demand to Beam Financial, Inc.*, 2020 WL 5037434 (Aug. 17, 2020). In that order, we explained that, in *Seila Law*, the Supreme Court "expressly declined the petitioner's invitation to overturn *Humphrey's Executor*, its precedent sustaining the constitutionality of the FTC's for-cause removal provisions." *Id.*, citing *Seila Law*, 140 S.Ct. at 2192. "The Court distinguished *Humphrey's Executor* in substantial part on the ground that the CFPB is a single-director agency, whereas the FTC is a bipartisan, multimemberbody." *Id.* Because the Supreme Court declined to overrule *Humphrey's Executor* in *Seila Law*, we declined to depart from their ruling in the context of a petition to quash a CID. National Debt's petition to quash makes the same arguments that we rejected in *Beam* and we reject them here for the same reasons.

² See 15 U.S.C. § 41 (Commissioners "shall be appointed for terms of seven years," which expire on a staggered basis, and "may be removed by the President" only "for inefficiency, neglect of duty, or malfeasance in office").

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B. National Debt has not shown that complying with the CID would pose an undue burden or that the information sought is not relevant to the investigation.

To establish that complying with an agency investigative process imposes an undue burden, the recipient must show that compliance “threatens to unduly disrupt or seriously hinder” the normal operations of its business. *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 & n.49 (D.C. Cir. 1987); see also *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 479 (4th Cir. 1986). This test is “not easily met” because “[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.” *Texaco*, 555 F.2d at 882. The recipient of process must establish the existence of an undue burden with specific facts. *Id.*; *In re Nat’l Claims Serv., Inc.*, 125 F.T.C. 1325, 1328-1329 (1998).

The petition to quash does not provide any specific facts or argument in support of its objection to producing financial information except the conclusory statement that “production of its confidential financial information [is] overbroad[,] unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.” Pet. 7. That is not enough to establish an undue burden. Petitioners must make “a record . . . of the measure of their grievance”; they may not ask us to assume it. *FTC v. Standard American, Inc.*, 306 F.2d 231, 235(3d Cir. 1962).

To the extent National Debt’s objection can be read to argue that financial information can never be relevant to the Commission’s investigation, we disagree. As the D.C. Circuit plainly put it, “financial information can be relevant to a pre-complaint investigation into possible section 5 violations.” *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089-1090 (D.C. Cir. 1992). Here, National Debt’s balance sheets and income statements may help Commission staff verify the accuracy of other information requested by the CID, such as information regarding the company’s sales and holdings of debt portfolios. In addition, the company’s financial information may help the Commission determine whether Commission action to obtain redress of injury to consumers or others would be in the public interest, one of the stated objectives of the CID. See Pet. Ex. A at 1.

We therefore deny National Debt’s request to quash the challenged document request.

III. CONCLUSION

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** National Debt Holdings, LLC’s Petition to Quash or Modify Civil Investigative Demand be, and hereby is, **DENIED**.

IT IS FURTHER ORDERED THAT National Debt Holdings, LLC, shall comply in full with the Commission’s Civil Investigative Demand no later than 15 days from the date of this order, subject to any modifications as to scope or timing that Commission staff may determine.

By the Commission,

Responses to Petitions to Quash

LIBERTY AUTO CITY, INC.*FTC File No. 222 3077 – Decision, June 13, 2022***RESPONSE TO LIBERTY AUTO CITY, INC.’S PETITION TO MODIFY OR QUASH CIVIL INVESTIGATIVE DEMAND DATED APRIL 12, 2022****By WILSON, Commissioner:**

Liberty Auto City, Inc. (Liberty) petitions the Commission to modify or quash a Civil Investigative Demand (CID) issued on April 12, 2022 in connection with the Commission’s investigation into whether Liberty has engaged in unfair or deceptive practices with respect to the marketing, sale, and financing of automobiles in violation of Section 5 of the FTC Act or the Equal Credit Opportunity Act (ECOA).

Specifically, Liberty requests that the Commission extend the time it may petition to quash or limit the CID, or in the alternative, that the Commission quash the CID as unreasonable. *Petition*, at 3-4. For the reasons set forth below, we deny Liberty’s petition.

I. Background

Liberty is an auto dealership network located in Libertyville, Illinois, a suburb of Chicago. It sells new and used Chrysler, Jeep, Dodge, Ram, and Subaru vehicles, and offers consumers financing in connection with those sales. Liberty sells over 3,000 vehicles per year. *Petition*, at 2.

In early 2022, the Commission initiated an investigation into whether Liberty has engaged in violations of the FTC Act or the ECOA. In particular, the Commission sought to determine whether Liberty’s auto sales and lending practices constituted unfair or deceptive practices or reflected discrimination on a prohibited basis – resulting in higher vehicle sales prices, periodic payments, “add-on” charges, or other harm to consumers.¹ On April 12, 2022, the Commission issued a CID to Liberty, seeking the production of documents and responses to interrogatories. The CID requests information related to Liberty’s financing and add-on practices, including its communications with financing companies and add-on providers, data regarding Liberty’s auto financing transactions, and consumer complaints, among other documents and information. *See* CID, at 2-6 (interrogatories), 6-9 (documents), 10 (data). The CID’s specified time period is April 1, 2019 through the present. *Id.* at 2.

The Commission served the CID on Liberty through Federal Express on April 13, 2022. *Petition*, at 1. Liberty did not send the CID to its counsel until April 20, 2022, when Liberty’s owner, Joseph Massarelli, returned from travel. *Id.* On April 21, 2022, Liberty’s counsel had a brief call with FTC staff, in which staff explained the meet and confer process and the requirements

¹ “Add-ons” are additional products or services not provided by the vehicle manufacturer, for which Liberty charges consumers a fee. *See* CID, at 11.

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for any proposed modification to the CID. On April 27, 2022, Liberty's counsel contacted FTC staff to schedule a meet and confer call, which was held on May 2, 2022.

During the May 2 call, Liberty raised several concerns with the CID, including that some requests seemed too broad and would require manual scanning of hard copy documents. *See Petition*, at 2-3. FTC staff clarified the scope of certain requests and expressed a willingness to accept certain modifications if Liberty justified them in writing and committed to making initial productions by the CID's May 12, 2022 deadline.

Liberty also requested an extension of the deadline to file a petition to quash the CID, which by Commission rules was set for the following day, May 3, 2022 – 20 days after service of the CID. *See* 16 C.F.R. § 2.10(a)(1). Staff orally denied the request, explaining that such extensions are not granted absent extraordinary circumstances, but recommended that the parties continue to negotiate in good faith about the CID's scope and a reasonable production schedule.

Liberty filed its petition to modify or quash the CID the next day. *Petition*, at 9. Since that time, FTC staff have continued to negotiate with Liberty. However, other than a preliminary response to a few of the CID's interrogatories, Liberty has not produced any documents or other information in response to the CID.²

II. Analysis

A. There Is No Good Cause To Extend The Petition To Quash Deadline.

Liberty first requests a 45-day extension of the date by which it must file a petition to quash or limit the CID. *Petition*, at 2-6. The Commission's rules require petitions to quash or modify compulsory process to be brought within 20 days of service. 16 C.F.R. § 2.10(a)(1). That timeline exists to facilitate efficient investigations of potentially unlawful practices. CIDs such as the one directed to Liberty only issue if there is reason to believe that the recipient may have information or documents relevant to unfair or deceptive practices. *See* 15 U.S.C. § 57b-1(c). CIDs enable Commission staff to obtain information needed to investigate potentially unlawful conduct, which may be significantly harming consumers. The 20-day period ensures that disputes regarding a CID's validity or scope are promptly presented to the Commission for resolution, which in turn enables the staff investigation to proceed efficiently and without delay – or to be adjusted as needed depending on the Commission's ruling.

Importantly, Liberty does not seriously dispute the relevance of the documents and information the CID seeks. Nor does it contend that the CID exceeds the authority of the agency, or that the CID's requests are too indefinite. *Cf. United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (explaining the limited grounds for challenging FTC compulsory process). Liberty claims only that there are “logistical challenges in discerning the scope, type, and ability to produce documents” responsive to the CID, and that its owner “is preparing for a significant medical

² This is so despite Liberty's representation in its *Petition* that it “anticipates being able to make the first in a rolling production of information and/or documents” by May 12. *Petition*, at 5.

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procedure in mid-May 2022.” *Petition*, at 5-6. Liberty asserts that it “cannot reasonably work through all potential issues as to the likely thousands of transactions for which the FTC seeks documentation and information by May 3, 2022,” and that it needs the extension to attempt to “come to agreement with the FTC on such issues.” *Id.* at 5.

As a threshold matter, mere statements by counsel in a brief do not provide a factual basis for Liberty’s claims. A petition to quash must include “all appropriate arguments, affidavits, and other supporting documentation.” 16 C.F.R. § 2.10 (a)(1). Liberty did not submit any such factual support for its claims. The Commission routinely denies petitions to quash that lack an adequate evidentiary basis.³ As the Supreme Court has explained, recipients challenging FTC compulsory process must “ma[ke] a record that would convince us of the measure of their grievance rather than ask us to assume it.” *Morton Salt*, 338 U.S. at 653-54 (rejecting as inadequate “mere assertions in . . . briefs”); *see also EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986) (mere “conclusory allegations” do not “constitute evidence” that could show an administrative subpoena is unduly burdensome).

Even if the Commission were to set aside that failure, Liberty’s stated reasons do not amount to good cause to extend the petition to quash deadline. Although certain FTC officials possess “the authority to rule upon” such “requests for extensions of time,” 16 C.F.R. § 2.10 (a)(5), whether to grant an extension rests within their sound discretion. Here, Liberty requested an extension the day before the May 3 deadline, and did not identify compelling reasons for an extension. In similar contexts, courts have found good cause to extend deadlines when the party seeking relief can “show that the deadlines cannot reasonably be met despite [the party’s] diligence.” *Capitol Sprinkler Inspection, Inc. v. Guest Servs.*, 630 F.3d 217, 226 (D.C. Cir. 2011) (cleaned up). As noted, Liberty cites only abstract “logistical challenges” to complying with the CID. *Petition*, at 5-6. Liberty does not provide any detail regarding the specific volume of responsive documents, the number of personnel hours it estimates compliance would require, or the estimated dollar cost of such efforts. Nor does Liberty explain why it was unable to conduct, within the standard 20-day period, an assessment enabling Liberty to determine whether it had any potentially valid grounds to quash or modify the CID – and if so, to prepare a petition.

Further undermining its extension request, Liberty also has not shown that it has been diligent in attempting to meet existing deadlines. *See Capitol Sprinkler*, 630 F.3d at 226. Liberty admits that it received the CID on April 13, but did not forward it to counsel until one week later, when its owner returned from unspecified travel.⁴ *Petition*, at 1. While that delay may be

³ *See, e.g., In re October 30, 2013 Civil Investigative Demand Issued to HealthyLife Sciences, LLC*, FTC File No. 122-3287 (Dec. 20, 2013), at 2 (rejecting claim of undue burden where CID recipient “has not provided any affidavits or other evidence” to establish that burden); *In re February 11, 2014 Civil Investigative Demand Issued to Ziegler Supersystems, Inc.*, FTC File No. 131-0206 (Apr. 21, 2014), at 10-11 (noting that CID recipient must make a factual record to support a claim of undue burden); *In re January 16, 2014 Civil Investigative Demand Issued to The College Network, Inc.*, FTC File No. 132-3236 (Apr. 21, 2014), at 8, 11 (denying petition to quash CID specification where recipient provided “no factual support” for its claimed burden).

⁴ The cover letter transmitting the CID states in bold font that Liberty should contact FTC counsel “as soon as possible” to schedule a call to discuss the CID, and cautions Liberty to “read the attached documents closely.” Apr.

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understandable, further delays ensued. Liberty's counsel waited six additional days to follow up with FTC staff to schedule the first meet and confer call, which, as a result, took place only the day before the May 3 petition to quash deadline. A second meet and confer call was scheduled for May 13, 2022, but Liberty canceled and rescheduled for May 18, 2022, further delaying progress in its discussions with FTC staff. Absent persuasive explanations for these delays (set forth in sworn affidavits), we are left to conclude that Liberty's actions "do not bespeak diligence or any sense of urgency at all." *Capitol Sprinkler*, 630 F.3d at 226. Liberty has failed to demonstrate good cause for its extension request, and we therefore deny it.

B. The CID Is Not Unduly Burdensome Or Unreasonable.

Liberty also requests, in the alternative, that the Commission quash the CID "in its entirety as unreasonable" and unduly burdensome. *Petition*, at 2, 6. We deny this request, too.

Agency process is not unduly burdensome unless compliance "threatens to unduly disrupt or seriously hinder normal operations" of the recipient's business. *FTC v. Texaco*, 555 F.2d 862, 882 (D.C. Cir. 1977) (en banc). Of course, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *Id.* Accordingly, the test for undue burden "is not easily met." *Id.*; see also *Maryland Cup*, 785 F.2d at 477, 479. Liberty has not made the required showing.

Liberty cites the number of the CID's interrogatories (25), document requests (12), and data requests (74), but we find these numbers entirely reasonable given the nature of the investigation and size of Liberty's business. See *Petition*, at 2 (noting that Liberty sells over 3,000 vehicles per year). The CID's requests are limited in time, and are tailored to provide the agency with specific information about Liberty's add-on sales and procedures and its financing practices – areas plainly relevant to assessing compliance with the fair lending and consumer protection laws at issue. See *Texaco*, 555 F.2d at 882 (recognizing that subpoenas were "broad in scope" but finding that breadth necessary to match the FTC's "comprehensive" investigation). Indeed, as noted, Liberty does not dispute the relevance of the requested information. And the number of requests or volume of responsive documents alone does not show undue burden. See, e.g., *In re March 19, 2014 Civil Investigative Demand Issued to Police Protective Fund, Inc. (PPF)*, FTC File No. 132-3239 (May 22, 2014) ("[A] 'sheer volume of requests' does not itself establish that the CID is overbroad or imposes undue burden."); *FDIC v. Garner*, 126 F.3d 1138, 1145-46 (9th Cir. 1997) (mere fact that a subpoena called for thousands of financial documents and one million other documents was not sufficient to establish undue burden); *FTC v. Jim Walter Corp.*, 651 F.2d 251, 258 (5th Cir. 1981) ("[a]bsent a showing of disruption, the sheer number of documents sought does not demonstrate" undue burden).

Nor does Liberty provide any affidavits or other factual documentation to support its conclusory claim that complying with the CID will "seriously hinder" its operations, "if not require it to cease conducting business altogether to focus exclusively on responding to the CID." *Petition*,

12, 2022 Letter, at 1-2. The CID itself states that any petition to limit or quash the CID must be filed "no later than twenty (20) days after service of the CID." CID, at 11.

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at 6. A CID recipient bears the burden to show *how* a CID interferes with its ability to operate its business. See *Garner*, 126 F.3d at 1146 (rejecting claim of undue burden where recipient failed “to enunciate how these subpoenas constitute a ‘fishing expedition’”); see also *FTC v. Standard American, Inc.*, 306 F.2d 231, 235 (3d Cir. 1962) (finding no undue burden where subpoena recipients “did not adduce a single shred of evidence” to support their claim that compliance would result in “the virtual destruction of a successful business”); *Texaco*, 555 F.2d at 882. The conclusory statements Liberty advances “do not constitute evidence that the company’s normal operations will be seriously disrupted” by producing the requested material.” *Maryland Cup*, 785 F.2d at 477; see also *Doe v. United States (In re Admin. Subpoena)*, 253 F.3d 256, 268-69 (6th Cir. 2001) (finding insufficient recipient’s “general and conclusory statement” regarding burden).

Finally, Liberty argues that the CID is unduly burdensome because responding to it will require engaging a third-party document vendor to scan and prepare documents for production, will involve review by counsel and others to ensure truthfulness, and “may” require “significant labor.” *Petition*, at 3, 6. As the D.C. Circuit explained in another FTC matter, “[t]he difficulty with [this] argument is that it could be made with respect to almost any investigation.” *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090-91 (D.C. Cir. 1992). Such burdens fall within the ordinary, reasonable costs that attend any government investigation, and do not make the CID unduly burdensome. See *id.*; see also *Texaco*, 555 F.2d at 882 (“Some burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.”). As we have previously explained, it is not enough merely to assert that a CID request “is overbroad and burdensome and that ‘gathering, copying, and scanning all documents and responses [to the CID] would take a significant amount of time and resources that the organization simply does not have.’”⁵ *PPF*, FTC File No. 132-3239, at 7. Those assertions need to be supported with competent evidence that makes a specific showing of severe business disruption. See *id.* (noting that “a blanket objection” does not suffice, and that a CID recipient must show a request is “highly disruptive”).

Nor has Liberty shown that the cost of such efforts is too high “relative to the financial positions” of the company when “measured against the public interest of this investigation.” *FTC v. Carter*, 464 F. Supp. 633, 641 (D.D.C. 1979), *aff’d*, 636 F.2d 781 (D.C. Cir. 1980); see also *Maryland Cup*, 785 F.2d at 479 (holding cost of compliance not unduly burdensome “in the light of the company’s normal operating costs”). In fact, Liberty has provided no information about its financial position, human resources, or other capabilities relevant to complying with the CID, giving us no factual basis to conclude that the burden on the company is undue.

Moreover, as Liberty acknowledges, Commission staff have repeatedly expressed willingness to further narrow or limit some of the CID’s requests in light of Liberty’s concerns, and have made several concrete proposals for compromise. See *Petition*, at 3, 5. Liberty apparently

⁵ To the extent the asserted burdens stem from Liberty’s own document practices (such as “maintain[ing] documents in hard copy” in a format that requires scanning “on a flatbed scanner,” *Petition*, at 3), such burdens “cannot excuse” Liberty from compliance with the CID. See, e.g., *Letter Ruling re Civil Investigative Demands Issued to D. R. Horton, Inc. and Lennar Corp.*, FTC File Nos. 102-3050 & 102-3051 (Mar. 9, 2010), at 6 (“Burden caused by Petitioners’ own organizational design cannot excuse them from compliance with the CIDs.”).

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has not responded to staff and attempted to negotiate any formal modification of the CID that might reduce burden while satisfying staff's investigational needs. That path remains open to Liberty. As issued, however, the CID is well within permissible limits and imposes no undue burden.

III. CONCLUSION

For the foregoing reasons, Liberty's petition to quash is denied.

IT IS HEREBY ORDERED THAT Liberty Auto City, Inc.'s Petition to Modify or Quash the April 12, 2022 Civil Investigative Demand be, and hereby is, DENIED.

IT IS FURTHER ORDERED THAT Liberty shall comply in full with the Commission's Civil Investigative Demand no later than **Wednesday, June 22, 2022, at 9:00 a.m. (Central Time)**, or at such other date, time, and location as the Commission staff may determine.

By the Commission,

ADVISORY OPINION

ADVISORY OPINION INTERPRETING THE HOLDER RULE

FTC File No. P124802 – Issued, January 18, 2022

COMMISSION STATEMENT ON THE HOLDER RULE AND ATTORNEYS’ FEES AND COSTS

This advisory opinion addresses the Federal Trade Commission’s Trade Regulation Rule Concerning Preservation of Consumers’ Claims and Defenses, 16 C.F.R. § 433.2, commonly known as the Holder Rule, and its impact on consumers’ ability to recover costs and attorneys’ fees. This issue has arisen repeatedly in court cases, with some courts correctly concluding that the Holder Rule does not limit recovery of attorneys’ fees and costs when state law authorizes awards against a holder,¹ and others misinterpreting the Holder Rule as a limitation on the application of state cost-shifting laws to holders.²

Background on the Rule. The Commission adopted the Holder Rule to protect consumers when they purchase goods or services on credit. The Commission identified multiple practices that sellers use to “cut off” consumers’ rights so that the holder of the loan may demand full payment from the consumer despite misconduct by the seller.³ The Commission determined that sellers’ use of these practices to foreclose consumer claims and defenses constitutes an unfair practice under Section 5 of the FTC Act.⁴ To preserve consumers’ claims and defenses, the Holder Rule requires

1 See, e.g., *In re Stewart*, 93 B.R. 878 (Bankr. E.D. Pa. 1988); *Home Sav. Ass’n v. Guerra*, 733 S.W.2d 134 (Tex. 1987); *Kish v. Van Note*, 692 S.W.2d 463 (Tex. 1985); *Reliance Mortg. Co. v. Hill-Shields*, No. 05-99-01615-CV, 2001 Tex. App. LEXIS 140 (Tex. App. Jan. 10, 2001); *Oxford Fin. Cos. v. Velez*, 807 S.W.2d 460 (Tex. App. 1991); *Green Tree Acceptance, Inc. v. Pierce*, 768 S.W.2d 416 (Tex. App. 1989); see also *Pulliam v. HNL Auto. Inc.*, 60 Cal. App. 5th 396, 274 Cal. Rptr. 3d 547, 559-67 (Cal. Ct. App. 2021), review granted, 484 P.3d 564, 277 Cal. Rptr. 3d 323 (Cal. Apr. 28, 2021) (No. S267576) (concluding that Holder Rule does not limit attorney fee recovery from holder; rejecting contrary position attributed to FTC and ruling that such an agency interpretation would not be entitled to deference).

2 See, e.g., *Spikener v. Ally Fin., Inc.*, 50 Cal. App. 5th 151, 162, 263 Cal. Rptr. 3d 726, 735 (Cal. Ct. App. 2020) (concluding statements by the Commission in 2019 (84 Fed. Reg. 18,711, 18,713 (May 2, 2019)) demonstrate “clear intent” to preempt attorney fee recovery “regardless of whether state claim being asserted pursuant to the Holder Rule contains fee-shifting provisions”, but declining to express opinion on whether costs are preempted for the same reason); Order on Motion, *Reyes v. Beneficial State Bank*, No. BCV-17-100082 (Cal. Sup. Ct., Kern Co., Dec. 5, 2019), appeal docketed, No. F080827 (Cal. Ct. App. Feb. 13, 2020) (ruling state statute is preempted by Commission statements on application of Holder Rule to attorney’s fees); see also *Lafferty v. Wells Fargo Bank, NA*, 25 Cal. App. 5th 398, 414-16, 275 Cal. Rptr. 3d 842, 855-57 (Cal. Ct. App. 2018) (concluding that second sentence of the Holder Rule Notice caps attorneys’ fees claim against defendant-holder unless “another state or local cause of action can be found to support such a claim,” but that costs are not subject to the same cap).

3 See 40 Fed. Reg. 53,506, 53,507-08 (1975) (use of promissory notes and waiver of defense clauses in seller-financed sales); *Id.* at 53,514-15 (use of “vendor-related” or “direct” loans by third party) (1975); see also FTC, Statement of Enforcement Policy, 41 Fed. Reg. 34,594, 34,596 (1976). (explaining affiliation and referral standards applicable to “transactions in which a seller accepts the proceeds of a loan extended directly from a lender to a purchaser.”).

4 40 Fed. Reg. at 53,523.

Advisory Opinion

a seller that finances sales to include in credit contracts the following provision, also known as the “Holder Rule Notice”:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2(a). Where the seller is not the creditor but receives payment from the proceeds of a loan by a creditor that has a referral or business relationship with the seller (defined in the Rule as a “Purchase Money Loan”), the consumer credit contract must have the same provision, except the words “PURSUANT HERETO OR” are omitted. *Id.* § 433.2(b). A creditor or assignee of credit contracts with the Holder Rule Notice is thus subject to any claims or defenses that the consumer could assert against the seller.

Analysis. The Holder Rule does not eliminate any rights the consumer may have as a matter of separate state, local, or federal law. Consequently, whether costs and attorneys’ fees may be awarded against the holder of the credit contract is determined by the relevant law governing costs and fees.⁵ Nothing in the Holder Rule states that application of such laws to holders is inconsistent with Section 5 of the FTC Act or that holders should be wholly or partially exempt from these laws.

Further, if the applicable law requires or allows costs or attorneys’ fee awards against a holder, the Holder Rule does not impose a cap on such an award. The sentence in the Holder Rule Notice that limits recovery to “amounts paid by the debtor” applies only to monetary recovery against holders based on the Holder Rule Notice (*i.e.*, recovery on the claims or defenses the debtor could assert against the seller); the Rule places no cap on a consumer’s right to recover from the holder for other reasons. Thus, for example, in an action between a consumer and a holder, if the applicable law authorizes the consumer to recover costs or fees from parties that unsuccessfully oppose the consumer’s claims or defenses, a prevailing consumer’s right to recovery against the holder is not restricted by the Holder Rule Notice. In this scenario, the cost or fee award is separate and supported by a law that is independent of the Holder Rule. Thus, the Holder Rule Notice does

⁵ States have passed varying laws regarding recovery of attorneys’ fees and costs under which responsibility to pay fees may depend on a variety of factors. *Compare* ALASKA R. CIV. P. 82(a) (2021) (“Except as otherwise agreed to by the parties, the prevailing party in a civil case shall be awarded attorney’s fees calculated under this rule”); WASH. REV. CODE § 4.84.330 (2021) (if a contract provides for fees to one party, the prevailing party is entitled to fees); KY. REV. STAT. Ann. § 367.220(1) (West 2015) (court may award attorneys’ fees and costs to prevailing party in any action under Kentucky Consumer Protection Act), *with* WASH. REV. CODE § 4.84.185 (court may award fees incurred in opposing claims or defenses that court finds were “frivolous and advanced without reasonable cause”); COLO. REV. STAT. § 6-1-113(2)(b) (2021) (in successful action to enforce liability, “person who is found to have engaged or caused another to engage in” deceptive trade practice is liable for costs and attorney fees).

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not limit costs or attorneys' fees that the applicable law directs or permits a court to award against a holder because of its role in litigation.

In a situation where the applicable law permits assessing costs or attorneys' fees exclusively against the seller, the seller's liability for such costs and fees may be raised against the holder because of the Holder Rule Notice. The holder's obligation to pay costs or fee awards available exclusively against the seller, however, would be limited to the amount paid by the consumer. Thus, for example, if a consumer is awarded fees in a suit solely against the seller, or the law allows awards only against a seller that has engaged in specified conduct, the Holder Rule Notice authorizes the consumer to recover such an award from the holder up to the amount paid. The consumer also may rely on a claim against the seller for costs or attorneys' fees to offset an obligation to the holder.

Some courts have read the Commission's statements in a 2019 Rule Confirmation notice regarding the Holder Rule as mandating a different result.⁶ Insofar as these decisions conclude that the Holder Rule precludes state law from providing for costs or attorneys' fees against the holder, they misconstrue the Commission's statements. Neither the Rule itself nor the 2019 Rule Confirmation notice say that the Holder Rule invalidates state law or that there is a federal interest in limiting state remedies. To the contrary, the 2019 Rule Confirmation says that nothing in the Holder Rule limits recovery of attorneys' fees if a federal or state law separately provides for recovery of attorneys' fees independent of claims or defenses arising from the seller's misconduct.⁷

By direction of the Commission.

⁶ *Supra* note 2.

⁷ We have previously observed that the Holder Rule Notice does not limit the availability of injunctive relief against a holder: "The final sentence of the Holder Rule Notice does not restrict the types of remedies available when a claim or defense is preserved; it simply states that the money that a consumer may obtain from a holder based on the Notice may not exceed amounts paid. The Commission affirms that the plain language of the Rule does not limit the types of relief a court may award against a holder." 84 Fed. Reg. at 18,713 n.32.