NO. S267576

IN THE
SUPREME COURT OF CALIFORNIA

TANIA PULLIAM,
Plaintiff / Respondent,

v.

TD AUTO FINANCE LLC,
Defendant / Petitioner.

Court of Appeal, Second Appellate District, Division 5
Case No. B293435

Los Angeles County Superior Court
Case No. BC633169, Hon. Barbara M. Scheper

APPLICATION TO FILE BRIEF AND BRIEF OF *AMICI CURIAE* UC BERKELEY CENTER FOR CONSUMER LAW & ECONOMIC JUSTICE, CENTERS FOR PUBLIC INTEREST LAW AT THE UNIVERSITY OF SAN DIEGO, CONSUMERS FOR AUTO RELIABILITY & SAFETY, CONSUMER FEDERATION OF CALIFORNIA, EAST BAY COMMUNITY LAW CENTER, HOUSING & ECONOMIC RIGHTS ADVOCATES, NATIONAL CONSUMER LAW CENTER, AND PUBLIC LAW CENTER, IN SUPPORT OF RESPONDENT

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APPLICATION TO FILE BRIEF AS *AMICI CURIAE*

Pursuant to the California Rules of Court, rule 8.520(f), the organizations described below respectfully request permission to file the attached brief as *amici curiae* in support of Respondent Tania Pulliam.

This application is timely made within 30 days of the filing of the reply brief on the merits. No party or counsel for any party in the pending appeal authored the proposed amicus brief in whole or in part, or made a monetary contribution intended to fund the preparation or submission of the brief, and no other person or entity made a monetary contribution intended to fund the preparation or submission of the brief, other than the *amici curiae*, their members, or their counsel in the pending appeal.

I. INTEREST OF *AMICI CURIAE*

Amicus curiae Center for Consumer Law and Economic Justice is a research and advocacy center housed at UC Berkeley School of Law. Through participation as *amicus* in this Court, in the United States Supreme Court, and in major cases around the state and throughout the nation, the Center seeks to develop and enhance protections for consumers and to foster economic justice. The Center appears in this proceeding in order to emphasize the need of all Californians for access to justice — access which is illusory if it does not include counsel.

Amicus curiae The Centers for Public Interest Law is part of the University of San Diego School of Law. One of its three Centers is the Consumer Protection Policy Center. Professor Robert Fellmeth, Price Professor of Public Interest Law, is its Executive Director. This policy center focuses on consumer protection, regulatory agencies, and legal ethics. It has been involved in antitrust and consumer law litigation and legislation for the last 41 years, and has worked on the issues brought before this Court in the present case.

Amicus curiae Consumers for Auto Reliability and Safety (CARS) is a national, award-winning nonprofit auto safety and consumer advocacy organization dedicated to preventing motor vehicle-related fatalities, injuries, and economic losses. CARS is based in Sacramento and has spearheaded enactment of numerous landmark consumer protection laws to improve the safety and economic well-being of the car-buying public in California and nationwide, including individual entrepreneurs, small businesses, and members of the United States Armed Forces. CARS founder and President has repeatedly testified on behalf of the motoring public at the invitation of Congress and of the California Legislature. CARS has a decades-long history of actively promoting equal access to justice, which entails ensuring that wronged consumers can avail themselves of expert legal counsel regardless of their economic status.

Amicus curiae Consumer Federation of California (CFC) is a nonprofit consumer advocacy organization based in California. Since 1960, CFC has been a powerful voice for consumer rights. CFC campaigns for state and federal laws that place consumer protection ahead of corporate profit. Each year, CFC testifies before the California legislature on dozens of bills that affect millions of the state's consumers. CFC also appears before state and federal agencies in support of consumer regulations. For decades, CFC has worked to defend consumers' access to justice in open, public courts of law, including supporting passage of legislation enacted in California to allow wronged consumers to afford to hold lenders accountable when they profit from transactions involving fraud and other illicit activities.

Amicus curiae East Bay Community Law Center (EBCLC) is a direct legal services organization and the largest education clinic in the Bay Area. EBCLC offers eight distinct practice areas, which are holistically focused on advancing systemic solutions to end racial inequities. EBCLC's 2021 Women of Color-Centered Platform prioritizes policies, partnerships, and investments that center the dignity of women of color. Low-income women of color, especially those who are the primary income earner, or single parents, are left to navigate the world of disreputable dealers for cars and large appliances, which require financing. Limiting recovery in a Holder Rule lawsuit to the amount the consumer has paid and excluding the

attorneys' fees necessary to enforce these rights is in conflict with the spirit of various state and federal consumer protection statutes and has a chilling effect on people whose only misstep is buying a bad product. The burden of ridding the market of lemons should not be borne by the consumer. Awarding attorneys' fees in an action under the Holder Rule is necessary to increase access to justice for low and even modest-income consumers.

Amicus curiae Housing and Economic Rights Advocates (HERA) is an Oakland-based legal services and advocacy non-profit dedicated to helping vulnerable Californians build a safe, sound financial future. HERA represents California consumers in a wide range of consumer protection cases, including unfair debt collection, credit reporting, home sales solicitation, telemarketing, and student loan litigation. HERA believes that enabling a prevailing consumer to recover attorney's fees is essential to providing the private bar with the necessary incentives to enforce California's consumer protection laws.

Amicus curiae National Consumer Law Center (NCLC) is a non-profit national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues. NCLC publishes a 21-volume Consumer Credit and Sales Legal Practice Series, including Federal Deception Law (3d ed. 2017), and Automobile

Fraud (6th ed. 2018) and has been actively involved in the debates concerning access to justice for consumers and holder liability issues. NCLC frequently appears as *amicus curiae* in consumer law cases before trial and appellate courts throughout the country.

Amicus curiae Public Law Center (PLC) is a non-profit legal services organization in Santa Ana, California that provides free civil legal services to low-income residents of Orange County, California in the areas of family law, immigration, health, housing, veterans, nonprofit and microbusiness, and consumer. PLC's Consumer Law Unit assists low-income individuals with a variety of consumer issues, and frequently, the relief needed by PLC's client must be provided by one entity, even if the other entity is the bad actor. For instance, with a for-profit school, the student needs relief from the student loan servicer, but frequently the school itself was the bad actor. PLC both recovers attorneys' fees in these cases and refers clients to private attorneys when appropriate. Allowing the recovery of attorneys' fees in cases brought pursuant to the Holder Rule is incredibly important to ensure that there are attorneys available to take on these cases and to ensure consumers get actual relief.

II. NEED FOR FURTHER BRIEFING

The proposed *amici curiae* believe that further briefing is necessary to explore matters not fully addressed by the parties' briefs, particularly the

application of the "genuinely ambiguous" standard for evaluating agencies' later interpretations of their own regulations. (*Kisor v. Wilkie* (2019) 139 S.Ct. 2400, 2415.) Neither the parties nor the court of appeal in this case employed that analysis set forth in *Kisor v. Wilkie*, which *amici* believe is the proper standard to apply to evaluate the 2019 FTC Rule Confirmation's interpretation of the 1975 FTC Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defenses (16 C.F.R. Part 433).

Additionally, *amici* believe that more than four decades' application of the 1975 FTC Rule in California has established a set of expectations for courts, consumers, and businesses. Recent court of appeal decisions upsetting those expectations have done significant harm and — if affirmed by this Court — will effectively leave consumers without an attorney in a situation where assistance of counsel is absolutely necessary. Not only is it nearly impossible for consumers to find an attorney for claims pursuant to the Rule if they cannot obtain attorneys' fees, but in an ironic twist, California's fee-shifting statutes may allow creditors to be awarded attorneys' fees even while consumers cannot do so. Such a result is antithetical not only to the purpose of the Rule but also to California consumer protection law.

III. CONCLUSION

For the foregoing reasons, the proposed *amici curiae* respectfully request that the Court accept the accompanying brief for filing in this case.

Dated: November 17, 2020

Respectfully submitted,

By: /s/ *Eliza J. Duggan*

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INTRODUCTION AND SUMMARY OF ARGUMENT

The 1975 Federal Trade Commission Rule Concerning Preservation of Consumers' Claims and Defenses (the Rule)[1] unambiguously allows consumers to recoup their statutory attorneys' fees in cases against companies that provide credit to finance purchases of defective goods. The Rule's limitation on recovery — that a consumer may not "recover" more than what she paid on the contract — refers to the consumer's damages, not her attorneys' fees. Without the availability of attorneys' fees, consumers would effectively be unable to bring claims against holders of their financing contracts — an interpretation that would undermine the fundamental purpose of the Rule.

Prior to 1975, consumers were left in the lurch if they purchased a defective product from a fly-by-night seller and the sale was financed by a third party. (*Implied Consumer Remedy Under FTC Trade Regulation Rule – Coup De Grace Dealt Holder in Due Course?* (1977) 125 U. Pa. L. Rev. 876, 880 ["[T]he same legal framework developed to meet the needs of commercial paper markets has been imposed, to the detriment of consumers, on transactions in consumer paper."].) The common law holder-in-due-course doctrine meant that the assignee of a financing contract could

[1] This rule is commonly known as the "Holder Rule," since it does away with the common law "holder-in-due-course rule." However, the primary aim of the regulation was and is to preserve consumers' ability to recover their losses after being defrauded.

not be held liable for the acts and omissions of the assignor, even if that assignor originated the contract based on fraud, misrepresentation, or the sale of a defective product. (*Id*. at p. 877.) As a result, a seller would routinely use deceptive sales tactics to sell a faulty product to consumers on credit, then turn around and the sell the repayment contracts to a finance company (or "holder"). (*Id*.) Later, when consumers discovered the product was faulty, they would find the seller had gone out of business — and that there was no recourse against the only solvent party, the holder. (*Id*.) The holder, however, had the right to sue the consumers if they stopped paying for the useless product. (*Id*.)

To combat this problem, the FTC crafted the 1975 Rule to give defrauded consumers a pathway to vindicate their claims.[2] The agency provided consumers the ability to bring claims against holders of their credit contracts, thus "reallocating the costs of seller misconduct" to holders. (40 Fed.Reg. 53523 (Nov. 18, 1975).) However, consumers were, and are, only able to bring such claims when they have access to legal representation — a fact of which the FTC was well aware. (40 Fed.Reg. at

[2] The Rule chiefly targets two situations: where the seller-originated credit includes a waiver of defense clause and where the seller refers the consumer to a third party that originates the credit or sells the contract to a third party. In the latter situations (at issue in this case) the third party claimed no responsibility for the seller because it is not an assignee.

p. 53511 [explaining the challenges consumers face in using the legal system].)

The FTC Rule limited an individual consumer's "recovery" against holders to the amount paid on the contract (16 C.F.R. Part 433 (1975)) — but this limitation did not and does not apply to attorneys' fees. Instead, it references the amount that an individual consumer may retrieve as damages: no more than what she lost. Were the amount to include attorneys' fees, then no consumer would be able to "recover" the amount she lost — because the amount of the recovery would always be lessened by attorneys' fees. That is a result directly at odds with the FTC's purpose in enacting the Rule.

In 2019, however, the FTC issued a cursory Rule Confirmation that erroneously concluded the opposite. (84 Fed.Reg. 18713-14 (May 2, 2019).) The 2019 Rule Confirmation interpreted the term "recovery" to include attorneys' fees, so that a consumer bringing a claim against a holder of a credit contract may not be awarded any attorneys' fees above what she

paid on the original contract if the claim was based on seller misconduct. [3] (*Ibid*.)

The interpretation of the term "recovery" articulated in the FTC 2019 Rule Confirmation is not entitled to deference. (*Kisor v. Wilkie* (2019) 139 S.Ct. 2400, 2415 [where there is only "one reasonable construction" of a rule, a later contrary interpretation by the agency is accorded no deference].) Since the 2019 Rule Confirmation is a later agency interpretation of its own rule, the framework recently set forth by the U.S. Supreme Court in *Kisor v. Wilkie* governs the inquiry. (*Ibid.* [updating the standard established by *Auer v. Robbins* (1997) 519 U.S. 452].) *Kisor* directs that a court should only consider deferring to a later agency interpretation of a regulation if that regulation is "genuinely ambiguous." (*Ibid*.) If, after examining the regulation's "text, structure, history, and purpose," the court finds that the regulation is susceptible of only one reasonable construction, then the regulation is not ambiguous and any later agency interpretation that differs from that construction should not be accorded deference. (*Ibid*.) Here, there is only one reasonable interpretation

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[3] The Rule Confirmation states that if the basis for attorneys' fees is some other statute than that upon which the seller-related claim is based, then fees are not limited by the cap. (84 Fed.Reg. 18713-14 (May 2, 2019) ["[I]f 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."].) However, the primary issue in this case is the limitation on attorneys' fees on claims based on seller misconduct.

of the FTC Rule: consumers *may* be awarded attorneys' fees in addition to their out-of-pocket losses in claims against the holders of credit contracts. Because the 2019 Rule Confirmation concludes otherwise, in conflict with the Rule's unambiguous meaning, it should not be followed. (*Ibid*. ["If uncertainty does not exist, there is no plausible reason for deference."].)

For more than forty years after the Rule was promulgated, California courts — properly interpreting the Rule — regularly awarded consumers attorneys' fees in cases against holders of their credit contracts; however, two recent court of appeal decisions have cast doubt on Californians' ability to count on that history. (See *Lafferty v. Wells Fargo* (2018) 25 Cal.App.5th 398, 414 [holding that consumers may not recover attorneys' fees above the amount on the contract]; *Spikener v. Ally Financial* (2020) 50 Cal.App.5th 151, 160 [holding that the 2019 Rule Confirmation should be accorded deference].) These decisions broke the from the decades of decisions permitting Californians the attorneys' fees necessary to pursue their claims and be made whole. (See, e.g., *Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 630, *as modified* (Feb. 22, 1995) [awarding attorneys' fees to the prevailing plaintiff pursuant to the Rule]; *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 572 [reversing the order awarding attorneys' fees to defendant based in its status as prevailing party in a claim brought by plaintiffs pursuant to the Rule].)

Unable to find counsel willing to take their cases in the wake of *Lafferty* and *Spikener*, Californians have been denied the opportunity to vindicate their rights under the state's consumer protection statutes and hold lawbreaking businesses accountable. In an ironic twist, those two opinions — if not disapproved by this Court — threaten to create a regime in which consumers are unable to obtain fee awards, while holders face no such obstacle to utilizing the state's fee-shifting statutes for themselves.

The court of appeal's decision in the present case promises to reestablish the rights that California consumers held for more than four decades. That decision should be affirmed, and Californians' rights restored, in accordance with the unambiguous meaning of the Rule.

ARGUMENT

The 1975 FTC Rule allows consumers to bring claims against lenders that supply credit to purchase faulty goods sold by unscrupulous sellers, and allows consumers to obtain the attorneys' fees needed to prosecute those claims. By preserving consumers' claims and defenses against the holders of their credit contracts,[4] the FTC shifted the financial

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[4] The Rule requires that all consumer credit contracts contain this 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 WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. (16 C.F.R. Part 433.2 (1975).)

burden away from injured consumers and placed the responsibility for making consumers whole on the holders of credit contracts who financially benefit from these sales. The Rule placed a limit on an individual consumer's "recovery" in claims brought pursuant to the Rule, but — as the text, history, structure and purpose of the Rule (*Kisor*, *supra*, 139 S.Ct. at p. 2415) make clear — that limit clearly does not extend to attorneys' fees.

After several years of appellate decisions and even a response by the Legislature (see Assem. Bill No. 1821 (2019)), the question of the proper interpretation of the Rule in California has squarely reached this Court. With an eye to the Rule itself, and to decades of settled California law, this Court can and should affirm Californians' ability to be made whole when unscrupulous business practices leave them in dire need of redress.

I. THE 2019 FTC RULE CONFIRMATION SHOULD NOT BE GIVEN DEFERENCE BECAUSE IT CONFLICTS WITH THE ORIGINAL RULE'S UNAMBIGUOUS SUPPORT OF ATTORNEY FEE AWARDS SEPARATE FROM THE AMOUNTS THAT CONSUMERS PAID ON THEIR CONTRACTS.

The 2019 Rule Confirmation should not be accorded deference because the architecture of the Rule, the context in which it arose in the 1970s, and the FTC's statements of purpose at the time all make clear that the term "recovery" in the Rule does not preclude consumers from

obtaining attorneys' fees. Therefore, the regulation is not "genuinely ambiguous."[5] (*Kisor*, *supra*, 139 S.Ct. at p. 2415.)

The Rule Confirmation wrongly interpreted the original Rule to mean that consumers may not collect attorneys' fees in their suits against holders. The Rule Confirmation concluded:

> [I]f 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. Conversely, if the holder's liability for fees is based on claims against the seller that are preserved by the Holder Rule Notice, the payment that the consumer may recover from the holder—including

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[5] While two California courts of appeal have now considered whether to accord deference to the 2019 FTC Rule Confirmation, neither has delved far into the threshold question of whether the regulation is ambiguous, as required by *Kisor* when considering whether to defer to an agency interpretation. (*Kisor*, *supra*, 139 S.Ct. at p. 2415.) Instead, the court in *Spikener* assumed, without deciding, that the FTC's construction of the Rule (that attorneys' fees were unavailable above the amount of the contract) and the plaintiff's reading (that attorneys' fees were available above the amount of the contract) were both reasonable, rendering the regulation ambiguous. (*Spikener v. Ally Financial, Inc.* (2020) 50 Cal.App.5th 151, 159.) However, "it is not enough to casually remark, as the court did here, that '[b]oth parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable.'" (*Kisor*, *supra*, 139 S.Ct. at p. 2423.) The court of appeal in the present case did not discuss whether the Rule was ambiguous, but instead analyzed the 2019 Rule Confirmation using the four *Kisor* factors employed *after* a court determines that a regulation is ambiguous. (*Pulliam v. HNL Automotive Inc.* (2021) 60 Cal.App.5th 396, 419.) But the U.S. Supreme Court in *Kisor* required that a court determine that a regulation is ambiguous before moving to the other factors, even if "it found the regulation impenetrable on first read." (*Kisor*, *supra*, 139 S.Ct. at p. 2415.) The Supreme Court stressed that "hard interpretive conundrums, even relating to complex rules, can often be solved." (*Ibid*.) Applying the analysis required by *Kisor* resolves the interpretive conundrum presented here.

> any recovery based on attorneys' fees—cannot exceed the amount the consumer paid under the contract.

(84 Fed.Reg. 18713-14 (May 2, 2019.)[6]

The U.S. Supreme Court's framework recently set out in *Kisor v. Wilkie* governs whether to give deference to a later agency interpretation of its own rule, and as such provides the appropriate standard to apply to the 2019 FTC Rule Confirmation. ((2019) 139 S.Ct. 2400, 2415.) The first inquiry under the *Kisor* framework is whether the regulation is "genuinely ambiguous"; if the Rule has only one clear meaning, then a later agency interpretation should not be accorded deference. (*Ibid*.) To determine whether or not a regulation is ambiguous, a court must "exhaust all the 'traditional tools' of construction" and "carefully consider the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on." (*Ibid*.) After conducting the inquiry, "if the law gives an answer—if there is only one reasonable construction of a

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[6] An example illustrates the practical problem with this interpretation. Under the 2019 Rule Confirmation interpretation, if a consumer had lost $2,000 to a fraudulent seller and had financed the purchase, she could bring her claim pursuant to the Rule against the holder of her credit contract. However, since her claim was preserved by the Rule Notice, she could not obtain more than $2,000 at the end of the suit — even if her attorneys' fees amounted to $10,000. Assuming her attorney won't work for free, she would either need to pay out of pocket for her attorney, or her attorney would be forced to accept a fraction of the attorney's fee — in either case, the consumer would personally recover nothing, and possibly end up in more debt.

regulation—then a court has no business deferring to any other reading." (*Ibid*.)

This first step of the *Kisor* analysis "will resolve many seeming ambiguities out of the box" (*ibid*.) — including the one at issue in this case.

A. The History, Purpose, And Context Of The Rule Make Clear That Attorneys' Fees Are Not Included In The Limitation On "Recovery."

The Rule's history and purpose and the context in which it arose clarify that the meaning of the word "recovery" in the Rule's Notice is not ambiguous: "recovery" in this instance means the amount the consumer lost to the unreliable seller, not including attorneys' fees. (*Kisor*, *supra*, 139 S.Ct. at p. 2415; see also *Reilly v. Marin Housing Authority* (2020) 10 Cal.5th 583, 592 [finding "several points from this rulemaking history to be significant"].) The FTC enacted the Rule to ease the burden on consumers, who the Commission found had a particularly challenging time accessing the court system on their own. (40 Fed.Reg. 53511 (Nov. 18, 1975).) The FTC shifted responsibility for monitoring and reining in shady sellers to holders of credit contracts, who the agency believed had a greater ability than consumers to prevent and address seller misconduct and absorb the costs of that misconduct. (40 Fed.Reg. at p. 53523.) The rulemaking history demonstrates the agency's intention that consumers be made whole by getting their money back, including the cost of hiring an attorney. (40 Fed.Reg. at p. 53509.)

1. At the time the FTC promulgated the Rule, the agency emphasized how difficult it was for consumers to obtain legal help in cases against holders of credit contracts.

The FTC developed the Rule with a keen awareness of the practical challenges that defrauded consumers face when trying to access the legal system to get their money back, and developed a way to shift the financial burden away from them and onto the other party that benefited from the transaction: the holder of the credit contracts. It would be contrary to the purpose and history of the Rule to formally allow consumers to bring cases against holders of credit contracts but deny them the means to actually bring those claims.

The burdens on a consumer after being deceived by a duplicitous seller are great — including trying to get legal assistance. Facing a climbing debt bill, a dropping credit score, and a useless product she must get rid of, the consumer is in dire need of assistance. In enacting the Rule, the FTC examined evidence demonstrating the serious challenges that defrauded consumers faced in vindicating their claims. (See, e.g., 40 Fed.Reg. 53511 (Nov. 18, 1975) [“aggrieved consumers are often not in a position to take advantage of the legal system”].) When a consumer has potential affirmative claims, even though “[t]he amount of a consumer’s damages in such a case may be substantial in real terms, … such damages are rarely enough to attract competent representation.” (40 Fed.Reg. at p. 53511-12.) Consumers generally could not (and should not) pay thousands

of dollars to recover what they paid, which usually would not be nearly as much as the cost of their attorney's labor. Small claims court didn't offer respite either: "The sheer costs of recourse to the legal system to vindicate a small claim, together with the days of work that must be missed in order to prosecute such a claim to judgment, render recourse to the legal system uneconomic." (40 Fed.Reg. at p. 53512.) Additionally, even if a consumer were eligible for legal aid, the demand for services far exceeds the supply. (*Ibid*.)

The FTC also recognized that deceitful sellers are often very difficult to sue and collect from, making the viability of claims against holders a key to making defrauded consumers whole. The agency found that "the worst sellers are likely to be the most volatile entities where market tenure is concerned. They prove difficult to locate and serve, and the marginal liquidity which characterizes their operations makes collection of a judgment difficult or impossible even if they are successfully served. Bankruptcy or insolvency becomes a final barrier to recovery." (40 Fed.Reg. 53512 (Nov. 18, 1975).) The FTC therefore determined that the "costs occasioned by seller misconduct in credit sale transactions" should be reallocated to other parties that financially benefited from the deal: the holders of the contracts. (40 Fed.Reg. at p. 53522.)

Given the agency's focus on the functional challenges that consumers faced when seeking legal representation and using the court

system, the only reasonable interpretation of the Rule is that the Commission intended for consumers to have access to attorneys, who provide the primary if not sole practical means to bring those claims. It defies logic to conclude that the agency, which emphasized how difficult it can be for a consumer to get a lawyer, wrote the Rule so as to make it virtually impossible for a consumer's attorney to be compensated.

2. The FTC's purpose in enacting the Rule was to reallocate the financial burden caused by dishonest sellers away from defrauded consumers to the holders of their credit contracts.

The "history" and "purpose" (*Kisor*, *supra*, 129 S.Ct. at p. 2415) of the Rule make clear that the FTC's priority was to shift the financial burden to the holders of credit contracts and make defrauded consumers whole, a goal that is only achievable if consumers can obtain legal representation and attorneys' fees. Charged with identifying unfair and deceptive acts and practices, 15 U.S.C. Sec. 45(a)(1), the FTC concluded that "[i]t is unfair to subject an innocent party to costs and harm occasioned by a guilty party." (40 Fed.Reg. 53523 (Nov. 18, 1975).) The FTC chose to empower defrauded consumers by preserving their claims and defenses so that they could recover what they lost from the holders of their credit contracts. Attorneys' fees are a key tool to help consumers get their money back and correct the injustices caused by duplicitous sellers.

The unfairness to consumers caused by the application of the common law holder-in-due-course rule and other techniques used to defeat consumer claims set the stage for the Rule's development. (40 Fed.Reg. 53507 (Nov. 18, 1975).) The FTC was concerned with the fact that creditors were able to assert their rights to collect on their contracts with consumers "despite misrepresentation, breach of warranty or contract, or even fraud on the part of the seller, and despite the fact that the consumer's debt was generated by the sale." (*Ibid*.) The FTC further identified that the holder-in-due-course doctrine had enabled merchants "who engage[] in disreputable and unethical sales practices to establish and maintain a source of payment which assures [them] a place in the market, notwithstanding continuing breaches of contract and warranty." (40 Fed.Reg. at p. 53509.)

Importantly, the FTC emphasized that individual consumers are already disadvantaged in these transactions and that it is fundamentally unfair to force them to bear the costs of fraudulent sales. The FTC recognized that the "relatively equal bargaining power which characterizes dealings between merchants is absent in consumer transactions." (40 Fed.Reg. 53509 (Nov. 18, 1975).) The agency made clear that the common law holder-in-due-course doctrine, while appropriate in the commercial market, should not be applied to consumers, who are "not in the same position as banks, bond issuers, or shippers of freight, nor are they in an equivalent position to vindicate their rights against a payee." (40 Fed.Reg.

at p. 53507.) The common law rule magnified the imbalance of power between individual consumers, sellers, and finance companies, because it placed “the risk of a seller’s misconduct on the party least able to bear the burden—the individual consumer.” (40 Fed.Reg. at p. 53509.)

The FTC determined that to properly protect consumers, the Rule should make holders of credit contracts compensate defrauded consumers and take more market responsibility — despite industry objections that the burdens were too great. It became clear to the FTC that holders of credit contracts are not merely detached outsiders, but have a substantial ability to monitor the market: “Between an innocent consumer, whose dealings with an unreliable seller are at most, episodic, and a finance institution qualifying as ‘a holder in due course,’ the financer is in a better position both to protect itself and to assume the risk of a seller’s reliability.” (40 Fed.Reg. 53509 (Nov. 18, 1975).) And, although industry members asserted that they were “in no position to know the status and reputation of retail merchants” and could not realistically “be expected to police retail sellers,” the FTC found that such assertions were “invalidated by other industry testimony which confirms that the volume of consumer sales-finance transactions is such that creditors have a full opportunity to detect and predict the incidence of consumer sales abuse on a statistically reliable scale.” (40 Fed.Reg. at p. 53518.)

The FTC articulated a two-fold plan to minimize risk to individual consumers by forcing the industry to absorb the costs. First, it aimed to "modify existing commercial behavior such that the costs occasioned by seller misconduct in the consumer market are reduced to the lowest possible level in the retail distribution system." (40 Fed.Reg. 53523 (Nov. 18, 1975.)) Second, "where certain seller misconduct costs cannot be eliminated from the market," the agency wanted those costs to be internalized, "so that the prices paid by consumers more accurately reflect the true social costs of engaging in a credit sale transaction." (*Ibid*.) Although the industry argued that the Rule would unfairly burden holders, the FTC reasoned that the shift would help to police the market and that holders would be more diligent in their dealings with sellers, to the benefit of all parties. (*Ibid*.)

The only logical reading of the Rule is that the agency meant to shift the financial burden — including the burden of attorneys' fees — to the party most able to bear it: the holder of the credit contract. (See *Kisor*, *supra*, 139 S.Ct. at p. 2415 [noting that if there is only "one reasonable interpretation" of a Rule, then it must govern].) By focusing so heavily on shifting the financial cost of dishonest sellers to the holders of credit contracts, the FTC was making clear its intention to relieve individual consumers from the great costs that they face from being defrauded. This goal is only achievable when consumers have access to the courts and,

more specifically, access to attorneys who are willing to work on a contingency basis. As such, the "history" and "purpose" of the Rule and the context in which it arose make clear that it grants consumers the right to collect attorneys' fees. (See *Kisor*, *supra*, 139 S.Ct. at p. 2415.)

B. The Plain Meaning Of The Word "Recovery" In The Context Of The Rule Supports Awards Of Attorneys' Fees To Consumers.

The meaning of the word "recovery" in the Rule is evident — and therefore unambiguous — not only in the Rule's history and purpose described above, but also in the Rule's plain language. (See *Kisor*, *supra*, 139 S.Ct. at p. 2415 [courts should carefully consider a regulation's "text" and "structure"].) It is against the backdrop of the FTC's investigation into the problems perpetuated by techniques used to cut off consumer defenses and claims and the agency's consumer protection goals in promulgating the Rule that the term "recovery" should be read.

In that context, the Rule's limitation on "recovery" can only refer to the amount that the consumer is able get back as damages in the lawsuit against the holder of the credit contract. The FTC Rule limits the consumer's "recovery" to what she paid on the contract. (16 C.F.R. 433 (1975).) If she must pay her attorneys' fees in order to regain what she paid, then she will not "recover" the amount that she lost. Instead, the lawsuit will cost her more than she lost, since it is most likely that her attorneys'

fees will exceed the amounts that she lost from the fraudulent seller — even if the credit holder does not drag out the litigation. (See *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 994 [explaining that the prospect of having to pay for an attorney would strongly discourage an aggrieved consumer from filing a lawsuit].) If she cannot be awarded her attorneys' fees, there is no "recovery" at all, since she will not be winning back what she lost. She will not be made whole. Legislatures authorize the award of fees in consumer protection cases specifically to address this reality.[7]

In the Rule notice, the term "recovery" does not limit attorneys' fees, but rather speaks to the fact that consumers are not meant to personally recover more than what they paid. The dictionary definitions of the word "recovery" at the time of the Rule's enactment support the interpretation that the consumer could regain her lost property — the amount she paid on the contract. (See *Wasatch Prop. Mgmt. v. Degrate* (2005) 35 Cal.4th 1111,

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[7] 8 Encyclopedia of Law & Economics (2009-2017) Fee Shifting, § 10, p. 278 ("Consider the case of a consumer who has purchased a defective ballpoint pen and who is in theory entitled to a refund. Because the value of the pen is exceeded by even the most streamlined judicial proceeding, the consumer's threat to litigate is not credible; and absent procedural devices such as a class action that can allow aggregation of her claim with others, she will be forced to rely on nonlegal incentives such as the seller's interest in its reputation. If the consumer can recover legal fees along with the value of her refund, however, her threat to sue becomes credible."); see also *Hayward v. Ventura Volvo* (2003) 108 Cal.App.4th 509, 512 (attorneys' fees allow consumers to pursue cases where the damages are modest).

1121–22, *as modified* (July 27, 2005) [dictionary definitions prove useful "when attempting to ascertain the ordinary, usual meaning" of words]; *State of California v. Altus Fin*. (2005) 36 Cal.4th 1284, 1295 [dictionary definitions must be read in the context in which they were written, including the "legal and broader culture"]; see also *Reilly v. Marin Housing Authority* (2020) 10 Cal.5th 583, 590 [discussing the definitions of the words in a regulation in the context of the goals of the logical purpose of the regulation].)

The primary definition of the term "recovery" in the version of Black's Law Dictionary operative in 1975[8] comports with the Rule's purpose to restore a consumer's rights. A defrauded consumer who wanted "recovery" under that definition would seek "the restoration or vindication of a right existing in a person, by the formal judgment or decree of a competent court, at his instance and suit, or the obtaining, by such judgment, of some right or property which has been taken or withheld from him." (Black's Law Dictionary (4th ed. 1968) p. 1440.) Under this definition, a consumer could restore her right by a court judgment to win back "property which has been taken or withheld" from her by a duplicitous seller. (*Ibid*.) The Rule extends the consumer's ability to restore her right from the holder of the consumer's credit contract. To accomplish the

[8] Black's Law Dictionary 4th Edition (1968) was the most current edition in 1975. The next edition was published in 1979.

"restoration or vindication" of that right (*ibid*.), she must be able also to recover her attorneys' fees — otherwise, her property will not be fully restored to her.

Other legal definitions of "recovery" in 1975 support the same reading of the Rule. Black's second entry provides, simply, that "recovery" is "[t]he obtaining of a thing by the judgment of a court, as the result of an action brought for that purpose" — in this context, the consumer obtains what was taken from her. (Black's Law Dictionary (4th ed. 1968) p. 1440.)

Black's third entry defines "recovery" as "the amount finally collected, or the amount of judgment." (*Ibid*.) In this sense, "recovery" does not include attorneys' fees. Rather, it is a figure often used to determine who is the prevailing party for the purposes of *awarding* attorneys' fees. (*Sears v. Baccaglio* (1998) 60 Cal.App.4th 1136, 1155 ["the court is not constrained to award attorneys' fees to the party with the greatest net monetary recovery"]; *Khavarian Enterprises, Inc. v. Commline, Inc.* (2013) 216 Cal.App.4th 310, 319 [Plaintiff "could not qualify as a prevailing party because settlement proceeds are not included in determining if a party received a net monetary recovery"].) In the 1970s, the understanding was similarly that the amount of "recovery" or "judgment" helped determine the award of attorneys' fees. (See Inaccurate and Unfair Billing Practices, Hearings before Sen. Com. on Banking, Housing, and Urban Affairs, Subcom. on Consumer Credit on S. 1630, 93rd Cong, 1st Sess., at p. 125

(1973) ["As you know, the courts have a standard for granting attorneys' fees which take into account a number of factors … Size of recovery is only one of the factors which the courts consider."].)

Beyond dictionary definitions, a reasonable interpretation of the Rule's text would support the inherent purpose of the Rule and lend it meaning. The FTC Rule would be rendered a nullity if it effectively barred most consumers from obtaining counsel — a result that is inherently unreasonable. (See *D&B Boat Rentals, Inc. v. United States* (E.D. La. 2020) 508 F.Supp.3d 87, 96 [interpretation of a regulation was unreasonable under *Kisor* because it rendered the regulation meaningless]; see also *Kisor*, *supra*, 139 S.Ct. at p. 2414 [courts should use standard tools of interpretation when examining statutes]; *Manufacturers Life Ins. Co. v. Superior Court* (1995) 10 Cal.4th 257, 274 ["Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative."].) Few — if any — consumers would be able to bring cases against holders of their contracts if they could not recover attorneys' fees. The plain language of the Rule Notice conveys that consumers may not recover more than they paid on the contract in damages, but they are still allowed to collect attorneys' fees to litigate their claims. The FTC purposefully shifted the burden of fly-by-night sellers to credit holders, who have a much greater ability to monitor those sellers than do innocent consumers. (40 Fed.Reg. 53512 (Nov. 18, 1975).) The

Commission listed extensive evidence demonstrating the challenges that consumers face in using the legal system. (*Ibid*.) Accordingly, preserving consumers' claims against a holder means that they are able to obtain the attorneys' fees necessary to pursue those claims.

The "text" of the Rule (*Kisor*, *supra*, 139 S.Ct. at p. 2415), read in the context in which it arose, clearly supports a consumer's ability to be awarded attorneys' fees.

C. The 2019 Rule Confirmation Conflicts With The One Reasonable Interpretation Of The Rule And Therefore Merits No Deference.

Since the 2019 Rule Confirmation proffered a reading of the Rule that conflicts with the Rule's only reasonable interpretation, it is not entitled to deference. (*Kisor*, *supra*, 139 S.Ct. at p. 2415.)

The Rule's meaning is clear: consumers may collect attorneys' fees. The Rule sought to mitigate the injury done to innocent consumers "by a system which forces them to bear the full risk and burden of sales related abuse." (40 Fed.Reg. 53523 (Nov. 18, 1975).) Thus, the question of where the Rule's limitation on a consumer's "recovery" should be placed has only "one reasonable construction" (*Kisor*, *supra*, 139 S.Ct. at p. 2415): consumers should be allowed to recover what they lost from the duplicitous buyer and be awarded attorneys' fees where state law authorizes them. Otherwise, the Preservation of Consumers' Claims and Defenses Rule

hardly “preserves” a consumer’s claims; instead, it leaves a consumer unable to vindicate her rights against a holder of the contract as if the Rule did not exist. The inquiry required by *Kisor* makes the Rule’s meaning evident.

Because the 2019 Rule Confirmation concludes that consumers may not recover attorneys’ fees above what they paid in claims brought pursuant to the Rule, 84 Fed.Reg. 18713-14 (May 2, 2019), that interpretation should not receive deference. (*Kisor*, *supra*, 139 S.Ct. at p. 2415; see also *Reilly v. Marin Housing Authority* (2020) 10 Cal.5th 583, 603 [courts should not defer to an agency’s later interpretation if the plain language of the regulation or the agency’s intent at the time of promulgation compels an alternative reading].) The Rule Confirmation’s erroneous conclusion that consumers may not collect attorneys’ fees above what they paid on their contracts places a large practical obstacle in the way of consumers vindicating their rights. The FTC in 1975 aimed to remove barriers to consumer recovery, not to increase them. The Rule’s “text, structure, history, and purpose” all point to just one reasonable meaning: consumers may be awarded attorneys’ fees in claims brought against holders. (*Kisor*, *supra*, 139 S.Ct. at p. 2415.) The 2019 Rule Confirmation — an agency interpretation to the contrary as to actions for seller misconduct — is entitled to no deference. (*Ibid*.)

II. PREVENTING CONSUMERS FROM OBTAINING FEE AWARDS IN CASES AGAINST HOLDERS DISTURBS THE FEE-SHIFTING BALANCE CREATED BY CALIFORNIA LAW AND WOULD SERIOUSLY DISADVANTAGE CONSUMERS.

Because the Rule incorporates state law claims, California's fee-shifting statutes could entitle some holders to obtain attorneys' fees even while vulnerable consumers are prevented from obtaining theirs — a true perversion of the purpose of the Rule and California law. Instead of taking away defrauded consumers' ability to regain what they lost from a dishonest seller by withdrawing the availability of attorneys' fees, the Rule is meant to expand upon the rights provided to consumers by state law.

California's fee-shifting consumer protection statutes play an important role in balancing consumer and business interests and are frequently used to vindicate consumer rights pursuant to the Rule. Since credit financing is so common for a wide variety of products (as was the case in 1975),[9] consumers who use financing are vulnerable to unscrupulous sellers of many kinds of wares. But consumers no longer live in a society governed by *caveat emptor*. In California, consumers can rely

[9] In promulgating the original Rule, the FTC identified various goods and services in its case histories that are purchased using credit, including courses of training or instruction, furniture and appliances, home improvements, freezer meats and other food plans, automobiles, carpeting, alarm systems, swimming pools, vacuum cleaners, kitchen utensils, encyclopedias, cemetery plots, clothing, and hearing aids. (40 Fed.Reg. 53510-11 (Nov. 18, 1975).)

on numerous statutes to get their money back if they have been defrauded. These statutes — including the Song-Beverly Act (Civ. Code, § 1794, subd. (d)), the Consumer Legal Remedies Act (Civ. Code, § 1780, subd. (e)), and the Automobile Sales Finance Act (Civ. Code, § 2983.4) — allow, and sometimes mandate, prevailing consumers to recover attorneys' fees. Further, California courts may "award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest" (Code Civ. Proc., § 1021.5), which may include claims under the Unfair Competition Law (Bus. & Prof. Code, § 17200 et seq.) or the False Advertising Law (Bus. & Prof. Code, § 17500 et seq.). In addition to providing recourse to consumers against unscrupulous sellers, these statutes are commonly used to recover money pursuant to the Rule from companies who finance the seller's defective products.

California courts have emphasized the significant impact these statutes have on consumers and their ability to seek redress for their injuries. Attorney fee awards under Song-Beverly, for example, provide "injured consumers strong encouragement to seek legal redress in a situation in which a lawsuit might not otherwise have been economically feasible," since "the prospect of having to pay attorney fees even if one wins a lawsuit can serve as a powerful disincentive to the unfortunate purchaser of a malfunctioning automobile." (*Murillo v. Fleetwood*

Enterprises, Inc. (1998) 17 Cal.4th 985, 994.) Under the CLRA, "the provision for recovery of attorney's fees allows consumers to pursue remedies in cases … where the compensatory damages are relatively modest." (*Hayward v. Ventura Volvo* (2003) 108 Cal.App.4th 509, 512.) And the attorneys' fees provision of the Automobile Sales Finance Act "accomplishes the Legislature's primary purpose … to enable consumers with good claims or defenses to find attorneys willing to represent them in court." (*Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 150.)

Further, California's fee-shifting consumer protection statutes allow prevailing *defendants* in some cases to obtain attorneys' fees, which could lead to a perverse situation if plaintiffs are unable to get fee awards. (See, e.g., Civ. Code, § 1780, subd. (e) (authorizing reasonable attorney's fees to prevailing defendants under the CLRA if plaintiff's action was not prosecuted in good faith); Civ. Code, § 2983.4 (mandating reasonable attorney's fees be awarded to prevailing parties in actions brought under the Automobile Sales Finance Act). To hold that consumers cannot get attorneys' fees above what they paid on the contract therefore risks putting consumers at a serious disadvantage in litigation. It would be a strange irony indeed for the FTC's Preservation of Consumers' Claims and Defenses Rule to actively prevent consumers from getting attorneys' fees, while allowing holders to obtain theirs. (See 40 Fed.Reg. 53527 (Nov. 18.

1975), quoting *Vazquez v. Superior Court* (1971) 4 Cal.3d 800, 824 ["'It would be ironic indeed if a provision in an act intended to benefit consumers could be invoked to their detriment to such an extent that they would stand in a less advantageous position.'"].

California's consumer protection statutes have worked in tandem with the Rule to give consumers, and sometimes holders, the ability to obtain attorneys' fees. The improper reading of the Rule — denying consumers attorneys' fees — disturbs the careful balance created by state statutes, unfairly disadvantages borrowers in litigation, and renders consumers unable to vindicate their rights.

III. THE IMPROPER VIEW THAT THE RULE DOES NOT ALLOW CONSUMERS TO OBTAIN ATTORNEYS' FEES DISTURBS CALIFORNIA'S LONG-HELD VIEW OF THE RULE AND LEAVES THE MOST VULNERABLE CONSUMERS UNABLE TO FIND LEGAL ASSISTANCE TO RECOVER THEIR LOSSES.

The proper interpretation of the Rule, permitting payment of attorneys' fees, shaped the expectations of California consumers, merchants, and courts for more than forty years after the Rule was enacted. The holdings of *Lafferty*, *supra*, 25 Cal.App.5th at p. 414, and *Spikener*, *supra*, 50 Cal.App.5th at p. 160, disturb those expectations and — if adopted by this Court — would leave vulnerable consumers without recourse.

For four decades after the FTC enacted the Rule, California courts agreed with the unambiguous reading that the Rule allows defrauded consumers to obtain their attorneys' fees in cases against holders of credit contracts. (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 630, as modified (Feb. 22, 1995) [awarding attorneys' fees to the prevailing plaintiff pursuant to the Rule]; *Lafferty v. Wells Fargo Bank* (2013) 213 Cal.App.4th 545, 572 [reversing the order "awarding attorney fees and costs to Wells Fargo" as it "was based on its status as the prevailing party pursuant to a judgment" in a claim brought by plaintiffs pursuant to the Rule].) Because the majority of these cases settle, there are few published California decisions discussing attorneys' fees in claims brought pursuant to the Rule; however, unpublished cases also confirm the fact that attorneys' fees have been regularly awarded.[10] (See, e.g., *Raczynski v. Daland Nissan, Inc.* (Cal. Ct. App., Feb. 15, 2017, No. A146992) 2017 WL 603869, at *2 [awarding attorneys' fees on claims brought pursuant to the Rule]; *Duran v. Quantum Auto Sales, Inc.*, No. G053712, 2017 WL 6334220, at *3 (Cal. Ct. App. Dec. 12, 2017) [same]; *Glass v. Veros Credit, LLC* (Cal. Ct. App., Apr. 30, 2019, No. G055257) 2019 WL 1911881, at *1 [same].)

[10] The unpublished decisions are adduced solely to demonstrate the fact that attorneys' fees were awarded.

Since 2018, when the most recent appeal in *Lafferty* was decided, consumer attorneys have been discouraged from taking cases against contract holders — especially when the seller was insolvent or was likely to become insolvent. (Auto Fraud Legal Center, *After A Wild Ride, California Court of Appeal Gives Consumers Back A Leg To Stand On Against Shady Used-Car Dealers* (Feb. 10, 2021)[11] ["The decision [in *Lafferty*] discouraged consumer lawyers from accepting cases against smaller dealerships."].) In drafting AB 1821 to reverse *Lafferty*, the California Assembly Judiciary Committee heard from individual attorneys who described how *Lafferty* had had a "chilling effect on attorneys' willingness to take on auto fraud and lemon law cases." (Bill Policy Analysis, Assem. Bill No. 1821 (2019-2020 Reg. Sess.), Apr. 9, 2019, p. 6.) A solo practitioner in Fresno shared her experience:

> Unfortunately, I am well-versed in the practice of shady used car dealers that pop up, defraud as many consumers as possible, run the bond [required under Vehicle Code Section 11711 to compensate victims of dealer fraud] dry, and then close shop. Because a bond company is only liable for up to $50,000 for all claimants, once the bond funds are depleted the consumer has no viable claim against the bond company. […] I would still take the case if there is a viable assignee-lender. Now with Lafferty in place, I cannot take these cases. … These are people that I firmly believe I could have helped if not for Lafferty.

(*Id.*)

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[11] *Available at* <https://www.autofraudlegalcenter.com/custom-posts/after-a-wild-ride-california-court-of-appeal-gives-consumers-back-a-leg-to-stand-on-against-shady-used-car-dealers>.

Another practitioner described the impact the unavailability of attorneys' fees had on his clients, especially monolingual Spanish speakers and low-income consumers:

> Each month I consult with local residents who have purchased vehicles and later learn that the dealership has misrepresented the condition of the vehicle or the financial terms. Often these consumers are unable to drive the car because of safety concerns or the car becomes inoperable. When the dealership will not rectify their fraud, consumers are left with almost no options except to file a lawsuit. Many of my clients are monolingual Spanish speakers and they have purchased used vehicles valued between $5,000-$15,000. In some cases, the dealership goes out of business and the only entity left is the bank who purchased the installment contract from the dealership. Banks impose and control all the financial conditions found in those installment contracts. The dealerships conform all of their consumer contracts to what the banks require. Legal fees and litigation costs are out of reach for many of my clients. Fortunately, California has several consumer protection statutes which allow the winning party in a lawsuit to be awarded his or her attorney fees and costs. These fee-shifting statutes are critical to ensuring that ordinary people who are fraud victims can afford lawyers to take their cases. As an attorney, I will not take a case unless a fee-shifting statute is available. However, *Lafferty v. Wells Fargo* has now made it almost impossible for me to take dealer fraud cases.

(*Id.*)

If attorneys' fees are unavailable, the only remaining options for most consumers are legal aid and public enforcement agencies — but defrauded consumers in these cases are very unlikely to receive aid from those sources. Cases that arise due to deceptive sellers "are too numerous and low-value to merit public enforcement by the Office of the Attorney General or local District Attorneys." (Bill Policy Analysis, Assem. Bill No. 1821 (2019-2020 Reg. Sess.), Apr. 9, 2019, p. 7.) And nonprofit legal aid

organizations do not have the resources to help the many clients who need it. As the East Bay Community Law Center put it:

> Our clients suffer abuse at the hands of unscrupulous businesses, including car dealers who sell our clients defective and at times dangerous vehicles through deceptive sales practices. The community's need for legal assistance to combat these abuses far exceeds [our] resources, which requires us to refer meritorious cases to private counsel. Unfortunately, [*Lafferty*] threatens our ability to do so, especially because the monetary value of our clients' cars is often far below what other Californians can afford….

(*Id.*)

The misinterpretations of the Rule articulated in *Lafferty* and *Spikener* would undo decades of established consumer protection law and return borrowers to a pre-1975 world. Consumers need to be able to access attorneys' fees in order to bring cases under the Rule. A contrary interpretation of the Rule is antithetical to the Rule's purpose and to California law.

CONCLUSION

The FTC Rule unambiguously allows defrauded consumers to bring claims against holders of their credit contracts and collect their attorneys' fees as provided by state law. That is the only reasonable interpretation of the regulation; the 2019 Rule Confirmation contradicting that construction with respect to claims for seller misconduct should not be accorded deference.

Without the availability of attorneys' fees, California consumers have been — and, unless the court of appeal here is affirmed, will be — much less able to get legal assistance after having been defrauded by duplicitous sellers. Not only that, but an improper reading of the Rule could cause California's fee-shifting statutes to work against consumers, allowing holders in some cases to recover their attorneys' fees while consumers cannot. Such an unreasonable result cannot stand. This Court should affirm the holding of the court of appeal and restore consumers' ability to vindicate their rights in California.

Dated: November 17, 2021

Respectfully submitted,

By: /s/ *Eliza J. Duggan*

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Cal. Rules of Court, rule 8.204, subd. (c)(1). The brief has been prepared in 13-point Times New Roman font. The word count is 10,469 words based on the word count of the program used to prepare the brief.

By: /s/ *Eliza J. Duggan*
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CERTIFICATE OF SERVICE

I, the undersigned, declare that I am a citizen of the United States, over the age of 18 years, reside in Oakland, California, and not a party to the within action. My business address is the University of California, Berkeley, School of Law, Bancroft Way, Berkeley, CA 94720-7200.

On the date set forth below, I caused a copy of the following to be served:

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on the following interested parties in this action via the **TrueFiling portal:**

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AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CALIFORNIA FINANCIAL SERVICES ASSOCIATION)

Jan T. Chilton
SEVERSON & WERSON
One Embarcadero Center. Suite 2600
San Francisco, CA 94111

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed 17th day of November, 2021, in Oakland, CA.

By: /s/ *Eliza Duggan*________________
Eliza Duggan