

**S267576**

**IN THE  
SUPREME COURT OF CALIFORNIA**

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**TANIA PULLIAM,**  
*Respondent,*

*v.*

**TD AUTO FINANCE, LLC**  
*Petitioner.*

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

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**RESPONDENT'S SUPPLEMENTAL BRIEF**

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## INTRODUCTION

Pursuant to Rule 8.520(d) of the California Rules of Court, Respondent Tania Pulliam respectfully submits this supplemental brief addressing a new Advisory Opinion filed on January 18, 2022, by the Federal Trade Commission (FTC).<sup>1</sup> The FTC's Statement on the Holder Rule and Attorneys' Fees and Costs addresses the specific issue raised in this case. This advisory opinion was filed after all briefing was submitted to this Court.

With this advisory opinion, the FTC has weighed in favor of Respondent's arguments on the issue before this Court. In short, the FTC agrees with Respondent that the Holder Rule (16 C.F.R. § 433.2) and the FTC's statements in its 2019 rule confirmation have been misconstrued by financial institutions and courts as preempting state law.

According to the FTC, the Court of Appeal's opinion in this case is the correct reading of the Holder Rule's limitation. The FTC's conclusion that it did not intend to preempt state law under the circumstances raised in this case, should be determinative. This Court is urged to consider this new advisory opinion as the Court decides this issue.

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<sup>1</sup> Federal Trade Commission, Statement on the Holder Rule and Attorneys' Fees and Costs, Advisory Opn., January 18, 2022, (Advisory Opinion) available at: [https://www.ftc.gov/system/files/documents/advisory\\_opinions/commission-statement-holder-rule-attorneys-fees-costs/p124802\\_commission\\_statement\\_on\\_the\\_holder\\_rule\\_and\\_attorneys\\_fees\\_and\\_costs.pdf](https://www.ftc.gov/system/files/documents/advisory_opinions/commission-statement-holder-rule-attorneys-fees-costs/p124802_commission_statement_on_the_holder_rule_and_attorneys_fees_and_costs.pdf)

## DISCUSSION

This Court granted review of this case to resolve a conflict among our courts of appeal regarding the interpretation of the FTC's Holder Rule. The conflict arose when the Court of Appeal's opinion in this case disagreed with two earlier opinions: *Spikener v. Ally Financial, Inc.* (2020) 50 Cal.App.5th 162 (*Spikener*), and *Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398 (*Lafferty II*).

In the advisory opinion issued last week, the FTC cites to the Court of Appeal's opinion in this case as one that has interpreted the Holder Rule as intended. (Advisory Opinion at p. 1.) That is, as not preempting state law on the availability of attorneys' fees and costs awards to consumers that prevail in litigation against a holder. It then cites to *Spikener* and *Lafferty II* as cases that have misinterpreted "the Holder Rule as a limitation on the application of state cost-shifting laws to holders." (Advisory Opinion at p. 1.)

The FTC reaffirms that the "Holder Rule does not eliminate any rights the consumer may have as a matter of separate state, local, or federal law." (*Id.* at p. 2.) Whether costs and attorneys' fees may be awarded against the holder is determined by relevant state law, and the Holder Rule does not impose a cap on such an award. (*Id.*)

The relevant California laws applicable here are the Song-Beverly Act, Civil Code section 1794(d), Civil Code section 1459.5 (ruled preempted by *Spikener*), as well as the costs statutes under Code of Civil Procedure sections 1032 and 1033.5.

Specifically, section 1459.5 states:

A plaintiff who prevails on a cause of action against a defendant named pursuant to Part 433 of Title 16 of the Code of Federal Regulations or any successor thereto, or

pursuant to the contractual language required by that part or any successor thereto, may claim attorney's fees, costs, and expenses from that defendant to the fullest extent permissible if the plaintiff had prevailed on that cause of action against the seller.

Under each of these laws, a California consumer may be awarded reasonable statutory attorneys' fees, costs, and expenses as the prevailing party in a litigation against a holder. These are state laws and remedies over which the FTC, through its Holder Rule, has no purview whatsoever.

The FTC clarifies that nothing in the Holder Rule nor in the FTC's rule confirmation invalidates state law or proclaims any federal interest in limiting state remedies. (Advisory Opinion at p. 3.) Further, the FTC writes that state law may differ in how, or whether, attorneys' fees and costs awards are available for prevailing consumers. (Advisory Opinion at p. 2, n. 5 [listing state cases and variety of factors used by courts to award fees and costs].)

In California, our Legislature and this Court have made clear that statutory attorneys' fees and costs are available, and indeed necessary, to uphold our consumer protection statutes. (See *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 994 ["By permitting prevailing buyers to recover their attorney fees in addition to costs and expenses, our Legislature has provided injured consumers strong encouragement to seek legal redress in a situation in which a lawsuit might not otherwise have been economically feasible."].) The FTC's Advisory Opinion is in line with our Legislature's consumer protections.

This new clarification from the FTC should help this Court's analysis in affirming the Court of Appeal's opinion.

## CONCLUSION

The Court of Appeal's opinion must be affirmed, this Court should disapprove of *Spikener* and *Lafferty II*, and this Court should find that Civil Code section 1459.5 is not preempted by federal law.

Dated: January 25, 2022      ROSNER, BARRY & BABBITT, LLP

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

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the foregoing **RESPONDENT TANIA PULLIAM'S SUPPLEMENTAL BRIEF** is produced using 13-point Century Schoolbook and contains approximately 795 words, which is less than the 2,800 words permitted by rule. Counsel relies on the word count of the computer program used to prepare this Brief.

Dated: January 25, 2022      ROSNER, BARRY & BABBITT, LLP

By: /s/ Arlyn L. Escalante  
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**CERTIFICATE OF SERVICE**

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

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

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**STATE OF CALIFORNIA**  
Supreme Court of California

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