ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

D.R. HORTON, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	No. 4:10-CV-547-A
	§	
JON LEIBOWITZ, Chairman, in his official capacity, and FEDERAL TRADE COMMISSION,	§	
	§	
Defendants.	§	

FEDERAL TRADE COMMISSION'S* REPLY IN SUPPORT OF MOTION TO DISMISS

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* References to the Federal Trade Commission ("FTC" or "Commission") include the Commission's chairman, Jon Leibowitz, who has been named as a Defendant in his official capacity.

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INTRODUCTION

The FTC demonstrated in its initial brief that Horton's complaint must be dismissed, both for lack of subject-matter jurisdiction and for failure to state a claim. At this preliminary stage, Horton cannot maintain a preemptive suit to enjoin the FTC's Civil Investigative Demand ("CID") or forestall its investigation of Horton, because the agency as yet has not adopted any "final agency action" that is reviewable under the Administrative Procedure Act ("APA"). Horton's suit also must be dismissed for improperly attempting to bypass the judicial review procedures required by statute – *i.e.*,

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Horton may present its legal challenges to the CID only as defenses to an enforcement action in federal court, if and when the FTC brings one.

Horton fails to refute these propositions in its opposition brief. As discussed below in the Argument section of this reply brief, Horton's legal arguments all are directly contradicted by extensive case law and can be disposed of readily.

Horton concedes, that the submission of unsubstantiated "'facts' have no place in the context of briefing on a motion to dismiss." Opp. at 19. Nonetheless, Horton mischaracterizes or grossly exaggerates the facts of the case – even though its attempts to do so are directly refuted by documents that *Horton itself* introduced into the record. For example, Horton's opposition brief attacks the original version of the CID issued in November 2009, and repeats, that the CID "require[s] the production of all, or substantially all, of [the] company's documents in existence since January 1, 2006." *Id.* at 14; *see also id.* at 8, 9, 11, 13, 14 n.6, & 15. In the text of its brief, however, Horton fails to mention that the FTC has already negotiated with Horton and reached an agreement to modify and narrow the scope of the CID, so as to substantially reduce the purported compliance burden on the company and set a more manageable production schedule.[1]

Horton deeply undercuts its own case by constantly reiterating an untrue allegation that

[1] *See* Complaint at 14, ¶ 39 (conceding that the FTC agreed to narrow its request to cover Horton's operations in only six states, rather than the 29 covered by the initial CID); *see also* Horton Opp., Appendix at 59, 83 (copies of FTC correspondence referring to June 24, 2010, letter from Joel Winston, Associate Director of the FTC's Bureau of Consumer Protection and head of its Division of Financial Practices, officially adopting modifications that narrowed the scope of the CID). Tellingly, Horton did not submit a copy of this letter among the numerous other documents included as exhibits to its Complaint and appendices to its Opposition Brief. Nor did Horton include the FTC's letter modifying and narrowing the CID with its motion that the Court take judicial notice of another document that is much less relevant to the merits of this case.

the CID "requires the production of virtually document generated by Horton over the last four-plus years." Opp. at 15.

ARGUMENT

I. Horton's Premature Challenge to the FTC's Investigation Must Be Dismissed, Because Issuing a CID and Refusing to Quash It Are Not Final Agency Actions.

As demonstrated in the FTC's initial brief, Horton's complaint must be dismissed for lack of subject-matter jurisdiction. Under the Administrative Procedure Act ("APA"), 5 U.S.C. § 704, only "final agency action" is subject to judicial review. In this case, the FTC has not taken any final actions: it has not adopted any orders that "mark the consummation of the agency's decision making process" or "by which rights or obligations have been determined or from which legal consequences will flow.[2] Rather, all the FTC has done to date is to issue a CID requesting that Horton provide information in response to detailed specifications.

Under the established law of the Fifth Circuit, a party may not challenge an FTC subpoena or CID by bringing a pre-enforcement action for injunctive or declaratory relief, as Horton seeks to do here. The Fifth Circuit has held that injunctive relief is improper in these circumstances because a party seeking to challenge an FTC subpoena has an "adequate remedy at law," and that the party's "proper remedies lie in [asserting defenses to] the FTC enforcement and adjudicative actions."[3] In this case, Horton cannot "be

[2] *Bennet v. Spear*, 520 U.S. 154, 177-78 (1997).

[3] *Atlantic Richfield v. FTC*, 546 F.2d 646, 649, 651 (5th Cir. 1977). *See also Veldhoen v. U.S. Coast Guard*, 35 F.3d 222 (5th Cir. 1994); *American Airlines, Inc. v. Herman*, 176 F.3d 283, 289-90 (5th Cir. 1999).

forced to comply with the [CID] nor subjected to any penalties for noncompliance until ordered to comply" by a federal court – if and when the FTC files an enforcement action and prevails.[4] The Supreme Court has similarly ruled that the FTC's issuance of an administrative complaint, which merely commences an adjudicatory proceeding and requires a party to "present evidence and testimony" in response to the FTC's charges, does not constitute a "definitive ruling or regulation" that is subject to judicial review.[5] Horton's complaint must be dismissed for the same reasons.

Horton claims that it "does not dispute the general case law regarding enforcement of administrative subpoenas," but nonetheless raises several arguments for why those "general principles are inapplicable" to this case.[6] Horton contends that the FTC's issuance of the CID and denial of Horton's petition to quash are "final" and "ripe" for judicial review, because Horton has "exhausted its administrative remedies" to challenge the CID, and is now subject to burdens, such as the costs of document production and the obligations to preserve records and avoid spoliation of evidence, that are "direct and immediate effect" and justify immediate judicial review. None of Horton's arguments are valid.

[4] *Atlantic Richfield*, 546 F.2d at 650.

[5] *Standard Oil*, 449 U.S. at 241. Note that, in *Standard Oil*, the FTC had determined that it had "reason to believe" the company had violated the law, 15 U.S.C. § 45(b), and, on that basis, initiated a formal administrative complaint. By contrast, in this case the FTC has made no such determination. Issuing a CID in the course of investigation is a much more preliminary step in the administrative process than issuing a complaint.

[6] Horton Opp. at 7.

First, Horton has "mistaken exhaustion for finality"[7] when it argues that, because Horton has "exhausted its administrative remedies" as to the CID, the FTC must have rendered a "final decision.[8] This construction of law is wrong; the judge-made doctrine of "exhaustion of administrative remedies" is distinct from the "finality" requirement of the APA.[9] "[E]xhaustion . . . is satisfied when no avenues of intra-agency relief remain open to the petitioner. Finality, by contrast, goes to the question whether the agency action has conclusively established or altered administrative norms that govern the petitioner."[10] In other words, "[w]hile exhaustion is directed to the steps a *litigant* must take, finality looks to the conclusion of activity by the *agency*."[11] Like the respondent in *Standard Oil*, Horton "may well have exhausted its administrative remedy" by filing a petition to quash and unsuccessfully appealing the denial of that petition to the full

[7] *Standard Oil*, 449 U.S. at 243.

[8] Horton Opp. at 7-8.

[9] *Darby v. Cisneros*, 509 U.S. 137, 144 (1993), citing *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985). *See also Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 746 (D.C. Cir. 1987) (Williams, J., concurring); *American Airlines*, 176 F.3d at 289-90.

[10] *Dow Chemical v. U.S. EPA*, 832 F.2d 319, 324 n.28 (5th Cir. 1987).

[11] *Ticor*, 814 F.2d at 745-46 (Williams, J., concurring) (emphasis added).

Commission.[12] Nonetheless, the FTC has done nothing to compel any action by Horton, and has not adopted any "final agency action" subject to judicial review.[13]

Horton also attempts to resuscitate an argument that the Supreme Court and the Fifth Circuit already have rejected – that the issuance of a CID asking a party to produce specified information imposes immediate harm, justifying immediate judicial review.[14] The principal "direct and immediate" effects that Horton claims, however, are the money and time that it must spend in responding to the CID, and its duty to suspend routine document destruction procedures so as avoid spoliation of potentially relevant documents.[15] The Supreme Court has ruled that "the burden of responding" to the FTC, like "the disruptions that accompany any major litigation," does not constitute the type of "legal force or practical effect" that could render the FTC's action "final" and subject to review.[16] And the Fifth Circuit rejected the same argument when offered by American

[12] *Standard Oil*, 449 U.S. at 243. Note that, "while the FTC did deny the motion to quash, it did so after granting 'substantial modifications' of the . . . subpoena which the FTC estimates will cut the [company's] compliance burden" substantially. *American Motors Corp. v. FTC*, 601 F.2d 1329, 1339 (6th Cir. 1979). As discussed below, Horton still has *informal*, but real, opportunities to seek FTC remedies to any undue burdens of responding to the CID, as demonstrated by the fact that the FTC has already been willing to modify the CID to reduce such purported burdens. *Cf. United States v. Morton Salt Co.*, 338 U.S. 632, 654 (1950) ("We think these respondents could have obtained any reasonable modifications necessary, but, if not, at least could have made a record that would convince us of the measure of their grievance rather than ask us to assume it.").

[13] *Cf. Standard Oil*, 449 U.S. at 243 ("Socal may well have exhausted its administrative remedy as to the averment of reason to believe. But the Commission's refusal to reconsider its issuance of the complaint does not render the complaint a 'definitive' action. The Commission's refusal does not augment the complaint's legal force or practical effect upon Socal. Nor does the refusal diminish the concerns for efficiency and enforcement of the Act.").

[14] Horton Opp. at 9.

[15] *Id.* at 9, 17. Horton also claims that the CID compels it to create new responsive documents. *Id.* at 16.

[16] *Standard Oil*, 449 U.S. at 242-43. "As we recently reiterated, 'mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.'" *Id.* at 243, quoting *Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974).

Airlines in 1999, holding that "the expense and annoyance of litigation does not constitute irreparable injury that would justify an exception to the finality rule."[17]

Horton suggests in a footnote that this Court should simply disregard those authorities because they "precede by decades the advent of electronic discovery and the sea change that it has brought."[18] But Horton provides no explanation for why e-discovery, however costly or burdensome, would transform a CID – which is non-final and non-reviewable as a legal matter – into a "final agency action" subject to review under the APA. Horton cites no case in which any court in the country has reached such a conclusion.[19]

II. Horton's Allegations Regarding the CID's Procedural Defects Are Not Ripe for Adjudication and Do Not Justify Bypassing the Procedures Mandated by Congress.

Horton alleges that the FTC violated its own regulations when issuing the CID, and on that basis, contends that it may sue immediately to enjoin the CID and shut down the investigation.[20] Horton fails, however, to offer any explanation for why this particular claim satisfies the Supreme Court's "ripeness" criteria any more effectively than its other

[17] *American Airlines*, 176 F.3d at 291, citing *Standard Oil*, 449 U.S. at 242, and *Pennzoil Co. v. FERC*, 742 F.2d 242, 244 (5th Cir. 1984). *See also Borden, Inc. v. FTC*, 495 F.2d 785, 789 (7th Cir. 1974) (affirming dismissal of interlocutory suit seeking injunction to halt an FTC proceeding, and holding that "Borden's claim of irreparable injury based upon the cost and inconvenience of defending itself in administrative proceedings is not alone sufficient to justify judicial intervention in the [FTC] administrative process.").

[18] Horton Opp. at 9 n.4.

[19] Horton cites three cases in its footnote, Horton Opp. at 9 n.4, but none of them supports the proposition for which Horton cites them nor has any bearing on whether an administrative agency's compulsory process is a "final agency action" under the APA. Rather, each of them involved legally compelled production of all data on entire hard drives and other data storage devices – a concern irrelevant to the FTC's CID, which includes no such demand. Moreover, these cases addressed factual questions of whether the information requests were overly broad – an issue that is not presented in the context of this Motion to Dismiss.

[20] Horton Opp. at 10-11. Specifically, Horton claims that the FTC failed to comply with its Rule 2.6, which requires that, when the agency seeks information from a party under investigation, it must advise the party of "the purpose and scope of the investigation and the nature of the conduct constituting the alleged violation which is under investigation." 16 C.F.R. § 2.6.

premature claims.[21] As the Seventh Circuit held in affirming a district court's dismissal of a complaint seeking an injunction to halt an ongoing FTC investigation, any such allegations that the agency had violated Rule 2.6 "during the investigatory stage . . . may be raised on appeal from the Commission's final order."[22]

Horton provides no reason why it could not present its Rule 2.6 argument concerning the CID's purported procedural defects to a federal court in a CID enforcement action, if and when the FTC brings one, following the clear route for judicial review intended by Congress and set forth in the FTC Act.[23] Horton cites cases establishing that, where an agency is accused of violating its own regulations, "there is a 'presumption of reviewability' even where a statute purports to preclude judicial review."[24] Whether or not this proposition is correct, it is irrelevant here, because the

[21] *See generally* FTC Br. at 15-17; *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967); *Texas v. United States*, 523 U.S. 296 (1998); *Atlantic Richfield*, 546 F.2d at 648.

[22] *Borden, Inc. v. FTC*, 495 F.2d at 788-89.

[23] *See* 15 U.S.C. § 57b1(e); *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927).

[24] Horton Opp. at 18. The cases Horton cites are inapposite, because they concern situations in which judicial review was not authorized under the APA or any other statute. *See American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94 (1902) (decided in 1902, before the enactment of the APA); *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996) (challenging action by the President, who is not an "agency" subject to judicial review under the APA); *Oestereich v. Selective Serv. Sys.*, 393 U.S. 233 (1968) (statute purported to preclude any judicial review of agency's decision); *Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988) (same). Horton also cites two cases that actually reach the opposite conclusion from that advanced by Horton: *Weber v. United States*, 209 F.3d 756, 759 & n.1 (D.C. Cir. 2000) (the "government does not argue that the actions of the [Office of Special Counsel] should be entirely immune from judicial review"), and *Withrow v. Larkin*, 421 U.S. 35 (1975) (district court should *not* have issued injunction against a state agency's conducting an investigative hearing).

statutes at issue in this case – the FTC Act and the APA – do not "purport to preclude judicial review." To the contrary, they specifically authorize it, as discussed above.[25] "The question is not *whether* . . ., but rather *how* and *when* an alleged error of the Commission is to be judicially considered. Congress has provided the method in the [FTC] Act itself, thus precluding it to a District Court exercising equity jurisdiction."[26] The mode of review prescribed by the FTC Act "has long been viewed as constituting a speedy and adequate remedy at law."[27] Horton's attempt to"short cut" or "bypass" that process is wholly improper.[28] Nor is Horton's premature attack on the Commission's investigation furthered by its contention that the FTC did not provide adequate notice of

[25] Horton levels the unfounded accusation that the FTC is "simply . . . attempt[ing] to avoid any examination of its conduct." Horton Opp. at 10. This is flatly untrue, and is directly refuted by the FTC's repeated affirmation, both in this brief and in the initial brief, that Horton *will* have an opportunity to obtain judicial review and present its allegations to a federal court for a ruling – but it may do so only as defenses in an enforcement case, as the statute prescribes, not in a preemptive suit like this one.

[26] *Elmo Div. of Drive-X Co. v. Dixon*, 348 F.2d 342, 348 (D.C. Cir. 1965) (*per curiam*) (Fahy, J. dissenting) (emphasis added). The Supreme Court, in *Standard Oil*, relied on the same rationale as Judge Fahy articulated his dissenting opinion – thereby apparently overruling the *Elmo* majority's *per curiam* ruling (that district court had jurisdiction over lawsuit seeking injunction against FTC's instituting a complaint), from which Horton cites a *dictum* (Opp. at 18). Indeed, ever since the Supreme Court decided *Standard Oil*, no court in the country has followed the *Elmo* ruling, to our knowledge. Only one post-*Standard Oil* case involving the FTC has even cited *Elmo*; and the court in that case distinguished *Elmo* and dismissed the complaint, concluding that "[t]he court is precluded from asserting subject matter jurisdiction by the holding in *FTC v. Standard Oil Co. of Calif.*" *R.J. Reynolds Co. v. FTC*, 14 F.Supp.2d 757, 761 (M.D.N.C. 1998). Moreover, even if *Elmo* were still good law, it is factually distinguishable from the present case; the panel majority's rationale for allowing a suit to enjoin the FTC from bringing a complaint was that the FTC, in an earlier consent decree, had agreed not to do so. There is no such prior consent decree here.

[27] *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967) (*per curiam*). *See also Claire Furnace*, 274 U.S. at 174; *Atlantic Richfield*, 546 F.2d at 648-49 (a party under investigation by FTC "may raise all its due process and regulatory procedural objections in any enforcement proceeding brought against it," but "pre-enforcement injunctive or declaratory relief [is] unwarranted, [given] the adequacy of the legal remedy"); *Reisman v. Caplin*, 375 U.S. 440, 450 (1964) (parties must follow "the comprehensive procedure of the [statute]," which "works no injustice" and "provides full opportunity for judicial review before any coercive sanctions may be imposed.").

[28] *Energy Transfer Partners v. FERC*, 567 F.3d 134, 141 & n.39 (5th Cir. 2009); *General Finance Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983) (Posner, J.) ("You may not bypass the specific method that Congress has provided for reviewing adverse agency action simply by suing the agency in federal district court . . . . to enjoin the investigation, but must wait till the government sues to enforce a subpoena or other compulsory process in aid of the investigation").

the conduct under investigation as required by 16 C.F.R. § 2.6.[29] As Horton concedes, the FTC "is under no obligation to propound a narrowly focused theory of a possible future case."[30] As the *en banc* D.C. Circuit explained,

> Where, as here, no complaint has yet been formulated and the issues have therefore not yet been crystallized, ... the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation. The district court is not free to speculate about the possible charges that might be included in a future complaint, and then to determine the relevance of the subpoena requests by reference to those hypothetical charges. The court must not lose sight of the fact that the agency is merely exercising its legitimate right to determine the facts, and that a complaint may not, and need not, ever issue."[31]

Similarly, in 1980 the D.C. Circuit rejected a group of cigarette companies' charge that an FTC resolution authorizing compulsory process – similar to the resolutions that the FTC staff relied upon as authority for issuing the CID to Horton – was impermissibly vague and "renders impossible a determination of the relevance of items sought by the subpoenas," in violation of Rule 2.6. The court concluded that the FTC resolution was adequate, and that in the subpoenas, "the agency identified both its statutory bases of authority as well as the subject of the investigation. When any agency invokes its subpoena power, it is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command."[32]

[29] Horton Opp. at 10-11.

[30] *Id.* at 14, quoting (but not citing) *FTC v. Texaco, Inc.*, 555 F.2d 862, 874 (D.C. Cir. 1977) (*en banc*).

[31] *Texaco*, 555 F.2d at 873-74.

[32] *FTC v. Carter*, 636 F.2d 781, 787-88 (D.C. Cir. 1980) (citation and internal quotes omitted). The court also found that "the documents subpoenaed are reasonably relevant to the purposes of the investigation," and that this "test is satisfied if the documents sought are not plainly irrelevant to the investigative purpose." *Id.* at 788. *See*

III. Venue is Improper in the Northern District of Texas

Horton claims that venue is proper in this District pursuant to 28 U.S.C. § 1391(e)(2) because "the events giving rise to the Complaint arise entirely from the CID served on Horton at its corporate headquarters and principal place of business in Fort Worth, Texas," and any "alleged company-wide 'deceptive or unfair acts or practices' would have originated from Horton's corporate headquarters and principal place of business in Fort Worth, Texas."[33] Horton apparently forgets that it is the *plaintiff*, not the defendant, in this particular case. It is true that many of Horton's potentially unlawful activities that the FTC is investigating occurred in Fort Worth, and that this District would be one of several possible appropriate venues if the FTC were to bring suit against Horton. However, the FTC is the defendant here, not Horton; and the FTC's activities at issue in this case – including its supposedly improper behavior in crafting the CID and denying Horton's objections to it – all took place in Washington, D.C.

Similarly, Horton notes that some of its wholly owned subsidiaries and other entities that are subject to the FTC's investigation are domiciled in Texas, potentially justifying venue in this District under 28 U.S.C. § 1391(e)(3).[34] Again, if the FTC were the plaintiff and those entities were among the defendants, the FTC undoubtedly could

also United States v. Morton Salt Co., 338 U.S. at 642-43, 652 (affirming a broad FTC data request, since even if the requested information were not "shown to be relevant to issues in litigation," the Commission has authority to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not. . . . [L]aw-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.").

[33] Horton Opp. at 20-21.

[34] *Id.* at 1-2, 24.

choose to sue them in this District. But those Texas-domiciled subsidiaries are not parties to this case at all. There is only one plaintiff in this case – D.R. Horton, Inc., the holding company, which is domiciled in Delaware, not Texas. Venue is thus improper here.

CONCLUSION

For the reasons set forth above and in the FTC's initial memorandum of points and authorities, the Court should dismiss this case.

Respectfully submitted,

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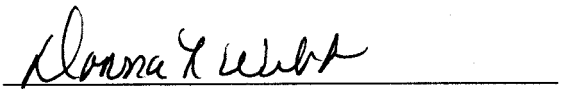

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