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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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COMPLETE MERCHANT SOLUTIONS,

Plaintiff,

vs.

FEDERAL TRADE COMMISSION,

Defendant.

Case No. 2:19-cv-00963-HCN-EJF

**MOTION TO DISMISS  
AND MEMORANDUM IN  
SUPPORT**

Judge Howard C. Nielson, Jr.

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Under Fed. R. Civ. P. 12 (b)(1), the Federal Trade Commission (FTC) moves to dismiss this case for lack of subject matter jurisdiction. The Court lacks jurisdiction because: (1) only the Administrative Procedure Act could provide a cause of action, but the complaint does not satisfy the statutory prerequisites for jurisdiction; and (2) the complaint's challenges to FTC action are unripe. Further, even if the Court has jurisdiction, it should refrain from exercising its authority as a matter of discretion and dismiss the case.

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## INTRODUCTION

Plaintiff Complete Merchant Solutions, LLC (CMS) serves as an intermediary between merchants interested in using credit-card transactions and credit-card payment networks, such as Visa and MasterCard. Several of CMS's merchant-clients have been or are targets of FTC investigations or defendants in FTC enforcement suits, and the FTC is investigating whether CMS itself broke the law when it provided them services. The FTC has not decided whether to file an enforcement case against CMS, but CMS sued the agency first, asking the Court to short-circuit the ordinary enforcement process, declare that CMS's practices are not unlawful, and bar the FTC from further investigation.

CMS's suit is barred by long-standing precedent that has rejected attempts to preemptively secure immunity from prosecution. The only cause of action available to CMS is the Administrative Procedure Act, which requires both that the plaintiff challenge a final agency action and that it have no other pathway to relief. But an *investigation* is not a final agency action, and should the FTC file an enforcement suit in the future, CMS can raise its claims and defenses in that proceeding.

CMS's claims also fail because they are not ripe for preenforcement review. CMS raises issues that are not purely legal, but are factbound and thus unfit for a declaratory ruling. The questions include whether its conduct caused substantial consumer injury, whether consumers could reasonably avoid the harm, and whether the harm was outweighed by benefits to consumers or competition. CMS also fails to identify any cognizable hardship it would face at this time.

Even if the Court has jurisdiction, it should exercise its discretion not to resolve this matter. CMS can challenge the FTC's authority to investigate and issue process as defenses in the FTC's pending suit to enforce a civil investigative demand, with which CMS has refused to comply. Whether CMS's activities violate the FTC Act also can be fully addressed in an enforcement action. Deferring resolution of the issues to such suits will avoid duplicative or inconsistent results. Indeed, if the FTC's charges in an enforcement case are broader or different than the issues CMS raises here, this Court's judgment would not resolve the parties' controversy. And if the FTC decides not to bring an enforcement action, resolving this suit will have wasted the parties' and the Court's time and resources and have resulted in an unwarranted advisory opinion.

## BACKGROUND

### A. The FTC's Investigative and Enforcement Authority

Section 5(a) of the FTC Act prohibits “unfair methods of competition” and “unfair or deceptive acts or practices” in or affecting commerce. [15 U.S.C. § 45\(a\)](#). The Telemarketing and Consumer Fraud and Abuse Prevention Act prohibits abusive or deceptive telemarketing, [15 U.S.C. §§ 6101-6108](#), and to implement that restriction the FTC has issued the Telemarketing Sales Rule (TSR), [16 C.F.R. Part 310](#). A violation of the TSR constitutes a violation of Section 5(a). [15 U.S.C. §§ 57a\(d\)\(3\), 6102\(c\)](#).

The FTC Act gives the agency broad authority to “investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” [United States v. Morton Salt Co., 338 U.S. 632, 642–43 \(1950\)](#). In support of that authority, the Act permits the agency to issue civil investigative demands (“CIDs”) that require production of documents and information “relevant” to its investigation. [15 U.S.C. § 57b-1\(c\)](#). The Tenth Circuit has recognized under similar provisions that relevance is to be construed broadly. See [Phillips Petroleum Co. v. Lujan, 951 F.2d 257, 260 \(10th Cir. 1991\)](#) (agency process requests exclude only matters that are

“plainly incompetent or irrelevant to any legal purpose” of the agency) (citing [\*Endicott Johnson v. Perkins\*, 317 U.S. 501, 509 \(1943\)](#)).

Once an investigation has concluded, agency staff may recommend that the Commission authorize an enforcement proceeding. Filing an enforcement case requires the vote of a majority of the Commission (which ordinarily includes five Commissioners). [16 C.F.R. § 4.14](#). Should the Commission decide to undertake enforcement, it may do so either through administrative adjudication under Section 5(b) of the FTC Act, [15 U.S.C. § 45\(b\)](#), or by filing a lawsuit in federal district court under Section 13(b), [id. § 53\(b\)](#), or Section 19(a)(1) of the FTC Act, [id. § 57b\(a\)\(1\)](#).

**B. CMS’s Declaratory Judgment Action**

In its complaint, CMS alleges it is an “independent sales organization” that matches merchants interested in processing credit card payments with banks (known as the “acquiring bank”) that are members of a payment association network such as Visa or MasterCard. CMS thereby facilitates the ability of merchants to transact business on the credit card networks. *E.g.*, Compl. ¶¶ [1](#), [13](#), [25](#).

When the FTC learned that CMS may have opened and maintained accounts for a significant number of merchants who had been charged with

violating federal or state law, it began investigating whether CMS itself had violated the FTC Act or the TSR. [Id.](#) ¶62; *see also* [Federal Trade Commission v. Complete Merchant Solutions, LLC](#), No. 2:19-cv-00996-HCN-EJF (D. Utah Dec. 23, 2019), ECF No. 2 (Petition) (“CID Enf. Pet.”) ¶¶10-13. In August 2017, the agency sent a CID to CMS (“the 2017 CID”). [Compl.](#) ¶62. After reviewing CMS’s partial response, in February 2019, FTC staff sent CMS a proposed complaint and a draft consent order that would settle the matter. [Id.](#) ¶65. The proposed complaint alleged that CMS engaged in unfair practices in violation of Section 5(a). [Id.](#) ¶67. The parties discussed settlement over the next 10 months, but reached no agreement. [Id.](#) ¶¶65, 90-91. To date, the FTC has not filed an enforcement complaint.

Instead of defending itself against an FTC enforcement action (should there be one), CMS preemptively sued the FTC, asking the Court to declare that CMS has not violated Section 5(a) and prohibit the FTC from further investigation or future enforcement asserting a violation of Section 5(a) based on the activities raised in the complaint. [Id.](#) ¶98; [id.](#) at 33 (prayer for relief). It also asks the Court to rule that the FTC may not sue CMS in federal court under Section 13(b) and may not recover any relief under that provision even if it can sue. [Id.](#) ¶102; [id.](#) at 33 (prayer for relief).

### **C. The FTC's CID Enforcement Case**

On November 5, 2019, after CMS refused to supplement its responses to the 2017 CID, the FTC issued CMS a second CID (the “2019 CID”), to aid its investigation. [CID Enf. Pet. ¶32](#). The investigation concerned whether CMS and its officers and managers “have engaged in deceptive or unfair acts or practices by providing payment processing services to merchants engaged in fraud” or “assisted or facilitated those merchants by processing payments from consumers that were either unauthorized or otherwise obtained illegally,” in violation of Section 5(a) or the TSR. [Id. ¶13](#). The 2019 CID requests a limited amount of materials and information relating to CMS’s provision of payment processing services for defendants in newly-filed cases and targets of current investigations. [Id. ¶33](#). CMS initially stated that it would produce responsive documents and information. [Id. ¶39](#). But on December 5, 2019, without prior notice to the FTC, CMS filed this declaratory judgment action instead and subsequently informed the FTC that it would not comply with the 2019 CID. [Id. ¶¶45-46](#). On December 23, the FTC filed a petition to enforce the CID, which is pending in this Court. [\*Federal Trade Commission v. Complete Merchant Solutions, LLC, supra.\*](#)

## ARGUMENT

### I. THE COURT LACKS JURISDICTION OVER THIS CASE

Federal district courts are courts of limited jurisdiction; they “possess only that power authorized by Constitution and statute.” [\*Kokkonen v. Guardian Life Ins. Co. of Am.\*, 511 U.S. 375, 377 \(1994\)](#). It therefore is “to be presumed that a cause lies outside this limited jurisdiction,” and “the burden of establishing the contrary rests upon the party asserting jurisdiction.” [\*Id.\*](#) CMS has failed to do so.

#### A. CMS Cites No Cause Of Action That Supports Jurisdiction

CMS alleges that its suit for declaratory and injunctive relief is brought pursuant to the Declaratory Judgment Act, 8 U.S.C. § 2201, and “relat[es] to an actual controversy arising under” Sections 5(a) and 13(b) of the FTC Act, 15 U.S.C §§ 45(a), 53(b). [Compl. ¶8](#). It claims subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1337, because it is an “action arisi[ng] under” federal law, including the FTC Act. [\*Id.\* ¶9](#). But neither the FTC Act nor the Declaratory Judgment Act provides CMS a cause of action to support federal jurisdiction.

The FTC Act does not provide a cause of action to private plaintiffs, [\*Am. Airlines v. Christensen\*, 967 F.2d 410, 414 \(10th Cir. 1992\)](#), and “[n]o

district court action for a declaratory judgment is authorized by [it].”

[Floersheim v. Engman](#), 494 F.2d 949, 954 (D.C. Cir. 1973).

Nor does the Declaratory Judgment Act provide a cause of action. That statute permits federal courts to “declare the rights and other legal relations of” the requesting party “[i]n a case of actual controversy within its jurisdiction.” [28 U.S.C. § 2201](#). But the provision does not “create substantive rights” and thus does not create a cause of action. [Hanson v. Wyatt](#), 552 F.3d 1148, 1156-57 (10th Cir. 2008). Nor “does [it] itself confer jurisdiction on a federal court where none otherwise exists.” [Henry v. Office of Thrift Supervision](#), 43 F.3d 507, 512 (10th Cir. 1994). The Declaratory Judgment Act merely provides a remedy for a complaint over which the court otherwise has jurisdiction.

**B. The Administrative Procedure Act is CMS’s Only Route to Judicial Review, but CMS Has Failed to Satisfy the APA’s Prerequisites to Suit**

The only possible cause of action here is under the Administrative Procedure Act (APA), [5 U.S.C. § 701](#) *et seq.* CMS, however, does not invoke the APA and, in any event, fails to satisfy the APA’s prerequisites to suit.<sup>1</sup>

Where no other statute provides a private right of action challenging federal government action, “[t]he jurisdiction of the federal courts . . . is codified in the [APA].” [General Finance Corp. v. FTC](#), 700 F.2d 366, 372 (7th Cir. 1983); *see also* [Norton v. S. Utah Wilderness All.](#), 542 U.S. 55, 61-62 (2004). In such situations, the APA is the “exclusive” method for review of agency conduct, and parties “may not bypass” it “simply by suing the

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<sup>1</sup> Courts typically deem a failure to meet the APA prerequisites to be a jurisdictional defect. *See* [General Finance](#), 700 F.2d at 372; [Wearly v. FTC](#), 616 F.2d 662, 667-68 (3d Cir. 1980); [LabMD, Inc. v. FTC](#), 776 F.3d 1275, 1277 (11th Cir. 2015); [Ukiah Valley Med. Ctr. v. FTC](#), 911 F.2d 261, 264 n.1 (9th Cir. 1990). The Tenth Circuit follows that approach unless “resolution of the jurisdictional question requires resolution of an aspect of the substantive claim,” in which case the dismissal is based on a failure to state a claim. [Davis ex rel. Davis v. United States](#), 343 F.3d 1282, 1296 (10th Cir. 2003) (citation omitted). As with other unripe preemptive challenges to nonfinal agency action, the jurisdictional question here does not require resolving aspects of CMS’s substantive claims and should be dismissed for lack of jurisdiction. *See, e.g.,* [Mobil Exploration & Producing U.S., Inc. v. Dep’t of Interior](#), 180 F.3d 1192 (10th Cir. 1999); [Belle Fourche Pipeline Co. v. United States](#), 751 F.2d 332 (10th Cir. 1984).

agency in federal district court under 1331.” [General Finance, 700 F.2d at 368](#) (citing [5 U.S.C. §§ 703, 704](#)). If a lawsuit is not authorized by the APA, then “general jurisdictional statutes such as [Sections] 1331 and 1337 cannot be used to confer jurisdiction.” [Id. at 372](#).

Congress limited lawsuits under the APA to those satisfying specific conditions that CMS fails to meet. First, it allows judicial review of “agency action made reviewable by statute.” [5 U.S.C. § 704](#). This case does not challenge FTC action “made reviewable by statute.” Second, the APA allows challenges to “final agency action for which there is no other adequate remedy in a court.” [Id.](#) CMS meets neither of those prerequisites.

### **1. CMS does not challenge any “final” FTC action.**

An agency action is “final” under the APA only if it meets both of two separate conditions. First, the action must “mark the consummation of the agency’s decisionmaking process,” and second, it must “be one by which rights or obligations have been determined, or from which legal consequences will flow.” [Bennett v. Spear, 520 U.S. 154, 156, 177-78 \(1997\)](#) (cleaned up). Both conditions “must be satisfied” to permit judicial review. [Id. at 177](#). Permitting review of nonfinal action would “lead[] to piecemeal review which at the least is inefficient and upon completion of the agency process

might prove to have been unnecessary.” [FTC v. Standard Oil Co. of Cal.](#), 449 U.S. 232, 242 (1980) (citation omitted).<sup>2</sup> CMS meets neither of those prongs.

**a. The FTC’s investigation is not the “consummation” of any decisionmaking process.**

CMS challenges an FTC investigation. It repeatedly complains, for example, about the investigation’s duration and “burdensome investigative demands,” [Compl. ¶90](#), and the agency’s purported litigation threats, *e.g.*, *id.* ¶¶[1](#), [5](#), [7](#), [22](#), [61](#), [73](#), [96](#), [100](#), if CMS did not agree to settle FTC staff’s “proposed complaint” and consent order, *id.* ¶[65](#). As explained above, the ongoing nature of the FTC’s investigation is highlighted by the issuance of its second CID mere weeks before this suit was filed, requesting additional

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<sup>2</sup> This case does not fall within the one very narrow exception to the final agency action rule. In [Leedom v. Kyne](#), 358 U.S. 184 (1958), the Supreme Court permitted review of a nonfinal order of the NLRB that it found the agency was without authority to issue and was contrary to a specific prohibition in its governing statute. *Id.* at 187-91. The Court did so, as the Tenth Circuit explained, because the agency did not contest that it had acted without authority and because the affected parties had no other means to protect and enforce their rights. *See Farrell-Cooper Min. Co. v. U.S. Dept. of the Interior*, 728 F.3d 1229, 1238 (10th Cir. 2013) (citing [Kyne](#), 358 U.S. at 187-88, 190). In stark contrast, CMS has other remedies in which to make its challenges and the FTC has not conceded that it acted without authority. *Kyne* “provides an exception of ‘very limited scope,’ to be ‘invoked only in exceptional circumstances,’” [Mobil Expl.](#), 180 F.3d at 1201 (citations omitted), and this case presents no such circumstances to justify invoking the limited exception.

materials and information relating to CMS’s payment processing services provided to defendants in newly-filed cases and targets in current investigations. At this point, the Commission has not voted to file a case nor reached any final decision to take other action. An ongoing investigation is hardly “the consummation of the agency’s decisionmaking process”; rather, it is merely a preliminary phase of that process. Although the parties began settlement discussions about a year ago, [Compl. ¶65](#), there is no guarantee that the Commission, which holds the final say in the matter, [16 C.F.R. § 4.14](#), will decide to proceed with an enforcement action in the absence of a settlement.

Given the uncertain outcome of the investigation, it is clear that the agency has not reached any decision on the matter, much less a “final” one. Indeed, in *Standard Oil*, the Supreme Court held that even the issuance of a complaint is not a “final” decision, since it merely initiates the process of fixing the rights and obligations of the parties. [449 U.S. at 243](#). There, the FTC issued an administrative complaint against Standard Oil, which then sued the agency in federal court for a declaration that the complaint was unlawful. [Id. at 234-35](#). The Supreme Court ordered the declaratory judgment action dismissed on the ground that “[t]he Commission’s issuance of its

complaint was not ‘final agency action’” because it represents merely “a threshold determination that further inquiry is warranted and that a complaint should initiate proceedings.” [Id. at 239, 241](#). If the agency’s issuance of a formal complaint is not a final, reviewable action, then *a fortiori* a mere preliminary investigation to determine whether to issue a complaint cannot possibly be final. [Am. Fin. Benefits Ctr., v. FTC, No. 17-04817, 2018 U.S. Dist. LEXIS 107004, at \\*21 \(N.D. Cal. May 29, 2018\)](#) (unpublished); cf. [Ash Creek Mining Co. v. Lujan, 934 F.2d 240, 243-44 \(10th Cir. 1991\)](#) (agency’s proposed plan not final action under the APA). Indeed, *Standard Oil* warned that preemptive lawsuits “should not be a means of turning prosecutor into defendant.” [449 U.S. at 243](#).

Applying the reasoning of *Standard Oil*, the Tenth Circuit has rejected preenforcement challenges to agency investigations. In *Mobil Exploration*, the court held that an agency letter requesting documents from a lessee of federal land – which it characterized as “strikingly similar to that of the FTC complaint in *Standard Oil*” – “constituted no more than ‘a threshold determination that further inquiry [was] warranted’” and was not final. [Mobil Exploration & Producing U.S., Inc. v. Dep’t of Interior, 180 F.3d 1192, 1198-1200 \(10th Cir. 1999\)](#) (citing [Standard Oil, 449 U.S. at 241-43, 246](#)).

Implicit in the Tenth Circuit's decision is the idea that if an agency investigation alone could trigger a lawsuit and judicial review, then every company investigated by the FTC could file its own preemptive suit against the agency, gutting the central holding of *Standard Oil*. It therefore is hardly surprising that many other courts similarly have rejected pre-enforcement challenges to FTC investigations. *See, e.g., LabMD, Inc. v. FTC*, 776 F.3d 1275, 1279 (11th Cir. 2015); *Ukiah Valley Medical Center v. FTC*, 911 F.2d 261, 263-64 (9th Cir. 1990); *General Finance Corp. v. FTC.*, 700 F.2d 366, 368 (7th Cir. 1983); *Blue Ribbon Quality Meats, Inc. v. FTC*, 560 F.2d 874, 876-77 (8th Cir. 1977); *Am. Fin. Benefits Ctr.*, 2018 U.S. Dist. LEXIS 107004, at \*21; *Direct Mktg. Concepts, Inc. v. FTC*, 581 F.Supp.2d 115, 117 (D. Mass. 2008).

**b. The FTC's investigation determines no legal rights and no cognizable consequences flow from it.**

An agency investigation by itself determines no legal rights. Only a decision on the merits, after the conclusion of the investigation and the issuance of a complaint, would have that effect. *Bennett*, 520 U.S. at 178. The investigation itself neither requires nor forbids CMS from doing anything at all.

Nor does the investigation have legally cognizable consequences. At most, CMS will need to respond to the 2019 CID in light of the pending CID enforcement suit, but the Supreme Court has definitively concluded that such obligations do not trigger judicial review. [\*Standard Oil\*, 449 U.S. at 242.](#) Rather, such costs are simply “part of the social burden of living under government.” [\*Id.\* at 244](#) (citation omitted). “If the cost, delay, and aggravation of litigation made an order final, the distinction between interlocutory and final decisions would collapse, and courts . . . would be deluged.” [\*R.R. Donnelley & Sons Co. v. FTC\*, 931 F.2d 430, 431 \(7th Cir. 1991\)](#); *see also* [\*Ukiah Valley\*, 911 F.2d at 264](#) (neither “mere ‘possible financial loss’” nor the burden of having to “appear and defend themselves” warrant review). That is why *Standard Oil* “holds that expense does not finality make.” [\*R.R. Donnelley\*, 931 F.2d at 431.](#)

Indeed, two district courts have recently dismissed virtually identical suits against the FTC. In [\*Endo Pharms. Inc. v. FTC\*, 345 F. Supp. 3d 554 \(E.D. Pa. 2018\)](#), the court dismissed a declaratory judgment case filed before the FTC initiated an enforcement suit. The court held that the filing of the FTC’s complaint “does not determine any rights or obligations and has no legal consequences,” whereas those determinations and consequences “will

flow from the [c]ourt’s and jury’s findings and decisions.” *Id.* at 560 (citation omitted). In *Am. Fin. Benefits Ctr.*, the court likewise dismissed a preemptive declaratory judgment case filed before the FTC sued, holding that “any rights, obligations and legal consequences are to be determined later by a judge,” not when the FTC files its complaint. [2018 U.S. Dist. LEXIS 107004, at \\*21-22](#) (citation omitted).

## **2. CMS has other adequate remedies in court.**

Jurisdiction in this case founders as well on the APA’s independent requirement that CMS must lack any “other adequate remedy in a court.” [5 U.S.C. § 704](#). With respect to the investigation, CMS can challenge the FTC’s authority to conduct the inquiry and its issuance of the 2019 CID in the course of the pending CID enforcement proceeding.<sup>3</sup> Indeed, that is the exclusive statutory method for seeking judicial relief from a CID. *See* [15 U.S.C. § 57b-1](#).

With respect to the legality of CMS’s underlying conduct, CMS can defend its practices and raise all the arguments it advances here in the course

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<sup>3</sup> CMS did not challenge either the 2017 or 2019 CIDs through the administrative petition to quash or limit process set forth in the Commission’s Rules. [16 C.F.R § 2.10](#). Instead, it filed the instant action. The FTC is asserting in the pending CID enforcement case that, by failing to exhaust its administrative remedies, CMS has waived any challenges to the 2019 CID.

of an FTC enforcement action, should the agency decide to bring one. Two Tenth Circuit cases control here, both holding that an agency's enforcement suit provides a remedy that bars preemptive suits. In *Mobil Exploration*, the court held that defendants could contest agency conduct as a defense to an agency enforcement suit. [180 F.2d at 1199-1200](#). And in *Belle Fourche*, the court recognized that, although – like here – the agency had not yet filed an enforcement suit, the targets of an agency investigation “possessed an adequate legal remedy” by being able to raise any challenges to an enforcement suit if one was brought. [751 F.2d at 334-35](#). CMS's suit represents an improper attempt to derail an agency investigation, much like those the Tenth Circuit condemned in *Mobil Exploration* and *Belle Fourche*.

Other courts have applied the same principle in dismissing preenforcement suits against federal agencies after concluding that the plaintiff had a more appropriate judicial remedy. *See, e.g., Buntrock v. SEC*, [347 F.3d 995, 997 \(7th Cir. 2003\)](#) (target of investigation cannot “derail” agency investigation by challenging agency action first, but must raise arguments as defenses to enforcement suit); *General Finance*, [700 F.2d at 368-69, 371-72](#) (target of FTC investigation could raise all arguments – including that the FTC lacked authority to engage in the investigation – as

defenses to agency enforcement proceeding); [First Nat'l City Bank v. FTC, 538 F.2d 937 \(2d Cir. 1976\)](#) (same).

\* \* \*

CMS disagrees with the FTC about the agency's authority to investigate its business practices and whether those practices are unlawful. But because CMS fails to challenge any final FTC action and has adequate remedies to raise its arguments in the pending CID enforcement suit and in a possible enforcement suit alleging FTC Act or TSR violations, it states no claim under the APA.

## **II. THIS CASE IS NOT RIPE**

Even properly pleaded claims should not be resolved unless they “arise in the context of a controversy ‘ripe’ for judicial resolution.” [Abbott Labs. v. Gardner, 387 U.S. 136, 148 \(1967\)](#), *abrogated on other grounds*, [Califano v. Sanders, 430 U.S. 99 \(1977\)](#). The ripeness doctrine ensures that courts avoid “premature adjudication” and do not “entangl[e] themselves in abstract disagreements,” thereby “protect[ing] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way.” [Id. at 148-49](#). The central inquiry is “whether the case involves uncertain or contingent future events that may not occur as

anticipated, or indeed may not occur at all.” [New Mexico v. Dep’t of Interior](#), 854 F.3d 1207, 1219 (10th Cir. 2017) (citations omitted).

The Tenth Circuit adheres to “the principle against pre-enforcement review” and will “dismiss anticipatory actions . . . as not being ripe” because the plaintiff could raise all its arguments in an agency enforcement suit if one is filed. [Mobil Expl.](#), 180 F.3d at 1200 (citation omitted). This principle derives from the Supreme Court “rule strongly disfavoring any pre-enforcement review.” [Belle Fourche](#), 751 F.2d at 334 (citing [Reisman v. Caplin](#), 375 U.S. 440 (1964)).

The Supreme Court has set out two factors for evaluating ripeness: “fitness of the issues for judicial decision” and “hardship to the parties of withholding court consideration.” [Abbott Labs.](#), 387 U.S. at 149. Elaborating on those criteria, the Tenth Circuit has set out four factors to determine ripeness:

- (1) “whether the issues in the case are purely legal”;
- (2) “whether the agency action involved is ‘final agency action’ within the meaning of the [APA]”;
- (3) “whether the action has or will have a direct and immediate impact upon the plaintiff”; and
- (4) “whether the resolution of the issues will promote effective enforcement and administration by the agency.”

*S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1158 (10th Cir. 2013)

(citations omitted); accord *New Mexico*, 854 F.3d at 1219. This case fails every factor.

*First*, the claims presented by CMS are not purely legal. Among other things, CMS seeks a declaration that its practices are not unfair under Section 5(a). Compl. ¶¶97-98; pg. 33 (prayer for relief). Resolving that question necessarily involves examining facts that have not yet been fully developed.

This is because an unfairness claim requires that the challenged action:

(1) “causes or is likely to cause substantial injury to consumers;” (2) “which is not reasonably avoidable by consumers themselves”; and (3) is “not outweighed by countervailing benefits to consumers or to competition.” 15

U.S.C. § 45(n). Each of these factors requires factual development. *See*

*Farrell-Cooper Min. Co. v. U.S. Dept. of the Interior*, 728 F.3d 1229, 1234

(10th Cir. 2013) (whether issues are fit for review depends on “whether the

courts would benefit from further factual development of the issues

presented.”) (citation omitted). CMS’s bare allegation that consumers can

avoid harm from disputed charges because the credit card system

“guarantee[s]” they will get reimbursed, *e.g.*, Compl. ¶93.f., demonstrates the

need for proof that all consumers can reasonably avoid harm by disputing

charges, that consumers know how to dispute a charge in the first place, and that the burden of launching a dispute is not itself a harm.

Likewise, its blanket assertion that “there is no evidence that CMS was knowingly complicit in [its] merchants’ misconduct,” *id.* ¶88, requires factual development because one of the key issues in the FTC’s investigation is whether CMS or its officers or managers “provid[ed] payment processing services when they knew or should have known that charges to consumers’ accounts were unauthorized or obtained illegally.” [CID Enf. Pet. at 17](#) (citing [2019 CID at 6](#) and [15 U.S.C. § 57b-1\(c\)\(2\)](#)).

*Second*, for the reasons set forth above, this case does not involve final agency action and thus fails the second factor. See [Ash Creek, 934 F.2d at 244](#) (dismissing challenge to “hypothetical” agency decision as unripe).

*Third*, CMS’s allegations fall far short of demonstrating that FTC “action” (whether that is considered the agency’s investigation, its 2017 or 2019 CIDs, its purported litigation threats if CMS did not agree to settle the matter, or some combination) has imposed the sort of “immediate substantial impact . . . similar to the burdens described in *Abbott Lab[s.]*” [Mobil Expl., 180 F.3d at 1203](#). In *Abbott Labs*, the company had to choose between complying with food and drug regulations at great cost or facing severe

criminal and civil penalties. [387 U.S. at 152-53](#). That type of hardship justified pre-enforcement review of the regulations. *Id.*

Here, by contrast, CMS faces no similar hardship. As discussed above, it is not required to do or refrain from doing anything by virtue of the FTC investigation. Nor will CMS face the type of hardship to justify court intercession should it decline to settle with the FTC. Whatever efforts CMS has had to spend to respond to the CIDs and negotiate with FTC staff, *see, e.g.*, Complaint ¶¶[3](#), [63](#), [90](#), amounts only to the cost of doing business and responding to reasonable governmental inquiries into potential wrongdoing.<sup>4</sup> Like issuance of the complaint in *Standard Oil*, CMS’s “burden of responding to the charges made against” it in the pending CID enforcement proceeding or in any possible enforcement suit alleging FTC Act or TSR violations imposes only “the disruptions that accompany any major litigation,” and does not constitute the sort of hardship that justifies immediate judicial intervention. [449 U.S. at 243](#).

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<sup>4</sup> Further, such efforts have been less than overwhelming. CMS responded belatedly to, and never certified compliance with, the 2017 CID. CID Enf. Pet. ¶¶[21-23](#). And it incurred hardly any burden regarding the 2019 CID because its response efforts were negligible and it refused to produce any new documents. *Id.* ¶¶[40-47](#).

CMS is in no different position than the parties whose claims were dismissed in *Mobil Exploration or Belle Fourche*. In *Mobil Exploration*, the court held that neither the agency’s document request letter nor its subpoena imposed an “immediate substantial impact” on the plaintiff that justified judicial intervention. [180 F.3d at 1203](#). The court also explained that “procedural wrangling” over the subpoena did “not impose any appreciable obligations upon their daily business.” *Id.* In *Belle Fourche*, the court held that if the plaintiffs’ defense against the agency subpoenas “has merit, they will not be exposed to civil fines,” and thus they “were not exposed to the type of immediate, irreparable injury necessary to justify jurisdiction.” [751 F.2d at 335](#); accord [Wearly v. FTC, 616 F.2d 662, 666-68 \(3d Cir. 1980\)](#) (dismissing preemptory challenge to agency subpoena as unripe due to lack of finality and absence of immediate harm).

*Fourth*, far from furthering effective enforcement and administration by the FTC, resolution of the claims in this suit will have precisely the opposite effect. Taking up the case now will only derail the FTC’s investigation and “cause substantial disruption to the administrative process.” [Mobile Expl., 180 F.3d at 1204](#).

### III. THE COURT SHOULD EXERCISE ITS DISCRETION TO DISMISS THIS CASE

Even if the Court had jurisdiction, it should not hear this case. “The Declaratory Judgment Act provides that a court ‘*may* declare the rights and other relations of any interested party,’ . . . not that it *must* do so.”

[MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 136 \(2007\)](#) (quoting [28 U.S.C. § 2201\(a\)](#)) (emphasis added). The Court thus has “substantial discretion in deciding whether to declare the rights of litigants.” [Wilton v. Seven Falls Co., 515 U.S. 277, 286 \(1995\)](#). Courts, however, are reluctant to exercise that discretion to review administrative activities “that are not final or otherwise ripe for review,” because doing so “would impermissibly employ the general, discretionary declaratory-judgment remedy to override the specific requirements of the APA addressing review of agency action.” [Automated Merch. Sys., Inc. v. Lee, 782 F.3d 1376, 1382 \(Fed. Cir. 2015\)](#) (citing [Abbott Labs., 387 U.S. at 148](#)).

To determine whether to hear a complaint for a declaratory judgment, the Tenth Circuit consider the following factors:

- (1) “whether a declaratory action would settle the controversy;”
- (2) “whether it would serve a useful purpose in clarifying the legal relations at issue;”

- (3) “whether the declaratory remedy is being used merely for the purpose of procedural fencing or to provide an arena for a race to *res judicata*;”
- (4) “whether use of a declaratory action would increase friction between our federal and state courts and improperly encroach upon state jurisdiction;” and
- (5) “whether there is an alternative remedy which is better or more effective.”

[Mid-Continent Cas. Co. v. Vill. at Deer Creek Homeowners Ass’n, Inc.](#), 685 F.3d 977, 980–81 (10th Cir. 2012). Applying similar factors, courts have declined to consider requests for declaratory relief that would preempt a government agency’s enforcement proceeding holding that the plaintiffs’ arguments should instead be raised as defenses in the enforcement case. *See, e.g., Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 694 (D.C. Cir. 2015); *Swish Mktg., Inc. v. FTC*, 669 F. Supp. 2d 72, 76-80 (D.D.C. 2009); *Endo*, 345 F. Supp. 3d at 563-65. All of the relevant factors point toward dismissal of this case.

*First*, a judgment in this suit will not necessarily resolve all aspects of the controversy between the parties. *See Calderon v. Ashmus*, 523 U.S. 740, 747 (1998) (a declaratory judgment claim should not be heard if it “would not resolve the entire case or controversy”). Because agency staff has not even concluded its investigation, the precise parameters of any future enforcement

action are not yet set. As a result, even if this Court ruled on CMS's claims, the Commission may allege conduct and legal violations that still would justify enforcement.

For example, the FTC's investigation includes whether CMS or its officers or managers violated the TSR as well as the FTC Act, *see* CID Enf. Pet. at [1-2](#), ¶[13](#), yet CMS's complaint does not address the TSR and would not resolve claims involving that rule. *See generally, FTC v. WV Universal Mgmt., LLC*, [877 F.3d 1234 \(11th Cir. 2017\)](#) (finding payment processor liable under the assisting and facilitating provisions of the TSR). Thus, “[e]ven if the Court provides the requested declaratory relief, the controversy between the parties is likely to continue, resulting in substantial inefficiencies for both the parties and the judicial system.” [Swish Mktg.](#), [669 F. Supp. 2d at 78](#); *accord Morgan Drexen*, [785 F.3d at 696-97](#) (affirming dismissal of suit for declaratory relief, which “would not finally settle the controversy and could result in piecemeal litigation”) (cleaned up).

*Second*, allowing this case to proceed likely would confuse the legal relations at issue, not clarify them. As explained above, in the absence of an enforcement suit, it is not possible to know the precise wrongdoing with which CMS and its officers and managers could be charged. If they differ

from CMS's claims here, the result would be duplicative litigation and potentially conflicting judgments.

*Third*, CMS may have filed this case first as a “race to *res judicata*,” in order to undermine the FTC's investigation by foreclosing additional legal theories and fact-gathering before the FTC has fully developed its case and determined whether to file an enforcement suit. The issue “is not which action was commenced first but which will most fully serve the needs and convenience of the parties and provide a comprehensive solution of the general conflict.” [Morgan Drexen, 785 F.3d at 697](#) (citation omitted), which only a possible FTC enforcement suit would do. A suit for declaratory relief should not be used as a means to anticipate defenses; by filing now, CMS has merely engaged in “a disorderly race to the courthouse.” *Id.* (citation omitted).

*Fourth*, as discussed above, CMS has an obvious and less wasteful alternative remedy: asserting its claims as defenses in the CID enforcement suit as appropriate and as defenses to an FTC enforcement suit if one is filed. Indeed, if the FTC does not authorize the filing of an enforcement case (or authorizes claims different from those for which CMS seeks a declaration), resolving the claims here will result only in a waste of the Court's and the

parties' time and resources and the issuance of an unconstitutional advisory opinion. [See Laird v. Tatum, 408 U.S. 1, 13-14 \(1972\)](#) (cleaned up) (Article III courts "do not render advisory opinions.").<sup>5</sup>

### CONCLUSION

For the foregoing reasons, this Court should dismiss this action for lack of subject matter jurisdiction or, alternatively, exercise its discretion to dismiss the case.

DATED: February 3, 2020

ALDEN F. ABBOTT, General Counsel

JOEL MARCUS, Deputy General Counsel

/s/ Michael D. Bergman

MICHAEL D. BERGMAN, Attorney

Attorneys for Defendant

FEDERAL TRADE COMMISSION

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<sup>5</sup> This suit does not implicate the fourth declaratory judgment factor because it does not affect federal-state relations.

## CERTIFICATE OF COMPLIANCE

Pursuant to DUCivR 7-1(a)(3)(A), I certify that the foregoing Motion to Dismiss filed by the defendant Federal Trade Commission complies with the word-count limit in the rule because it contains 5,958 words excluding the parts exempted by the rule. I also certify that the Motion complies with the format for motions in DUCivR 10-1(a) and with the font requirements in DUCivR 10-1(b) because it was prepared using 14 point Times New Roman font size and type.

DATED: February 3, 2020

/s/ Michael D. Bergman  
Michael D. Bergman  
Attorney  
Federal Trade Commission

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

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COMPLETE MERCHANT SOLUTIONS,

Plaintiff,

vs.

FEDERAL TRADE COMMISSION,

Defendant.

Case No. 2:19-cv-00963-HCN-EJF

**[PROPOSED] ORDER GRANTING  
MOTION TO DISMISS**

Judge Howard C. Nielson, Jr.

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Defendant Federal Trade Commission (FTC) moves to dismiss the complaint. For good cause shown, the FTC's motion is GRANTED. The complaint is DISMISSED WITH PREJUDICE.

DATED: \_\_\_\_\_, 2020

BY THE COURT:

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Howard C. Nielson, Jr  
District Judge