ALDEN F. ABBOTT, General Counsel
JOEL MARCUS, Deputy General Counsel
MICHAEL D. BERGMAN, Attorney (*pro hac vice*)
mbergman@ftc.gov
Attorneys for Defendant the Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
Telephone: (202) 326-3184

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

COMPLETE MERCHANT SOLUTIONS, Plaintiff, vs. FEDERAL TRADE COMMISSION, Defendant.	Case No. 2:19-cv-00963-HCN-EJF **REPLY IN SUPPORT OF FEDERAL TRADE COMMISSION'S MOTION TO DISMISS** Judge Howard C. Nielson, Jr.

TABLE OF CONTENTS

INTRODUCTION 1

I. ONLY THE APA PROVIDES THE COURT AUTHORITY TO REVIEW AGENCY ACTION, AND CMS DOES NOT SATISFY ITS REQUIREMENTS 1

II. THIS CASE IS NOT RIPE 5

III. THE COURT SHOULD DISMISS THE CASE AS A MATTER OF DISCRETION 8

IV. THE REQUEST TO AMEND THE COMPLAINT SHOULD BE DENIED 10

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Abbott Labs v. Gardner, 387 U.S.136 (1967) 4, 5, 6, 7

Am. Airlines v. Christensen, 967 F.2d 410 (10th Cir. 1992) 2

Am. Fin. Benefits Ctr. v. FTC, No. 17-04817, 2018 WL 3203391 (N.D. Cal. May 29, 2018)... 3, 4

Basic Research, LLC v. FTC, 807 F. Supp.2d 1078 (D. Utah 2011) 7

Belle Fourche Pipeline Co. v. United States, 751 F.2d 332 (10th Cir. 1984) 3, 8

Calderon v. Ashmus, 523 U.S. 740 (1998) 8

Califano v. Sanders, 430 U.S. 99 (1977) 5

Cont'l Bank & Trust Co. v. Martin, 303 F.2d 214 (D.C. Cir. 1962) 4

Direct Mktg. Concepts, Inc. v. FTC, 581 F. Supp. 2d 115 (D. Mass. 2008) 3

Endo Pharms., Inc. v. FTC, 345 F. Supp. 3d 554 (E.D. Pa. 2018) 3, 4

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

FTC v. CMS, No. 2:19-cv-996-HCN-EJF (D. Utah. Dec. 23, 2019) 6

FTC v. Nash-Finch Co., 288 F.2d 407 (D.C. Cir. 1961) 4

FTC v. Standard Oil, 449 U.S. 232 (1980) 1, 2, 3, 5

Gen. Fin. Corp. v. FTC, 700 F.2d 366 (7th Cir. 1983) 1, 4

Hanson v. *Wyatt*, 552 F.3d 1148 (10th Cir. 2008) 1

Henry v. Office of Thrift Supervision, 43 F.3d 507 (10th Cir. 1994) 1

Holt v. United States, 46 F.3d 1000 (10th Cir. 1995) 5

Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375 (1994) 5

Merida Delgado v. Gonzales, 428 F.3d 916 (10th Cir. 2005) 5

Mobil Expl. & Producing U.S., Inc. v. Dep't of Interior, 180 F.3d 1192 (10th Cir. 1999) 3, 5, 8

Morgan Drexen v. Consumer Fin. Prot. Bureau, 785 F.3d 684 (D.C. Cir. 2015)..... 9

Morrison v. Back Yard Burgers, Inc., 91 F.3d 1184 (8th Cir. 1996)..... 2

Ohio Forestry Inc. v. Sierra Club, 523 U.S. 726 (1998) 6

Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978) 6

Research Automation, Inc. v. Schrader-Bridgeport Intern., Inc., 626 F.3d 973 (7th Cir. 2010).... 9

Roe No. 2 v Ogden, 253 F.3d 1225 (10th Cir. 2001) 6

S. Utah Wilderness All. v. Palma, 707 F.3d 1143 (10th Cir. 2013)..... 5

Thomas v. Union Car. Agr. Prod. Co., 473 U.S. 568 (1985) 6

Trudeau v. FTC, 456 F.3d 178 (D.C. Cir. 2006) 5

Statutes

15 U.S.C. § 45(b) 6

15 U.S.C. § 53(b) 6

Rules

Fed. R. Civ. P. 15 10

Regulations

16 C.F.R. § 2.31 3

INTRODUCTION

Targets of government investigations may not preemptively immunize themselves from possible enforcement actions by filing declaratory judgment suits. We showed in our motion that the only cause of action available to plaintiff Complete Merchant Solutions (CMS) is a claim under the Administrative Procedure Act (APA), but such a claim fails here because CMS cannot satisfy the APA's prerequisites for suit. Nothing in CMS's opposition shows otherwise. CMS is wrong in arguing that the APA applies only to administrative remedies, and it fails to support its sweeping assertion that the Declaratory Judgment Act (DJA) permits lawsuits against the government in the absence of final agency action. Here, for example, the FTC is merely investigating CMS; it has not yet made any decision to bring an enforcement case. For similar reasons, the matter is unripe. The Supreme Court has warned against using preenforcement declaratory judgment suits as a means of "turning prosecutor into defendant." *FTC v. Standard Oil*, 449 U.S. 232, 243 (1980). This Court should heed that warning and dismiss this case.

I. ONLY THE APA PROVIDES THE COURT AUTHORITY TO REVIEW AGENCY ACTION, AND CMS DOES NOT SATISFY ITS REQUIREMENTS

The Declaratory Judgment Act neither creates a federal cause of action nor federal court jurisdiction. *Hanson* v. *Wyatt*, 552 F.3d 1148, 1156-57 (10th Cir. 2008); *Henry v. Office of Thrift Supervision*, 43 F.3d 507, 512 (10th Cir. 1994). The only congressionally created cause of action against the government for the relief CMS seeks is the APA, *Gen. Fin. Corp. v. FTC*, 700 F.2d 366, 372 (7th Cir. 1983) – and CMS concedes that it does not satisfy the requirements to sue under that law. Opp. 12-13. Instead, it tries to sidestep the APA under two incorrect legal claims.

First, CMS asserts that it can use the cause of action Congress gave to the FTC to enforce the FTC Act as its own cause of action. Opp. 9-11. That "borrowing" theory fails for several

reasons. For one thing, it reads into the FTC Act a private right of action Congress did not create. The Tenth Circuit has established unequivocally that "there is no private right of action under" the FTC Act, *Am. Airlines v. Christensen*, 967 F.2d 410, 414 (10th Cir. 1992), Several other courts of appeals agree, *e.g.*, *Morrison v. Back Yard Burgers, Inc.*, 91 F.3d 1184, 1187 (8th Cir. 1996), and one expressly held that "[n]o district court action for a declaratory judgment is authorized by the [FTC] Act." *Floersheim v. Engman*, 494 F.2d 949, 954 (D.C. Cir. 1973). For similar reasons, the Supreme Court held in *Standard Oil* that declaratory judgment claims against the FTC were "subject to judicial review . . . *only* if the issuance of the complaint was 'final agency action' or otherwise was 'directly reviewable'" under the APA. *Standard Oil*, 449 U.S. at 238 (emphasis added). CMS barely tries to distinguish these controlling decisions.

Beyond that, CMS's theory would allow *any* party to sue the government under the DJA whether or not it challenges final agency action, creating a loophole that would render the APA meaningless. Just as bad, it could turn every government investigation into two cases – one filed by the target, and one by the agency – burdening the courts and the government with wasteful duplicative litigation that might lead to inconsistent rulings. It is hardly a surprise that courts have foreclosed such a problematic approach.

CMS relies primarily on cases involving private party litigation, such as disputes about rights under contract or patent, and none allowed a private party to preempt a government investigation or enforcement action." Opp. 10. Private defendants are not covered by the APA, as the federal government is. Suits against the government are restricted by special rules not applicable to private parties due to sovereign immunity. Furthermore, in private litigation, either

side could have a cause of action under the statute at issue, whereas here, only the FTC may sue under the FTC Act.

Second, CMS makes the unsupported contention that the APA is applicable only where the FTC is pursuing administrative remedies and not where it is "threatening" to sue CMS in federal court. Opp. 2. It claims that the FTC cited no case that dismissed preenforcement declaratory suits in the latter situation. Op. 13-14.[1] In fact, the FTC cited several cases dismissing preemptive declaratory judgment actions filed before or during FTC civil enforcement lawsuits. *See, e.g.*, *Am. Fin. Benefits Ctr. v. FTC* (*American Financial*), No. 17-04817, 2018 WL 3203391 (N.D. Cal. May 29, 2018); *Endo Pharms., Inc. v. FTC* (*Endo Pharm.*), 345 F. Supp. 3d 554 (E.D. Pa. 2018); *Direct Mktg. Concepts, Inc. v. FTC*, 581 F. Supp. 2d 115 (D. Mass. 2008). *American Financial* recognized that "the APA encompasses all 'agency action' within an agency's statutory grant of authority," including investigations and both administrative and civil enforcement cases and rejected the argument now made by CMS as "utterly without basis." *American Financial*, 2018 WL 3203391, at *6 (citing *Standard Oil*, 449 U.S. at 238 n.7).

CMS also ignores the many additional cases we cited dismissing on APA grounds preenforcement challenges to nonfinal agency actions, including investigations. They include two binding Tenth Circuit cases affirming the dismissal of suits seeking to enjoin an agency investigation. *Mobil Expl. & 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); *see also*

[1] CMS is wrong that the FTC's offer to discuss settlement of a proposed federal court complaint amounted to a "threat" or coercion. The agency's rules sensibly provide for the mutual resolution of matters under investigation to spare both parties burden and expense. *See, e.g.*, 16 C.F.R. § 2.31 (parties may propose consent agreements in matters under investigation).

General Finance Corp v. FTC, 700 F.2d 366, 372 (7th Cir. 1983) (affirming dismissal of a declaratory suit seeking to preempt a FTC investigation after the target had received a CID, concluding that the company had "jumped the gun" by filing its suit first).

CMS feebly attempts to distinguish *General Finance* and *American Financial* on the ground that in both cases, the agency made no "threat" to file federal court litigation until after the declaratory suit was filed. Opp. 14. But the decisions turn on a failure to satisfy the APA requirements; the plaintiffs' awareness of a proposed complaint was irrelevant. *See also* *Endo Pharm*, 345 F. Supp. 3d at 555 (dismissing declaratory judgment case filed before enforcement suit); *American Financial*, 2018 WL 3203391, at *3 (declaratory judgment suit filed after target learned of possible enforcement litigation).

CMS gets no help from *FTC v. Nash-Finch Co.*, 288 F.2d 407 (D.C. Cir. 1961). *See* Opp. 12. That rarely-cited case has no bearing here because it did not involve an attempt to preempt an agency investigation or enforcement action. Rather, it involved a challenge to a final FTC ruling applying a recently enacted law to cease-and-desist orders, 288 F.2d at 409-10, and did not hold that the Declaratory Judgment Act allows litigants to circumvent APA requirements. Indeed, the author of *Nash-Finch* made clear just one year later that the Declaratory Judgment Act does *not* create a freestanding cause of action, explaining that "if [an] agency's action is not final so as to be reviewable under the Administrative Procedure Act [a plaintiff] is not helped on the question of jurisdiction by the Declaratory Judgment Act . . . for that Act does not afford an independent basis for jurisdiction." *Cont'l Bank & Trust Co. v. Martin*, 303 F.2d 214, 215 (D.C. Cir. 1962) (footnote omitted). To the extent that *Nash-Finch* can be read otherwise, it is no longer good law in light of *Abbott Labs v. Gardner*, 387 U.S.136, 149-51 (1967), *abrogated on other grounds*,

Califano v. Sanders, 430 U.S. 99 (1977), which held that in assessing whether an agency action is ripe for review, courts must look to whether it is "final agency action" under the APA, and *Standard Oil*, 449 U.S. at 238, which held that declaratory judgment claims against the government are reviewable "only" if the APA requirements are satisfied. Similarly, *Trudeau v. FTC*, 456 F.3d 178 (D.C. Cir. 2006), did not involve a preenforcement challenge to an agency investigation or lawsuit and did not base jurisdiction on the DJA.

In sum, this case must be dismissed because CMS has not met its burden to show federal court jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994).[2]

II. THIS CASE IS NOT RIPE

The FTC demonstrated in its motion that this case should be dismissed for the independent reason that CMS's claims are not ripe for judicial review based on the fitness and hardship criteria set forth in *Abbott Labs.*, 387 U.S. at 148. Motion 18-23. We showed that CMS's suit failed each of the four ripeness factors set forth by the Tenth Circuit. *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1158 (10th Cir. 2013); *Mobil Expl.*, 180 F.3d at 1197.

First, we showed that CMS's claims are not solely legal because the question whether practices are unfair under the FTC Act requires a factbound assessment of three criteria. Motion 20-21. CMS offers no response other than the bare contention that the FTC is precluded from

[2] CMS claims that the FTC's jurisdictional challenge is facial, so the Court may not look at matters beyond the factual allegations of the complaint. Opp. 9. The argument is nothing more than a distraction because the FTC is challenging the adequacy of the complaint under controlling law that cannot be avoided through artful pleading. That challenge more closely resembles a factual challenge, as to which the complaint allegations are not taken as true and the Court may go beyond the complaint itself. *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995). As the party asserting federal jurisdiction, CMS bears the burden of proof. *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir. 2005) (citation omitted).

seeking additional facts due to the duration of its investigation and purported "threats" to file a federal court complaint. Opp. 23. That claim is a red herring because at this stage, the FTC is entitled to gather enough information to determine whether there is "reason to believe" CMS has violated the law. *See* 15 U.S.C. §§ 45(b); 53(b). Moreover, CMS is well aware that yet additional facts are relevant and undiscovered. As we explained, Motion 6, the FTC filed a separate action to enforce its CID issued in November 2019 because CMS has refused to comply. *FTC v. CMS*, No. 2:19-cv-996-HCN-EJF (D. Utah. Dec. 23, 2019). The issues here and in any future FTC enforcement action challenging CMS's conduct under the FTC Act clearly are not "purely legal" or even predominantly legal, Opp. 23-24, because they cannot be resolved without "further factual development." *Thomas v. Union Car. Agr. Prod. Co.*, 473 U.S. 568, 581 (1985).

Second, we demonstrated that CMS is not challenging final agency action by contesting the FTC's investigation. Motion 10-16, 21. CMS does not meaningfully contend otherwise. Instead, it tries to avoid the issue by claiming that the ripeness inquiry does not involve finality, citing *Roe No. 2 v Ogden*, 253 F.3d 1225, 1231 (10th Cir. 2001), which in turn relied on *Ohio Forestry Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998). Opp. 19 & n.4. Those cases did not address finality for case-specific reasons; they did not create a general rule. Finality was not relevant in *Ogden*, which involved state and not federal action, and *Ohio Forestry* presented no dispute that the challenged federal action was final. The only fitness question presented was "whether the courts would benefit from further factual development of the issues." *Roe No. 2*, 253 F.3d at 1231. When finality is in question, however, "fitness for judicial decision *requires* a finding that the agency action is final and that the issues involved are legal ones." *Pence v. Andrus*, 586 F.2d 733, 737 (9th Cir. 1978) (emphasis added) (citing *Abbott Labs.*, 387 U.S. at 149).

Third, we showed that the complaint falls far short of demonstrating CMS faces anything resembling the kind of "immediate substantial" hardship that establishes ripeness under *Abbott Labs*. Motion 21-22 (citing *Mobil Expl.*, 180 F.3d at 1203). In particular, CMS does not face a "very real dilemma" by having to choose between costly compliance with agency rules or significant penalties for noncompliance. *Abbott Labs*, 387 U.S. at 152-53. CMS claims that it must either accept "onerous" settlement terms or "risk accruing additional potential penalties" in an enforcement suit, Opp. 20, but that is simply wrong. The FTC has offered pre-litigation settlement terms, but CMS faces no penalty or sanctions for declining them and litigating instead. Indeed, the Commission has not even voted to undertake an enforcement action and may never do so; at this point, it is merely investigating. CMS is not required to do or refrain from doing anything at all. The only dilemma it faces is whether to settle or to litigate (if it comes to that) – a choice faced by every potential litigant.

Nor does *Basic Research, LLC v. FTC*, 807 F. Supp.2d 1078 (D. Utah 2011), show that CMS faces a dilemma that makes its case ripe. Opp. 21. There, the court held ripe for review a purely legal challenge to a final FTC order incorporating a settlement agreement. 807 F. Supp. 2d at 1090-91. The plaintiff was required either to make costly changes to its advertising to comply with the FTC's interpretation of the agreement or risk contempt sanctions for violating the order. *Id.* at 1087, 1091-94. No remotely similar circumstances are presented here. Far more applicable are *Mobil Expl.* and *Belle Fourche*, holding unripe challenges to agency subpoenas.

Finally, we showed that this matter is unripe because judicial intervention at this point could seriously impair the FTC's administrative process by prematurely stopping the FTC's duly-authorized investigation in its tracks and barring any possible enforcement suit. Motion.23.

Indeed, in directly analogous circumstances, *Mobil Exploration* and *Belle Fourche* both made clear that judicial review of an agency subpoena would "interfere[ ] with an ongoing investigation," *Belle Fourche*, 751 F.2d at 335, and "impede the agency's ability to pursue the prescribed administrative processes." *Mobil Expl.*, 180 F.3d at 1204. CMS offers no genuine rebuttal – indeed, impairing the FTC's process is the very point of its lawsuit.

III. THE COURT SHOULD DISMISS THE CASE AS A MATTER OF DISCRETION

Even if the Court had jurisdiction and the issues were ripe, discretionary factors weigh strongly against review. Motion 24-28. CMS provides no reason to question that conclusion.

As we showed, resolving this suit will not resolve the entire controversy between the parties. CMS posits that it will because its complaint "addresses the FTC's proposed complaint, which, the FTC has not amended since March 2019." Opp. 15-16. That position falsely assumes that the FTC's investigation is complete and that CMS has full insight into its findings. As noted above, the FTC's investigation is ongoing and includes conduct by CMS that postdates the March 2019 draft complaint. CMS's refusal to comply with the properly issued November 2019 CID leaves little doubt that the Commission's ultimate enforcement claims (if any) have yet to be determined. And any issue CMS could point to that might be resolved here would still be considerably insufficient because a declaratory judgment suit must "resolve the entire case or controversy." *Calderon v. Ashmus*, 523 U.S. 740, 747 (1998).[3]

Second, CMS is also wrong that resolving this suit will necessarily clarify the legal relations between it and the FTC. Opp. 17. The claims in any possible enforcement action are unknown

[3] In light of *Calderon, Harris v. United States Fid. & Guar. Co.*, 569 F.2d 850 (5th Cir. 1978) is not controlling law.

now. Adjudication of CMS's suit thus could very well result in confusion and uncertainty, potentially inconsistent rulings, and possibly this Court's issuance of an unwarranted advisory opinion. Motion 26-27. Further, even the issues CMS raises would very likely require factfinding, for example, whether it engaged in unfair acts or practices. *See, e.g.*, Complaint ¶¶ 93.e., 96-98.

CMS also likely filed this case as "procedural fencing" or a "race to res judicata" by seeking a premature end to the Commission's investigation, a bar to any enforcement suit, and a declaration that it committed no wrongdoing under Section 5(a). *See, e.g.*, Complaint ¶¶ 95-102 and 33 (prayer for relief) – all well before the FTC completes its inquiry and determines if it has "reason to believe" that the law has been violated. *See* Motion 27. CMS suggests that this factor is limited to forum shopping and emphasizes this suit was filed in the same district as that reflected in the proposed complaint. Opp. 17-18. That is one form of procedural fencing, but the Court must also consider whether CMS's first-filed suit is an improper attempt to adjudicate an anticipatory defense that deprives the natural plaintiff of its choice of timing, *Morgan Drexen v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 697-98 (D.C. Cir. 2015), and which will "only exacerbate[ ] the risk of wasteful litigation," *Research Automation, Inc. v. Schrader-Bridgeport Intern., Inc.*, 626 F.3d 973, 980 (7th Cir. 2010).

Finally, CMS makes the farcical argument that there is no alternative remedy to resolve the issues in this suit. Opp. 19. It should go without saying that CMS may raise all its arguments as defenses if applicable in a FTC enforcement suit, which may or may not be filed.

IV. THE REQUEST TO AMEND THE COMPLAINT SHOULD BE DENIED

CMS requests that, if the FTC's motion is granted, it be allowed to amend its complaint to cure any "jurisdictional or ripeness" defects. Opp. 24-25. This request should be denied as premature. The court has not yet ruled on the motion and, assuming it is granted, the grounds for dismissal are unknown and therefore so are the grounds for amending the complaint. It makes little sense to grant an anticipatory amendment to cure a pleading defect that is unknowable at this point. Any such question should be deferred until it is actually presented. To the extent CMS may be using this request to seek Court approval of a motion seeking leave to amend its complaint to cure its infirmities *before* the Court resolves the FTC's dismissal motion, such a request here is clearly improper under Fed. R. Civ. P. 15. The FTC seeks dismissal of CMS's current complaint, which is the only operative one now.

CONCLUSION

The Court should dismiss the complaint for lack of subject matter jurisdiction.

DATED: March 16, 2020

ALDEN F. ABBOTT, General Counsel

JOEL MARCUS, Deputy General Counsel

/s/ *Michael D. Bergman*
MICHAEL D. BERGMAN, Attorney

Attorneys for Defendant
FEDERAL TRADE COMMMISSION