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U.S. DISTRICT COURT
NORTHERN DIST. OF TX
FT. WORTH DIVISION
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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.	§	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OF DEFENDANTS FEDERAL TRADE COMMISSION AND CHAIRMAN JON LEIBOWITZ, IN HIS OFFICIAL CAPACITY

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Trade Commission (FTC or Commission)[3] is investigating whether D.R. Horton, Inc. (Horton) has violated, or is violating Section 5(a) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45(a); the Consumer Credit Protection Act, 15 U.S.C. §§ 1601 *et seq.*;[4] and the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* – statutes that prohibit racial discrimination and other unfair or deceptive commercial practices – in the course of selling homes and originating mortgages to consumers. The

[3] References herein to the FTC include the agency's Chairman, Jon Leibowitz, who has been named as a defendant in his official capacity.

[4] *See infra* note 5.

Commission has adopted resolutions authorizing the use of compulsory process to obtain information relating to the investigation. In November 2009, pursuant to those resolutions, the FTC issued a Civil Investigative Demand ("CID") to Horton, which is the nation's largest homebuilder (*see* Complaint at 3, ¶ 6) and indirect owner of DHI Mortgage Company, Ltd., a mortgage lender. The CID demanded the production of information and documents relevant to the investigation.

Horton objected to the CID: it filed an administrative petition to quash the CID on December 11, 2009, which an FTC Commissioner, acting on delegated authority, denied on March 9, 2010. Horton requested review of that ruling; the full Commission considered Horton's arguments and, on July 12, 2010, rejected them and affirmed the ruling denying the petition to quash. While Horton's request for review was pending before the Commission, FTC staff negotiated with Horton and agreed to several modifications to the CID in order to reduce Horton's burden of compliance. Although Horton eventually purported to agree to respond to the CID, as modified, its responses are incomplete and riddled with deficiencies.

Horton has now filed this action in an attempt to anticipate, and potentially obstruct, an enforcement action that Horton fears the Commission will bring against it to compel compliance with the CID, pursuant to Section 20(e) of the FTC Act, 15 U.S.C. § 57b-1(e). Horton evidently is trying to avoid its obligations by seeking to preemptively defeat enforcement of the CID through this action for declaratory and injunctive relief, rather

than presenting its arguments straightforwardly as defenses to a CID enforcement action – if and when the FTC chooses to bring one. Horton's action is an improper attempt to enlist this Court's equitable powers as "a means of turning prosecutor into defendant before adjudication concludes," *FTC v. Standard Oil Co. of Calif.*, 449 U.S. 232, 243 (1980) – or even begins.

The grounds for this Motion to Dismiss are summarized below:

This action should be dismissed for lack of subject-matter jurisdiction, Fed. R. Civ. P. 12(b)(1), because the FTC activities of which Horton complains are not "final agency action" subject to judicial review. *See* 5 U.S.C. § 704. The Supreme Court has made clear that the FTC's "issuance of [a] complaint [is] not final agency action" because it "is not a definitive statement of position" and has no "legal or practical effect, except to impose upon [the defendant] the burden of responding[.]" *Standard Oil*, 449 U.S. at 239, 241-42. As the Fifth Circuit has confirmed, initiating an investigation and serving compulsory process are even less "final" than issuance of a formal complaint. *See Atlantic Richfield Co. v. FTC*, 546 F.2d 646 (5th Cir. 1977) (denying pre-enforcement review of FTC subpoena) *Veldhoen v. U. S. Coast Guard*, 35 F.3d 222, 225-26 (5th Cir. 1994) (district court lacked jurisdiction to act on petition for declaratory and injunctive relief, brought by recipients of agency compulsory process, seeking to halt agency's investigation). (*Section I.A.*)

Moreover, this action is not "ripe" for judicial review under the two-part standard established by the Supreme Court. *See, e.g., Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 162 (1967). First, the issues Horton presents are not "appropriate for judicial resolution here," *id.*, because (I) FTC CIDs are not self-enforcing – compliance can be compelled only by a district court on application of the Commission pursuant to Section 20(e) of the FTC Act, 15 U.S.C. § 57b-1(e); (ii) there is thus no final FTC decision compelling the company to do anything; and (iii) the company "may raise all its due process and regulatory procedural objections in any enforcement proceeding brought against it." *Atlantic Richfield*, 546 F.2d at 649. As to the second prong of the "ripeness" test, Horton will "suffer no undue hardship from denial of judicial relief outside the enforcement proceedings." *Id.* at 650. If and when the Commission applies to a district court for an order enforcing the CID pursuant to 15 U.S.C. § 57b-1(e), then Horton's contentions might become ripe and justiciable – but only in such an enforcement action, not in a pre-enforcement lawsuit initiated by Horton. (*Section I.B.*)

In addition, Horton's attempt to have its claims adjudicated in the context of an affirmative petition for injunctive and declaratory relief runs directly counter to the procedures established by Congress in the FTC Act for adjudicating issues related to enforcement of FTC CIDs. "Where Congress has provided an adequate procedure for judicial review of administrative actions, that procedure must be followed." *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967). Horton must follow the process set forth in

the statute – "not shortcut it." *Energy Transfer Partners v. FERC*, 567 F.3d 134, 141 & n. 39 (5th Cir. 2009), citing and quoting *American Airlines, Inc. v. Herman*, 176 F.3d 283, 292 (5th Cir. 1999). *See also General Finance Corp. v. FTC*, 700 F.2d 366, 368 (7th Cir. 1983) (Posner, J.); *FTC v. Claire Furnace Co.*, 274 U.S. 160, 173-74 (1927); *accord, Atlantic Richfield, supra*. Thus, Horton's Complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). (*Section II.A.*)

The Court should reject Horton's effort to subvert the purposes of the Declaratory Judgment Act, 28 U.S.C. § 2201. This action is a transparent effort "to gain precedence in time and forum" (*i.e.*, to preempt the FTC's right to select the forum and timing of a CID enforcement action), *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 (5th Cir. 1983), and to assert claims that are nothing more than the arguments Horton may wish to raise as defenses to a CID enforcement action brought by the FTC. "The Declaratory Judgment Act was not intended to enable a party to obtain a change of tribunal . . ., and it is not the function of the federal declaratory action merely to anticipate a defense that otherwise could be presented [in a different forum]." *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1278 n.19 (2009) (citation omitted); *see also Calderon v. Ashmus*, 523 U.S. 740, 747-48 (1998) (it is improper to use declaratory judgment procedure to "attempt[] to gain a litigation advantage by obtaining an advance ruling on an affirmative defense"). (*Section II.B.*)

Finally, Horton has selected an improper venue to bring this action. First, for purposes of the venue statute, the Commission resides in Washington, D.C. – not here. *See* 28 U.S.C. § 1391(e)(1)*; Reuben H. Donnelley Corp. v. FTC*, 580 F.2d 264, 266 n.3 (7th Cir. 1978). Second, the FTC activities that Horton challenges in its Complaint occurred at the agency's headquarters in Washington, D.C. – not here. *See* 28 U.S.C. § 1391(e)(2). And third, Horton's corporate residence for venue purposes is Delaware, the state in which it is incorporated – not here. *See* 28 U.S.C. § 1391(e)(3); *Tenneco Oil Co. v. EPA*, 592 F.2d 897, 899 (5th Cir. 1979); *Suttle v. Reich Brothers Construction Co.*, 333 U.S. 163, 166 (1948). Accordingly, this action must be dismissed for improper venue. Fed. R. Civ. P. 12(b)(3). (*Section III*.)

For all of these reasons, the Court should dismiss this case.

FACTUAL BACKGROUND

In November 2009[5], the Commission issued a CID to Horton, as part of an investigation into whether Horton had engaged, or is engaging, in illegal acts or practices in the course of selling homes and originating mortgages to consumers, with a specific focus on Hispanic and other minority consumers, in violation of the FTC Act or the Consumer Credit Protection Act ("CCPA"), including the Equal Credit Opportunity Act ("ECOA"), the Truth in Lending Act ("TILA"), and the Fair Credit Reporting Act

[5]The Commission initially issued a CID to Horton on November 3, 2009, because it inadvertently admitted a return date, the Commission re-issued an identical CID on November 12, 2009, which included a return date and superceded the November 3 CID.

("FCRA").[6] (Appx. pp. 1-35). This CID was authorized by two Commission resolutions. One resolution, issued on December 15, 2008, authorized compulsory process regarding: (i) possible deceptive or unfair acts or practices relating to the advertising, marketing, sale, or servicing of loans and related products, in violation of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a); and (ii) whether various loan brokers, lenders, loan servicers, and other marketers of loans are or were engaging in conduct that violated the CCPA (*e.g.*, failing to properly disclose consumer credit terms or failing to provide appropriate notices of adverse action to consumers).(Complaint p. 4 ¶13). The other resolution, issued on August 1, 1994, authorized compulsory process relating to possible discrimination in the extension of credit on the basis of race, sex, marital status, national origin, or other categories, in violation of the ECOA and its implementing regulations, or unfair or deceptive practices in violation of Section 5(a) of the FTC Act.[7](Complaint p. 4 ¶12).

The Commission's CID requested information concerning, *inter alia*, Horton's policies and practices for its home sales and mortgage lending operations; the manner in which Horton audits or otherwise ensures compliance with its policies, procedures, and

[6] The ECOA, FCRA, and TILA are all incorporated within the CCPA. ECOA is Title VII of the CCPA (15 U.S.C. §§ 1691–1691f); FCRA is Title VI of the CCPA (15 U.S.C. §§ 1681–1681x); and TILA is Title I of the CCPA (15 U.S.C. §§ 1601–1667f).

[7] *See Resolution Directing Use of Compulsory Process in Non-Public Investigations of Various Unnamed Loan Brokers, Lenders, Loan Servicers, and Other Marketers of Loans*, File No. 042-3135 (Dec. 15, 2008) (Appx. p. 3); *Resolution Directing Use of Compulsory Process in Non-Public Investigation of Unnamed Violators of the Equal Credit Opportunity Act*, File No. P944809 (Aug. 1, 1994) (Appx. pp. 4-5).

relevant regulatory and statutory requirements; the nature of Horton's interactions with customers with limited English proficiency; the relationship between Horton's new home sales and marketing operations and its lending subsidiary, including how this relationship is explained to consumers; and relevant consumer complaints, private litigation, and government investigations regarding Horton's marketing, sales, and lending practices. (Appx. pp. 15-33).

On December 11, 2009, Horton filed a petition to limit or quash the CID pursuant to Commission Rule 2.7(d), 16 C.F.R. § 2.7(d).[8](Appx. pp. 36-37). In support of the petition, Horton argued, *inter alia*, that the information sought exceeded the scope of the investigations authorized by the resolutions; that the CID specifications were too indefinite and sought documents and information not reasonably relevant to the investigations; and that compliance would be unduly burdensome. (Appx. pp. 2-3). Then-Commissioner Pamela Jones Harbour, acting as the Commission's delegate pursuant to 16 C.F.R. § 2.7(d)(4), issued a Letter Ruling on March 9, 2010, finding that Horton had failed to provide adequate factual or legal support to justify relief, and denied Horton's petition to quash. (Appx. pp. 36-45). On March 17, 2010, Horton requested a review of the Letter

[8] Horton's petition to quash is available on the FTC's website at http://www.ftc.gov/os/quash/091211hortonpetition.pdf. Horton's counsel also represents another large homebuilder that received a substantially similar CID in the FTC's broader investigation. That other company filed a separate, substantially similar petition to quash. The petitions were resolved together, initially in a single letter ruling rejecting both petitions issued by Commissioner Harbour, and subsequently in a single ruling affirming Commissioner Harbour's decision issued by the full Commission.

Ruling by the full Commission pursuant to 16 C.F.R. § 2.7(f). (Appx. pp. 4-6). On July 12, 2010, the full Commission affirmed the Letter Ruling in its entirety. (Appx. pp. 46-54). The full Commission's decision, *inter alia,* specifically rejected Horton's contention that the FTC staff had not acted in good faith in their negotiations with Horton over narrowing the scope of the CID to reduce the burden on the company.[9] (Appx. p. 53).

Subsequently, the FTC staff identified numerous significant deficiencies in the limited information that Horton had begun to provide in response to the CID, and on July 20, 2010, sent Horton a letter identifying in detail the specific additional information that Horton would need to provide in order to remedy these deficiencies. (Complaint at 14, ¶¶ 40-41.) Horton neither cured these deficiencies nor awaited a Commission proceeding to enforce the CID. Instead, on August 4, 2010, it filed its Complaint initiating

[9] Appx. p. 53 ("Before Petitioners filed their Petitions [to quash], staff offered to narrow the scope of the CIDs and to extend the time for compliance, but Petitioners either ignored or rejected those offers. After the Petitions were filed, staff made themselves available to both Petitioners to discuss the scope and timing of the CIDs, but without success. After the Petitions were denied and Petitioners filed the present Requests, staff continued to attempt to work with Petitioners as to the scope and timing of the CIDs even though they had not yet made any meaningful efforts to comply with the CIDs. It was only after staff's repeated attempts to discuss the scope and timing of the CIDs and the expiration of the compliance deadline that Petitioners were willing to meaningfully discuss modifications and time lines for production that were consistent with the investigations. During those discussions, Petitioners agreed to several proposed modifications that were designed to reduce their burden of compliance, consistent with the scope of the investigations – a number of which staff had proposed before Petitioners filed their Petitions. The Associate Director for the Division of Financial Practices has recently modified the CIDs to reflect those agreements, and both Petitioners have agreed to comply with the modified CIDs under a tentative production schedule. Thus, contrary to Petitioners' contentions, staff's extensive efforts to work with both Petitioners – even after their noncompliance with the CIDs – demonstrate staff's good faith in this matter.").

this pre-enforcement action. As of the date of the instant filing, the Commission has not brought an action to enforce the CID issued to Horton.

ARGUMENT

I. HORTON'S COMPLAINT MUST BE DISMISSED FOR LACK OF SUBJECT-MATTER JURISDICTION

"Federal courts are courts of limited jurisdiction. Absent jurisdiction conferred by statute, district courts lack power to consider claims. This limitation is doubly significant for suits against the federal government, which, absent express waiver, are barred by the doctrine of sovereign immunity." *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994), citing *Kansas v. United States*, 204 U.S. 331, 341 (1907). Horton's claims must be dismissed for lack of subject-matter jurisdiction, Fed. R. Civ. P. 12(b)(1), because, as discussed in Section I.A below, the FTC activities that Horton seeks to challenge are not "final agency actions" under the Administrative Procedure Act ("APA");[10] and as discussed in Section I.B, Horton's claims are not "ripe" for judicial review.

A. The FTC Activities Challenged By Horton Are Not "Final Agency Actions" Under the Administrative Procedure Act And Are Not Subject to Judicial Review

[10] To the extent the APA authorizes judicial review, it "waives federal agencies' sovereign immunity in suits for relief other than money damages," *Anderson v. Jackson*, 556 F.3d 351 (5th Cir. 2009); *Dept. of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 259 (1999); 5 U.S.C. § 702. In such cases, subject-matter jurisdiction may exist "under the general federal-question statute" (28 U.S.C. § 1331); but where the APA does not authorize review, such "statutory preclusion of judicial review would be jurisdictional in effect, requiring dismissal." *Lundeen v. Mineta*, 291 F.3d 300, 304-05 (5th Cir. 2002), citing *Block v. Community Nutrition Inst.*, 467 U.S. 340, 353 n. 4 (1984).

"If there is no 'final agency action,' as required by the controlling statute, a court lacks subject matter jurisdiction." *Veldhoen*, 35 F.3d at 225. "When, as here, review is sought not pursuant to specific authorization in the substantive statute,[11] but only under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'" *Lujan v. National Wildlife Fed.*, 497 U.S. 871, 882 (1990), citing and quoting 5 U.S.C. § 704. The finality requirement is jurisdictional because it "is concerned with whether the initial decisionmaker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 193 (1985). An agency's action is considered "final" only if it "mark[s] the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature" – and is "one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997), citing *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U.S. 103, 113 (1948), and *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970).

The Fifth Circuit has definitively established that "[a]n agency's initiation of an investigation does not constitute final agency action. . . . Normally, the plaintiff must await resolution of the agency's inquiry and challenge the final agency decision."

[11] Horton alleges jurisdiction based on § 1331 and claims a right to judicial review based on the APA and the Declaratory Judgment Act – not based on any specific provision of the FTC Act. Complaint, ¶¶ 9-10.

Veldhoen, 35 F.3d at 225 (finding no subject-matter jurisdiction to consider plaintiffs' request for declaratory judgment and injunction to halt enforcement of subpoenas or continuation of an investigation), citing *Standard Oil*, 449 U.S. at 239-45. In the specific context of FTC investigations, the Fifth Circuit has made it absolutely clear that the FTC's issuance of compulsory process is not subject to pre-enforcement judicial review as final agency action under the APA. "We . . . hold that denial of all injunctive and declaratory relief is proper," and "pre-enforcement relief from [FTC] subpoenas . . . is inappropriate." *See Atlantic Richfield*, 546 F.2d at 648, 649.

The Fifth Circuit has identified "four pragmatic factors for determining when agency action is final. Those factors include: (1) whether the challenged action is a definitive statement of the agency's position; (2) whether the action has the status of law with penalties for noncompliance; (3) whether the impact on the plaintiff is direct and immediate; and (4) whether immediate compliance is expected." *Jobs, Training and Servs., Inc. v. E. Tex. Council of Gov'ts*, 50 F.3d 1318, 1324 (5th Cir. 1995), citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 149-53 (1967); *see also American Airlines, Inc. v. Herman*, 176 F.3d 283, 287 n.4 (5th Cir. 1999). In this case, those criteria clearly are not satisfied.

First, the FTC's issuance of the CID to Horton is not a "definitive statement of the agency's position." A CID is nothing more than a request for documents and other information, as part of the investigative process by which the FTC staff gathers and

reviews evidence on the basis of which it will ultimately make recommendations to the Commission. Upon review of the staff's recommendations, the Commission may file a complaint, commence rulemaking proceedings, issue a report or study, or do nothing at all. Thus, an investigation is a preliminary, non-final step in the administrative process, and issuance of a CID to a party is just one small part of the conduct of an investigation.

Second, the FTC's issuance of a CID does not have "the status of law with penalties for noncompliance." As the Fifth Circuit made clear in *Atlantic Richfield*, a recipient of Commission compulsory process "may not be forced to comply with the subpoenas nor subjected to any penalties for noncompliance until ordered to comply pursuant to appropriate enforcement proceedings, in which [it] may assert its due process objections." 546 F.2d at 650. Under Section 10 of the FTC Act, 15 U.S.C. § 50, penalties may be imposed for noncompliance with Commission compulsory process only where a district court has entered an order directing compliance. Accordingly, the Court dismissed Atlantic Richfield's pre-enforcement challenge to subpoenas, holding that "denial of all injunctive and declaratory relief is proper" because Atlantic Richfield "could raise any constitutional or other objections to the summons in the enforcement proceeding." 546 F.2d at 648, citing *Reisman v. Caplin*, 375 U.S. 440 (1964).[12]

[12] *Accord, In re Office of Inspector General, R.R. Retirement Bd.*, 933 F.2d 276, 277 (5th Cir. 1991) ("Prior to final resolution of the government's action for enforcement of the administrative subpoena, the [subpoena recipient] may not maintain an action which seeks, *inter alia*, an injunction of that subpoena."); *Audubon Life Ins. Co. v. FTC*, 543 F. Supp. 1362, 1366 (M.D. La. 1982) (rejecting pre-enforcement challenge because "plaintiffs have failed to make [the] requisite showing" that "the initiation of the FTC investigation and the issuance of the CID

Third, the CID has no "direct and immediate" effect on Horton. Even when and if a district court issues an order compelling Horton to respond, that would impose no cognizable "burden" on Horton other than the obligation to respond. As in the *Standard Oil* case, the FTC's CID had no significant "legal or practical effect, except to impose upon [Horton] the burden of responding . . . . It had no legal force or practical effect upon [Horton's] daily business other than the disruptions that accompany any major litigation." 449 U.S. at 242-43; *accord, Pennzoil Co. v. FERC*, 742 F.2d 242, 244 (5th Cir. 1984) (declining to review order that "has no direct and immediate effect upon Pennzoil" other than the "burden of participating in the proceeding").[13]

Finally, Horton's "immediate compliance" with the CID – while requested (and typically provided) – is not "expected" in the sense that Horton is legally required to comply, unless and until a district court orders it upon application of the FTC. The CID and the FTC's letter ruling denying Horton's petition to quash the CID do not yet have the "status of law" such that "immediate compliance with their terms" could be compelled; nor do they have a "direct and immediate effect on [Horton's] day-to-day business. *Standard Oil*, 449 U.S. at 239, quoting *Abbott Labs*, 387 U.S. at 152.

constitute 'final agency action'"), citing *Atlantic Richfield*.

[13] *See also Ticor Title Ins. Co. v. FTC*, 814 F.2d 731, 746 (D.C. Cir. 1987)(Williams, J., concurring) ("[A] long line of decisions establishes that the expense of an administrative proceeding – the sole burden that appellants allege here – does not qualify as the imposition of a burden or denial of a right."); *Aluminum Co. of America v. United States*, 790 F.2d 938, 941 (D.C. Cir. 1986) ("It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding.").

In sum, the FTC's issuance of a CID and denial of Horton's petition to quash the CID are not "final agency action" under the APA, and therefore Horton's complaint must be dismissed for lack of subject-matter jurisdiction.[14]

B. Horton's Claims Fail for Lack of Ripeness

The issues Horton raises are not "ripe" for judicial review. The Supreme Court has set forth a twofold framework for evaluating the ripeness of challenges to agency action, "requiring [the court] to evaluate both [i] the fitness of the issues for judicial decision and [ii] the hardship to the parties of withholding court consideration." *Abbott Labs.*, 387 U.S. at 149 (numbering added); *see also Toilet Goods*, 387 U.S. at 162; *Atlantic Richfield*, 546 F.2d at 650. Importantly, "[t]he injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial

[14] The same arguments apply equally to all three counts of the Complaint, in which Horton sets forth various grounds on which it bases its improper pre-enforcement challenge. As to Count II, the Supreme Court has made it clear that, where an agency's statute specifies a "comprehensive enforcement structure," the incidental burdens of pursuing administrative and judicial review in the statutorily-prescribed manner do not give rise to a deprivation of due process. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 216-18 (1994). In such cases, the Court held, parties have no "due process" right to maintain an action seeking to "to evade the statutory-review process by enjoining the [agency] from commencing enforcement proceedings . . . . To uphold the District Court's jurisdiction in these circumstances would be inimical to the structure and purpose of the [statute.]" *Id.* at 216. As for Horton's Count III, the Supreme Court has recently reaffirmed that "[t]he Declaratory Judgment Act does not enlarge the jurisdiction of the federal courts; it is procedural only." *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1278 n.19 (2009), citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). *See infra*, Section II.B. Thus, all three counts must be dismissed for lack of subject-matter jurisdiction, essentially for the same reasons.

resolution." *Abbott Labs.*, 387 U.S. at 148. Here, Horton's claims are unripe because the FTC activities that Horton seeks to challenge have no "present effect on those seeking relief" and the impact of the challenged action cannot "be said to be felt immediately by those subject to it in conducting their day-to-day affairs." *Toilet Goods*, 387 U.S. at 164.

Horton's complaint satisfies neither of the two "ripeness" criteria. Under the first prong, this case is not fit for judicial decision because, for the reasons discussed above, the FTC actions that Horton seeks to challenge do not constitute "final agency action."[15] As the Fifth Circuit held in *Atlantic Richfield*, a party subject to an FTC subpoena cannot "establish . . . a present need for such relief under the governing standards set forth in the *Abbott Laboratories* cases." 546 F.2d at 650. This case in its present posture, like *Atlantic Richfield*, is not fit for judicial review because Horton cannot be compelled to respond to the CID unless and until the FTC requests, and a court grants, a petition for enforcement pursuant to 15 U.S.C. § 57b-1(e). The FTC has not yet even filed a petition for enforcement of the CID, and when and if it does so, that court will decide whether to grant it. "Under these circumstances, where 'we have no idea whether or when such [a sanction] will be ordered,' the issue is not fit for adjudication." *Texas v. United States*, 523 U.S. 296, 300 (1998) (alteration in original), quoting *Toilet Goods*, 387 U.S. at 163.

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[15] The doctrines of finality and ripeness are closely related. *Ticor*, 814 F.2d at 750 (Green, J., concurring). *See also id.* at 745-46 (Williams, J., concurring) (explaining in depth the similarities and differences between the doctrines of finality, ripeness, and exhaustion of administrative remedies).

For purposes of the second "ripeness" criterion, deferring judicial review will not impose any legally cognizable hardship upon Horton. Horton contends that compliance with the FTC's CID would be unreasonably burdensome. *See, e.g.,* Complaint at 7-9, 14, ¶¶ 21-22, 42. As explained above, however, the Supreme Court has already considered and rejected such an allegation as a basis for justifying immediate judicial intervention. *Standard Oil*, *supra*. Moreover, Horton "will suffer no undue hardship from our withholding judicial consideration at this juncture in the FTC's proceedings," because if and when the FTC seeks to enforce the CID, the company will have "an adequate remedy at law" in that proceeding. *Atlantic Richfield*, 546 F.2d at 648. Consequently, "denial of all injunctive and declaratory relief is proper." *Id.* If and when the Commission applies to a district court for an order enforcing the CID pursuant to 15 U.S.C. § 57b-1(e), then Horton's contentions might become ripe and justiciable – but only in such an enforcement action, not in a pre-enforcement lawsuit initiated by Horton.

II. THE COMPLAINT FAILS TO STATE CLAIMS UPON WHICH RELIEF CAN BE GRANTED, BECAUSE ITS PURPORTED CLAIMS CAN BE PRESENTED ONLY AS DEFENSES TO AN ENFORCEMENT ACTION

A. This Pre-Enforcement Lawsuit Is An Improper Attempt to Circumvent the Procedural Framework Established by Congress for Enforcement and Adjudication of FTC Civil Investigative Demands

"Where Congress has provided an adequate procedure for judicial review of administrative actions, that procedure must be followed" – particularly where "this statutory right to review has long been viewed as constituting a speedy and adequate

remedy at law." *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967) (*per curiam*). Thus, where "[t]he remedy specified by Congress works no injustice,[16] . . . the parties [must follow] the comprehensive procedure of the [statute], which provides full opportunity for judicial review before any coercive sanctions may be imposed." *Reisman v. Caplin*, 375 U.S. 440, 450 (1964) (dismissing suit seeking injunction against IRS subpoenas to testify and produce records, where IRS had not yet taken action to enforce the subpoenas in district court as required by the statute). Consistently, if a party seeking to challenge agency action has some "other adequate remedy in court," 5 U.S.C. § 704 – such as, in this case, Horton's opportunity to pose its arguments as defenses to a CID enforcement action when and if the FTC brings one – the party has no right to pre-enforcement judicial review. *See* 5 U.S.C. § 703 ("The form of proceeding for judicial review [under the APA] is the special statutory review proceeding relevant to the subject matter in a court specified by statute.").[17]

[16] Horton specifically concedes the validity of the FTC's general investigative authority. *See* Complaint at 13, ¶ 37. The Fifth Circuit has repeatedly rejected challenges to interlocutory FTC orders on those grounds. *See, e.g., Atlantic Richfield, supra*; *FTC v. J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964); *Coca-Cola Co. v. FTC*, 475 F.2d 299 (5th Cir. 1973).

[17] *See also Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000) (no § 1331 jurisdiction to review pre-enforcement challenge to regulations where statute specifies an "administrative review channel" while preserving ultimate right to judicial review); *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 168 (5th Cir. 1989) ("If there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies").

Here, by filing this injunctive and declaratory ruling action, Horton effectively is attempting to circumvent the statutory framework for judicial review and enforcement of FTC CIDs specified in Section 20(e) of the FTC Act.[18] *See Atlantic Richfield*, 546 F.2d at 646-51. This Court must not countenance Horton's improper attempt to thwart the approach "intended by Congress in providing this method of enforcing the orders of the [Federal] Trade Commission . . . ." *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927) (Taft, C.J.). Thus, until an action is brought in court to enforce an FTC order as specified in the FTC Act, "the defendants cannot suffer, and, when [such action is brought], they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction." *Id.* If and when the Commission brings an action pursuant to Section 20(e) of the FTC Act, 15 U.S.C. § 57b-1(e), to enforce its CID, Horton would be able to obtain full judicial review of its claims (as defenses to the CID enforcement action) without risk of prejudice.

Horton must pursue the process set forth in the statute – "not shortcut it." *Energy Transfer Partners v. FERC*, 567 F.3d 134, 141 & n. 39 (5th Cir. 2009), citing and quoting

[18] Section 20 was modeled on the statutory enforcement provisions that are applicable to compulsory process issued in Department of Justice antitrust investigations, *see* 15 U.S.C. § 1312, but Section 20 substituted a motion to quash procedure before the Commission, 15 U.S.C. § 57b-1(f), for the pre-enforcement review procedure contained in the Antitrust Civil Process Act, 15 U.S.C. § 1314(b)(1). The change reflects a specific Congressional plan to preclude pre-enforcement review of FTC CIDs.

American Airlines, 176 F.3d at 292. As Judge Posner explained in a case presenting facts virtually identical to those in this case:

> 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 under [28 U.S.C. §§] 1331 or 1337; the specific statutory method, if adequate, is exclusive. . . . Therefore, the target of [an FTC] investigation may not maintain a suit under §§ 1331 or 1337 to enjoin the investigation, but must wait till the government sues to enforce a subpoena or other compulsory process in aid of the investigation, since that is the method of judicial review of FTC investigations that Congress has prescribed. The Supreme Court so held more than 50 years ago, *FTC v. Claire Furnace Co.*, 274 U.S. 160, 173-74 (1927), and its holding is repeated in numerous court of appeals cases . . . .

General Finance Corp. v. FTC, 700 F.2d 366, 368 (7th Cir. 1983) (Posner, J.).[19]

Consistently, adhering to the Fifth Circuit's definitive guidance in *Atlantic Richfield*, the District Court, in *Chilton Corp. v. FTC*, No. CA-3-79-0163-C, 1979 WL 1589 (N.D. Tex. 1979), dismissed a petition for declaratory and injunctive relief from an FTC subpoena, holding that the petition failed to state a claim upon which relief may be granted. Fed. R. Civ. P. 12(b)(6). The same result should apply here.

[19] In such circumstances, the courts of appeals have uniformly held that the CID enforcement proceeding required under the FTC Act constitutes an adequate remedy at law and that preemptive claims for declaratory or injunctive relief are to be dismissed. *See American Motors Corp. v. FTC*, 601 F.2d 1329, 1335-37 (6th Cir. 1979); *Casey v. FTC*, 578 F.2d 793, 794 (9th Cir. 1978); *Wearly v. FTC*, 616 F.2d 662, 665-68 (3rd Cir. 1980); *Blue Ribbon Quality Meats, Inc. v. FTC*, 560 F.2d 874 (8th Cir. 1977); *First Nat'l City Bank v. FTC*, 538 F.2d 937, 938-39 (2d Cir. 1976).

B. Horton Should Not Be Allowed to Abuse the Declaratory Judgment Process to Litigate Defenses to an Anticipated FTC Enforcement Action

The Declaratory Judgment Act, 28 U.S.C. § 2201, is not a source of jurisdiction for anticipatory suits. As the Supreme Court has declared, "it is not the function of the federal declaratory action merely to anticipate a defense that otherwise could be presented" in a different forum, *Vaden v. Discover Bank*, 129 S. Ct. at 1278 n.19, quoting 10B Wright & Miller, *Federal Practice & Procedure* § 2758, nor to "attempt[] to gain a litigation advantage by obtaining an advance ruling on an affirmative defense." *Calderon v. Ashmus*, 523 U.S. 740, 747-48 (1998). "Anticipatory suits are disfavored because . . . '[t]he wholesome purposes of declaratory acts would be aborted by [their] use as an instrument of procedural fencing either to secure delay or to choose a forum.'" *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n.3 (5th Cir. 1983), quoting *American Automobile Ins. Co. v. Freundt*, 103 F.2d 613, 617 (7th Cir. 1939). "[T]he Declaratory Judgment Act is not a tactical device whereby a party who would be a defendant in a coercive action may choose to be a plaintiff by winning the proverbial race to the courthouse." *Hyatt Int'l Corp. v. Coco*, 302 F.3d 707, 712 (7th Cir. 2002) (citation omitted).[20]

Consistent with these authorities, the Fifth Circuit identified a number of factors that a district court may consider in deciding whether to issue a declaratory ruling:

[20] *See also AmSouth Bank v. Dale*, 386 F.3d 763, 788 (6th Cir. 2004); *Int'l Ass'n of Entrepreneurs v. Angoff*, 58 F.3d 1266, 1270 (8th Cir. 1995).

"[1] whether the plaintiff filed suit in anticipation of a lawsuit filed by the defendant; [2] whether the plaintiff engaged in forum shopping in bringing the suit; [3] whether possible inequities in allowing the declaratory plaintiff to gain precedence in time or to change forums exist; . . . and [4] whether retaining the lawsuit would serve the purposes of judicial economy[.]") *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585, 590-91 (1994) (numbering altered), quoting *Travelers Ins. Co. v. Louisiana Farm Bureau Federation*, 996 F.2d 774, 778 (5th Cir. 1993).[21] Horton's Complaint satisfies none of these factors.

First, it is patently obvious that Horton has filed this action because it anticipates, and seeks to block, an affirmative FTC lawsuit to enforce the CID. *See, e.g.,* Complaint at 21 (Prayer for Relief), ¶ 6 (requesting "an order enjoining the FTC from enforcing the CID"). As discussed above, Horton's purported claims here are nothing more than the defenses that it would raise in opposition to an affirmative CID enforcement action, if and when the FTC brings one. By filing the instant lawsuit asking this Court for a declaratory ruling to suppress the CID in advance of the FTC's possible filing of an affirmative enforcement suit to compel Horton to comply with the CID, Horton is seeking adjudication of the defenses that it otherwise would raise in response in response to the FTC's action.

Second, by bringing this action in the judicial district in which its headquarters are located, Horton appears to be attempting to select a forum it views as favorable (although,

[21] The lists of factors set forth in *Trejo* and *Travelers* also included additional items relating to the interaction between federal and state courts and causes of action. These factors are omitted above because those issues are not pertinent to this case.

as discussed in Section III below, one in which venue is improper) – so as to trump the FTC's right to select the forum in which to bring a CID enforcement action. *See* 15 U.S.C. § 57b-1(e) (authorizing FTC to file an enforcement petition against any person who "fails to comply with any civil investigative demand . . . in the district court of the United States *for any judicial district in which such person resides, is found, or transacts business*") (emphasis added). *See also Hanes Corp. v. Millard*, 531 F.2d 585, 592-93 (D.C. Cir. 1976) ("The anticipation of defenses is not ordinarily a proper use of the declaratory judgment procedure. It deprives the plaintiff of his traditional choice of forum and timing, and it provokes a disorderly race to the courthouse."); *Swish Marketing, Inc. v. FTC*, 669 F. Supp.2d 72, 77 (D.D.C. 2009) (same).

Third, for the same reasons set forth in the preceding paragraph, it would be inequitable to allow Horton to dictate the forum and timing of the adjudication of the CID's validity and enforceability. Horton's attempt to do so flouts the procedure specifically set forth in the FTC Act, as discussed in Section III.A above, and wrongly seeks to subvert the declaratory judgment procedure as "a means of turning prosecutor into defendant before adjudication concludes," *Standard Oil*, 449 U.S. at 243 – or even begins.

Finally, retaining this lawsuit here would disserve the interest of judicial economy, because, as discussed in Section I.A above, it would waste judicial resources to review activities that are not "final agency action." Moreover, if the FTC were to bring a CID enforcement action either in this judicial district or in a different jurisdiction – as it has the

right to do[22] – retaining this lawsuit here would risk placing the same legal issues concerning the FTC's CID before two different judges – or worse, before two separate jurisdictions – at the same time.

III. VENUE IS IMPROPER IN THIS DISTRICT

This action must be dismissed because Horton has selected an improper venue to bring this action. Fed. R. Civ. P. 12(b)(3). As Horton recognizes, venue in this action is governed by 28 U.S.C. § 1391(e). Complaint at 4, ¶ 11.[23] That statute provides that a civil action in which the defendant is an agency of the United States or an official acting in his official capacity may be brought "in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action."

Although Horton's principal place of business is in Fort Worth, Texas, for purposes of 28 U.S.C. § 1391(e)(3), a corporate plaintiff "resides" *only* in the state in which it is incorporated. As Horton admits, it is incorporated in Delaware and not in this district.

[22] As the Fifth Circuit has declared, there is no requirement that any enforcement proceedings against pre-enforcement plaintiffs be brought as compulsory counterclaims. *See United States v. Ramirez*, 905 F.2d 97, 99 (5th Cir. 1990) (holding that, in response to plaintiff's pre-enforcement action to quash an administrative subpoena, the agency had a choice of moving to dismiss for lack of subject matter jurisdiction or of filing a counterclaim for the enforcement of the subpoena).

[23] In the venue paragraph in the Complaint (¶ 11), Horton also cites 5 U.S.C. § 703 and 28 U.S.C. § 124(a)(2), but neither of those statutory sections provides any specific guidance regarding the proper venue for any given action.

(Complaint at 3, ¶ 6). However, "[f]or purposes of the general venue statute, a corporation resides only at its place of incorporation." *Tenneco Oil Co. v. EPA*, 592 F.2d 897, 899 (5th Cir. 1979). *See Suttle v. Reich Brothers Construction Co.*, 333 U.S. 163, 166-67 (1948) ("the 'residence' of a corporation, within the meaning of the venue statutes, is only in 'the State and district in which it has been incorporated.'"), citing *Shaw v. Quincy Mining Co.*, 145 U.S. 438, 441 (1892). Furthermore, that a corporation "may be 'found,' 'transacts business,' or has an agent to receive service of process" in a district are no import to the § 1391(e)(3) venue question. *Suttle*, 333 U.S. at 167.[24]

The defendants in this action – Chairman Leibowitz and the Commission – also do not reside in this district. For purposes of 28 U.S.C. § 1391(e)(1), "the residence of a federal officer has always been determined by the place where he performs his official duties." *Reuben H. Donnelley Corp. v. FTC*, 580 F.2d 264, 266 n.3 (7th Cir. 1978), citing *Butterworth v. Hill*, 114 U.S. 128, 132 (1885). The presence of an FTC regional office in Dallas does not make this judicial district the residence of the Commission (or its Chairman) for purposes of venue. *Reuben H. Donnelley Corp.*, 580 F.2d at 267. Rather, their residence is the District of Columbia, where they perform their official duties.

Nor did the "events or omissions giving rise" to the purported causes of action occur in this district under 28 U.S.C. § 1392(e)(2). Horton's purported causes of action are based on the Commission's issuance of the investigatory resolutions and the CID,

[24] There is no "real property" at issue in this case.

staff's conduct during the course of this investigation, and the Commission's denial of Horton's petition to limit or quash the CID. Complaint at 14-20, ¶¶ 42-71. These activities all occurred in Washington, D.C., where the Commission's headquarters are located and where the investigation of Horton is being conducted. Plaintiff's cause of action thus arose in the District of Columbia and not in this district. *See Donnelley*, 580 F.2d at 268.

Because venue in this district is improper, the Court should dismiss this action pursuant to Fed. R. Civ. P. 12(b)(3). *McClintock v. School Bd. East Feliciana Parish*, 299 Fed. Appx. 363, 366 (5th Cir. 2008); *Lowery v. Estelle*, 533 F.2d. 265 (5th Cir. 1976).[25]

CONCLUSION

For the reasons set forth above, the Court should dismiss Horton's Complaint for declaratory and injunctive relief.

Respectfully submitted,

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[25] In the event this Court denies this motion to dismiss, it should transfer this action under 28 U.S.C. § 1404(a) to either of the two judicial districts where it could have been brought – Delaware (where Horton resides) or the District of Columbia (where the purported cause of action arose and defendants reside).

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CERTIFICATE OF SERVICE

I, Donna K. Webb, Assistant United States Attorney for the Northern District of Texas certify that on the ___ day of August, 2010, the foregoing document was sent by Certified Mail to the following:

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