IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

***In re* SANCTUARY BELIZE LITIGATION**	* * * * * * * * * * *	**Civil No. 18-3309-PJM**

REPRESENTED DEFENDANTS' OPPOSITION TO
FTC'S MOTION TO REFORM AND REAFFIRM FINAL ORDERS

Defendants Andris Pukke, Peter Baker, and John Usher (the "Represented Individuals"), and Defendants Global Property Alliance, Inc., Sittee River Wildlife Reserve, Buy Belize, LLC, Buy International, Inc., Foundation Development Management Inc., Eco Futures Development, Eco-Futures Belize Limited, Power Haus Marketing, Sanctuary Belize Property Owners' Association, and the Estate of John Pukke (the "Represented Entities") oppose the motion of plaintiff Federal Trade Commission ("FTC") to "reform and reaffirm" three final orders entered by the Court.[1] The FTC's motion to "reform" the "Contempt Order" is barred by the "mandate rule" and is financially unnecessary and its motion to "reform" the "Default Order" also is barred by the "mandate rule." The FTC's motion to "reaffirm" the "De Novo Order" is unnecessary.

[1] The FTC alleged in its complaint that Represented Individuals Pukke, Baker, and Usher own, control, or manage Represented Entities Global Property Alliance, Inc., Sitte River Wildlife Reserve, Buy Belize, LLC, Buy International, Inc., Foundation Development Management, Inc., Eco-Futures Development, Eco-Futures Belize Limited, Power Haus Marketing, Sanctuary Belize Property Owners' Association, and the Estate of John Pukke (ECF Dkt. No. 1 at ¶¶ 8, 10, 11-18, 23, 31, and 35). The final orders that are the subject of the FTC's motion apply to these defendants, none of whom has settled (ECF Dkt. Nos. 1112, 1113, and 1194).

The Represented Individuals and Entities submit that, with the issuance of the Fourth Circuit's mandate, the Court has two tasks. First, the Court should lift the freeze the Court placed on the assets of the Represented Individuals and Entities pursuant to section 13(b) of the Federal Trade Commission Act ("FTCA") and order the Receiver to return to them their frozen assets passports. Second, the Court should implement ¶ 4 of the "Contempt Order by determining the amounts already saved by, credited, or returned to consumers, and how much, if anything, remains unpaid of the $120.2 million sanction imposed by that Order.

STATEMENT

A. The Relevant Proceedings in this Court

The FTC filed its original complaint on October 31, 2018.[2] The FTC alleged that defendants made material misrepresentations to lot purchasers at Sanctuary Belize, in violation of section 5(a) of the FTCA and the Telemarketing Sales Rule (" TSR"), 16 C.F.R. § 310.3.[3]

Along with the original complaint, the FTC moved *ex parte* for a temporary restraining order and writs *nea exeat*.[4] The FTC asked the Court to freeze defendants' assets and appoint a receiver to take custody and control of them under section 13(b) of the FTCA, 15 U.S.C. § 53(b), and to order several individual defendants to surrender their passports.[5] On November 5, 2018, the Court granted the FTC's motion and issued the requested orders.[6] The Court later explained that the purpose of the freeze and seize order was to ensure "that funds might be available for

---

[2] ECF Dkt No. 1.

[3] *Id*. at 6-7.

[4] *See* ECF Dkt. No. 23-4, at 5, 8-9.

[5] *Id*.

[6] ECF Dkt. No. 23-4.

restitution should the Court eventually order that relief."[7] The Court extended the terms of that order in an amended temporary restraining order and a preliminary injunction.[8]

After conducting a trial in early 2020, the Court issued a Memorandum Opinion on August 28, 2020, finding that defendants violated section 5(a)(1) of the FTCA and the TSR.[9] Because defendant John Usher and the defendant entities owned or controlled by the individual defendants did not appear in the case, the Court said it would enter a default judgment against them.[10] The Court also found the three Represented Individuals in contempt for violating the telemarketing provisions of the Stipulated Final Judgment in the earlier *AmeriDebt* case, and it found defendant Andris Pukke in contempt for violating a payback prohibition in the *AmeriDebt* Stipulated Final Judgment.[11]

The Represented Individuals and Entities appealed from a number of the Court's rulings, including three principal final orders. The first was entitled "Final Order for Permanent Injunction and Monetary Judgment Against Defaulting Defendants," entered on January 13, 2021 (the "Default Order").[12] Sections I-III, X, and XII-XV of the Default Order contained injunctive and compliance provisions; Section IV contained the "Equitable Monetary Judgment;"

---

[7] ECF Dkt. No. 1020, Memorandum Opinion at 4.

[8] ECF Dkt. Nos. 15, 34, and 539.

[9] ECF Dkt. No. 1020, Memorandum Opinion, at 79-145.

[10] *Id*. at 133-145.

[11] *Id*. at 162-177.

[12] ECF Dkt. No. 1112.

Section V contained "Additional Monetary Provisions;" and Sections VI-IX contained provisions applicable to the court-appointed Receiver and the Receivership.[13]

In the "Equitable Monetary Judgment," the Court entered judgment in the amount of $120.2 million against the defaulting defendants except for the Estate of John Pukke, against which it entered judgment in the amount of $830,000, and it ordered them to pay those amounts to the FTC.[14] The Court made permanent the prior asset freeze orders and the Receiver's custody and control of the defaulting defendants' assets, and it ordered the Receiver to "marshal and then liquidate all such assets for the benefit of the FTC."[15] The Court also ordered the defaulting defendants to turn over to the Receiver any other assets that had not been seized, and it ordered that "[a]ll money paid to the FTC pursuant to this Order may be deposited into a fund administered by the FTC or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund."[16]

The second principal final order, entitled "Final Order of Contempt Against Andris Pukke, Peter Baker, and John Usher," which also was entered on January 13, 2021 (the "Contempt Order"), ordered those three to "transfer to the FTC $120.2 million (as reduced by the amounts, if any, already distributed to consumer by the FTC and increased by any applicable interest)" and additionally ordered Pukke "to pay the FTC $172 million."[17] The Contempt Order did not contain any asset freeze or Receiver asset custody and control provisions.

---

[13] ECF Dkt. No. 1112.

[14] *Id.* at 9.

[15] *Id*.

[16] *Id*. at 14.

[17] ECF Dkt. No. 1113 at 2-3.

The third principal final order, entitled "Amended Final Order for Permanent Injunction and Monetary Judgment Against Defendants Andris Pukke, Peter Baker, and Luke Chadwick," was entered on March 24, 2021 (the "De Novo Order").[18] The De Novo Order was virtually identical to the Default Order, and it ordered the named defendants to pay the FTC $120.2 million and made permanent the prior asset freeze orders and the Receiver's custody and control of those defendants' assets.[19] The De Novo Order, like the Default Order, provided that the $120.2 million would be deposited into a fund to be administered by the FTC for consumer redress and attendants administrative expenses.[20]

B. <u>The Relevant Portions of the Fourth Circuit's Decision</u>

The Fourth Circuit affirmed the Contempt Order in its entirety, and it affirmed the injunctive provisions of the De Novo Order and the Default Order. *Federal Trade Commission v Pukke*, 53 F.4th 80, 101-107 (4th Cir. 2022) ("4th Cir. Op."). However, on the authority of the Supreme Court's decision in *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021), the Fourth Circuit vacated the equitable monetary provisions of the De Novo Order and the Default Order. *Id*. at 104-107.

With respect to the Contempt Order, the Fourth Circuit held that this Court "did not abuse its discretion in holding Pukke, Baker, and Usher in contempt for their telemarketing misrepresentations in violation of the *AmeriDebt* permanent injunction." 4th Cir. Op. at 103.

With respect to the De Novo Order, the Fourth Circuit did not accept the FTC's argument that it should ignore *AMG* and affirm the $120.2 million judgment on the theory that the FTC's

---

[18] ECF Dkt. No. 1194.

[19] *Id*. at 8-13.

[20] *Id*. at 11.

allegations against defendants could have been sustained under section 19 of the FTCA, 15 U.S.C. § 57b(b).[21] Although the Fourth Circuit's opinion did not mention the FTC's section 19 argument, the author of the opinion, Judge J. Harvie Wilkinson III, had this to say about it to the FTC's appellant counsel at oral argument:

> I don't think much of your section 19 argument, I must say, because you didn't plead it and section 19 has a number of procedural hurdles which you didn't clear. …Aren't you reaching farther than you need to reach in trying to uphold the $120 million in the Sanctuary Belize case, the monetary judgment. That's a straight section 13, section 13 judgment. I don't see how it can stand. And aren't you overreaching in trying to get that upheld?[22]

The Fourth Circuit ruled: "The Supreme Court's holding in *AMG* does indeed render invalid the $120.2 million equitable monetary judgment, at least to the extent that judgment rests on Section 13(b)." 4th Cir. Op. at 105. Nevertheless, the Fourth Circuit pointed out that "*AMG* does not undercut the injunctive relief entered under Section 13(b), and the $120.2 million order can be upheld under the contempt judgment, so *AMG* does not in fact change the bottom line." *Id.* at 106.

Finally, with respect to the Default Order, the Fourth Circuit rejected the FTC's argument that *AMG* did not require that it vacate the $120.2 million equitable monetary component of that Order,[23] but it affirmed the injunction provisions in that Order. 4th Cir. Op. at 107. The Fourth Circuit said (*Id.*):

---

[21] Fourth Circuit Brief of the Federal Trade Commission at 19-24, annexed as Exhibit A.

[22] Transcript of Oral Argument, at 31:40 and 34:07, September 13, 2022.

[23] Fourth Circuit Brief of the Federal Trade Commission, at 26-28, annexed as Exhibit A.

> Usher and the corporate defendants now assert that the $120.2 million judgment against them must be thrown out under *AMG Capital*. As noted, *AMG* requires vacating the $120.2 million equitable monetary judgment, but the default judgments are upheld because the district court did not abuse its discretion and *AMG* does not affect the injunctive relief granted in each default judgment.
> .

The Fourth Circuit also affirmed this Court's appointment of the Receiver for the purpose of "effectuating the permanent injunctions imposed under the Sanctuary Belize judgment." 4th Cir. Op. at 108. The Fourth Circuit noted that "[t]he appointment of a receiver has long been considered an ancillary power that a court can deploy to effectuate its injunctive relief." *Id*. at 107-108.

The FTC filed a post-judgment motion for "clarification" or, in the alternative, a petition for rehearing with respect to the Fourth Circuit's order vacating the $120.2 million equitable monetary judgment in the Default Order.[24] The FTC argued that the Fourth Circuit could not have meant what it said in vacating that $120.2 million judgment against the defaulting defendants, but that if it did mean what it said, it was wrong.[25] The Represented Individuals and Entities opposed the FTC's motion/petition.[26] The Fourth Circuit summarily denied the FTC's motion/petition.[27]

---

[24] Fourth Circuit ECF Dkt. No. 103, annexed as Exhibit B.

[25] *Id*.

[26] Fourth Circuit ECF Dkt. No. 107, annexed as Exhibit C.

[27] Order of November 29, 2022 (Fourth Circuit ECF Dkt. No. 108), annexed as Exhibit D.

ARGUMENT

I. The Court Should Lift the Asset Freeze and Order the Return of Defendants' Property

With the issuance of the mandate of the Fourth Circuit vacating the $120.2 million equitable monetary judgments in the De Novo Order and the Default Order against the Represented Individuals and Entities under section 13(b) of the FTCA, the Court should order the Receiver to return to them their assets and passports.[28] Those assets and passports were seized and held by the Receiver for the purpose of ensuring there would be funds available should this Court grant the FTC equitable monetary relief under section 13(b) of the FTCA. Because such relief was vacated by the Fourth Circuit under *AMG*, there is no longer any legal basis for the Receiver to exercise custody and control of those assets and passports.

This was precisely the holding of the Eleventh Circuit in *Federal Trade Commission v. On Point Capital Partners, LLC*, 17 F.4th 1066 (11th Cir. 2021). *On Point* is similar to the present case.

In *On Point*, the FTC brought suit under section 13(b) of the FTCA against six individuals and 54 corporate entities under their control, collectively referred to as "On Point," alleging that they had engages in unfair or deceptive business practices in violation of section

---

[28] The FTC claims that an e-mail to the Represented Individuals from their counsel "highlights their control," with their counsel "asking" them "how to assert control over these assets and use a third party to hide their involvement." FTC Mot. at 15 and Exhibit 2 thereto. The FTC's assertion of nefarious conduct is absurd, and highlights its consistent efforts to paint the defendants in an unfavorable light. In fact, counsel advised the Represented Individuals in that e-mail that, notwithstanding the Fourth Circuit's decision, the injunctive provisions in the De Novo Order remain in place and "prohibit( ) you all from running Sanctuary Bay." Because "[s[omeone needs to be in charge," counsel wondered whether that should be Alphonso Bailey. ***Alphonso Bailey is the current General Manager of Sanctuary Belize for the Receivership*** – hardly some undisclosed "third party." Far from suggesting that the Represented Individuals "use a third party to hide their involvement," counsel was advising the Represented Individuals to advocate for the continued operation of Sanctuary Belize consistent with the Court's orders.

5(a) of the FTCA. The same day the FTC filed suit, it moved for a temporary restraining order to freeze the assets of the On Point parties and place the corporate entities into a receivership. The United States District Court for the Southern District of Florida, operating under pre-*AMG* precedent, granted the FTC's motion and extended the asset freeze, the receivership, and a variety of injunctive provisions in a preliminary injunction for the duration of the lawsuit.

Concurrently, the FTC reopened a 2014 case named *Federal Trade Commission v. Acquinity Interactive* against one of the *On Point* defendants, and alleged that he and several On Point entities had violated a consent injunctive decree in *Acquinity* and should be held in contempt. The district court granted the FTC's motion for a preliminary injunction in *Acquinity* and imposed an asset freeze against the defendants identical to the asset freeze in *On Point*. On appeal by several of the On Point entities to the preliminary injunction in *On Point*, the Eleventh Circuit vacated the parts of the preliminary injunction that subjected appellants to the asset freeze and receivership.

The Eleventh Circuit held that, in light of *AMG*, the asset freeze and receivership against the On Point appellants was "unlawful." *On Point*, 17 F.4th at 1078. The Eleventh Circuit said that, in *AMG*, "the Supreme Court held that § 53(b) does now allow district courts to grant 'equitable monetary relief such as restitution or disgorgement.'" *Id*. "As monetary relief is no longer available under § 53(b), there is no need to preserve resources for a future judgment," and "the imposition of an asset freeze or receivership premised solely on § 53(b) is inappropriate." *Id*. The Eleventh Circuit rejected the FTC's argument that the appeal was moot because appellants were subject to an identical asset freeze in the related *Acquinity* case. *On Point*, 17 F.4th at 1078. It concluded: "Lifting the unlawful asset freeze and receivership in this case is a necessary condition for [appellants] to regain the use and control of [their] property." *Id*.

The FTC has conceded in three different district courts that, in light of *AMG*, asset freeze orders entered under section 13(b) of the FTCA must be lifted. First, in *FTC v. Noland*, No. CV-2000047-PHX-DWL, 2021 WL 4318466 (D. Ariz. Sept. 23, 2021), the FTC sued defendants under section 13(b) of the FTCA, alleging that defendants were operating an illegal pyramid scheme and had made false and misleading representations. The district court granted the FTC's motion for a preliminary injunction and froze the individual defendants' assets.

After *AMG* was decided, the defendants moved to dissolve the preliminary injunction and asset freeze and the FTC moved to keep them in place. However, in its renewed motion for a preliminary injunction, "the FTC acknowledge[d] that the asset-freeze component of the earlier order cannot be sustained on the current record. … This is because the sole purpose of the asset freeze was to preserve funds that could be used to satisfy a future monetary judgment on the FTC's § 13(b) claims, but following *AMG Capital*, such claims may no longer give rise to monetary claims." 2021 WL 4318466 at *3. The district court concluded: "Everybody agrees that, in light of *AMG Capital*, the FTC's § 13(b) claims no longer provide a basis for keeping the asset freeze in place." *Id*. at *5.[29]

Second, in *FTC v. Jason Cardiff*, No. ED 18-CV-02104, DMG (PLAx), C.D. Calif., the district court had granted the FTC preliminary equitable monetary and injunctive relief and froze defendants' assets pursuant to section 13(b) of the FTCA. After *AMG*, the district court denied the FTC's motion to grant monetary relief under a different statutory provision and asked the FTC to propose a final judgment. The FTC proposed a final judgment that continued the

[29] The district court in *Noland* nevertheless kept the asset freeze in place because it had previously held that the FTC had timely sought and could obtain monetary relief under section 19 of the FTCA. 2021 WL 4318466 at *5. Here, in contract, the Fourth Circuit has held that the FTC has no viable section 19 claim.

injunctive provisions but lifted the asset freeze once the district court had approved the receiver's final report. *Cardiff*, ECF Dkt. No. 651. The district court adopted the FTC's proposed judgment. *Id*. ECF Dkt. Nos. 638, 703.

Third, in *AMG* itself, *FTC v. AMG Services, Inc.*, Case No. 2:12-cv-00536-GMN-VCF, the district court similarly had granted the FTC preliminary equitable monetary and injunctive relief and froze defendants' assets pursuant to section 13(b) of the FTCA. On remand after the Supreme Court's decision, the district court held a status conference and announced its intention to lift the asset freeze in light of the Supreme Court's decision and asked for the parties' respective positions.[30] Counsel for the FTC told the district court that the FTC agreed that the equitable monetary provisions of the court's preliminary order had to be vacated and that all parties agreed that the asset freeze had to be lifted.[31] The district court entered an order to that effect, winding down the "monitorship" in that case.[32]

Thus, under the Eleventh Circuit's decision in *On Point* and the district court decisions in *Noland*, *Cardiff*, and *AMG*, the Court should vacate its orders freezing the assets of the Represented Individuals and Entities and order the Receiver to return to them their assets and passports.[33] Indeed, given the FTC's acknowledgments in *Noland, Cardiff,* and *AMG* that the

---

[30] Transcript of Proceedings, July 13, 2021, at 7, 14-15, annexed as Exhibit E.

[31] *Id*. at 17-21.

[32] Case No. 2:12-cv-00536-GMN-VCF, ECF Dkt. No. 1338.

[33] The Receiver also seized and maintains custody and control of the assets of other defendants, many of whom settled with the FTC. The Represented Individuals and Entities take no position on whether the settling defendants waived any rights they may have or had to reclaim their seized assets because of *AMG*.

asset freeze orders in those cases should be lifted, the FTC is barred by the doctrine of judicial estoppel from taking a contrary position in the present case.

"'Judicial estoppel precludes a party from adopting a position that is inconsistent with a stance taken in prior litigation. The purpose of the doctrine is to prevent a party from playing fast and loose with the courts, and to protect the essential integrity of the judicial process.'" *Lowery v. Stovall*, 92 F.3d 219, 223 (4th Cir. 1996) (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 28-29 (4th Cir. 1995)). The Supreme Court has instructed that the doctrine of judicial estoppel should be applied where "a party's later position [is] 'clearly inconsistent' with its earlier position;" where "the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled,'" and where "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-751 (2001). All three of those factors apply here to estop the FTC from opposing the lifting of the asset freeze and the return of the assets and passports to the Represented Individuals and Entities.

II. The Court Should Not Summarily Freeze the Represented Individuals' Assets

Although the Represented Individuals do not challenge the FTC's assertion that, under the Contempt Order, Pukke, Baker, and Usher must transfer to the FTC $120.2 million, they do challenge the FTC's contention that the Court should summarily impose an asset freeze on them.[34] Under Fed. R. Civ. P. 64(b), a post-judgment asset freeze to secure payment of a

[34] Motion to Reform and Reaffirm Final Orders ("FTC Mot.") at 12-13.

judgment is the equivalent of a post-judgment attachment or garnishment and must comport with state law. In Maryland, as elsewhere, that means such a freeze may be imposed only if satisfies the minimum requirements of due process, namely, notice to the judgment debtor and a meaningful opportunity to be heard. *See Reigh v. Sleigh*, 784 F.2d 1191, 1193 (4th Cir. 1986); *Jordan v. Berman*, 758 F. Supp. 269, 278-280 (E.D. Pa. 1991).

Here, ¶ 4 of the Contempt Order states that the $120.2 million contempt sanction against Pukke, Baker, and Usher must be "reduced by the amounts, if any, already distributed to consumers by the FTC and increased by any applicable interest." Such a reduction is necessary because, as the Supreme Court has ruled, the amount of a civil contempt sanction imposed to compensate the victims of contumacious conduct, such as the one imposed here by the Contempt Order, must be limited to "actual losses" incurred by the victims. *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947). The sanction cannot confer a windfall on those victims. *See, e.g., Goya Foods, Inc. v. Wallack Management Co.*, 290 F.3d 63, 78 (1st Cir. 2002); *In re Dual-Deck Video Cassette Recorder Antitrust Litigation*, 10 F.3d 693, 696 (9th Cir. 1993).

As defendant Baker avers in his annexed declaration, the Sanctuary Belize lot purchasers already have saved or stand to be credited or receive more money than the $120.2 million sanction imposed against the Represented Individuals. If he is correct, the entire sanction in the Contempt Order has been satisfied under ¶ 4 of that Order.

Therefore, the Court should establish a transparent process in which the FTC, the Receiver, and the Represented Individuals may participate and proceed to liquidate the assets under the Receiver's custody and control, to enable the Court to determine the precise the Represented Individuals' outstanding debt to the FTC under the Contempt Order. Until that is done, there is no basis for the Court to impose any asset freeze on the Represented Individuals.

III. The Assets of the Defaulting Defendants May Not be Seized or Liquidated

The FTC's argument that the Contempt Order requires the seizure and liquidation of the assets of John Usher and the Represented Entities has no merit.[35] The Default Order does not contain any contempt provisions or remedies, and the Fourth Circuit has vacated the provisions in the Default Order imposing a monetary judgment of $120.2 million. Therefore, there is no basis for "reforming" the Contempt Order to require the seizure and liquidation of the assets of the Represented Entities, as proposed by the FTC.

In fact, the Court is barred by the "mandate rule" from altering the Contempt Order. "The mandate rule requires that, on remand, the lower body must 'implement both the letter and spirit' of the mandate." *Edd Potter Coal Co., Inc. v. Director, Office of Workers' Comp. Programs*, 39 F.4th 202, 210 (4th Cir. 2022). "A remand therefore does not throw open the floodgates. For instance, 'any issue conclusively decided … on the first appeal is not remanded." *Id*.

The Fourth Circuit "conclusively" vacated the $120.2 million component of the Default Order. Furthermore, the Court is barred by the "mandate rule" from altering the Contempt Order. End of story.

IV. The Fourth Circuit Did Vacate the Monetary Relief in the Default Order

The Fourth Circuit said what it meant and meant what it said when, in the Default Order, it vacated the monetary judgment of $120.2 million the Court entered under section 13(b) of the FTCA against John Usher and the Represented Entities. It was required to do so by *AMG*, just as

[35] FTC Mot. at 13-16.

it was required by *AMG* to vacate the monetary judgment of $120.2 million the Court entered against the Represented Individuals in the De Novo Order.

The FTC claims that "[t]he Fourth Circuit's intention not to vacate the monetary relief becomes crystal clear in context."[36] Nonsense. The Fourth Circuit said (4th Cir. Op. at 107):

> Usher and the corporate defendants now assert that the $120.2 million judgment against them must be thrown out under *AMG Capital*. As noted, *AMG* requires vacating the $120.2 million equitable monetary judgment, but the default judgments are upheld because the district court did not abuse its discretion and *AMG* does not affect the injunctive relief granted in each default judgment.

The only "crystal clear" reading of this paragraph is that the "$120.2 million equitable monetary judgment" which the Fourth Circuit says in the second sentence "*AMG* requires vacating" is the very same "$120.2 million judgment" which the Fourth Circuit says in the preceding first sentence "Usher and the corporate defendants now assert" is "against them" and "must be thrown out under *AMG Capital.*" The Fourth Circuit is not referring in the second sentence, and would have no reason to refer, to the $120.2 million judgment in the De Novo Order against Pukke, Baker, and Usher – and not the "corporate defendants" -- which the Fourth Circuit previously vacated. The FTC offers no logical reason why the Fourth Circuit would vacate the $120.2. million monetary judgment in the De Novo Order under *AMG* because it was issued under section 13(b) of the FTCA and not vacate the $120.2 million monetary judgment in the Default Order which also was issued under section 13(b) of the FTCA, and there is none.

Moreover, the Court again is barred by the "mandate rule" from considering the FTC's argument. The FTC made this very same argument to the Fourth Circuit in its post-judgment

---

[36] FTC Mot. at 17.

motion/petition for "clarification" or rehearing, which the Represented Individuals and Entities opposed and the Fourth Circuit summarily denied.[37] The issue is foreclosed.

V. The Monetary Relief Cannot be Sustained Under Section 19 of the FTCA

Finally, contrary to the FTC's contention, the equitable monetary relief granted by the Court in its De Novo and Default Orders against the Represented Individuals and Entities under section 13(b) of the FTCA cannot be sustained under section 19 of the FTCA. The FTC made this same argument to the Fourth Circuit, which did not accept it, as Judge Wilkinson confirmed in his remarks at oral argument. The FTC did not plead section 19 in its complaint and did not satisfy its procedural requirements, and this Court did not grant the FTC's post-judgment motion to amend its complaint to assert claims under section 19,[38] and, as the Represented Individuals and Entities demonstrated in their Reply Brief in the Fourth Circuit, the FTC did not satisfy the procedural requirements of section 19.[39] Therefore, the FTC's section 19 argument is groundless, and the Court is also barred by the "mandate rule" from considering it.

---

[37] *See* annexed Exhibits B, C, and D.

[38] ECF Dkt. No. 1367.

[39] Appellants' Reply Brief at 12-18, annexed as Exhibit F. The Represented Individuals and Entities respectfully refer the Court to and incorporate this Reply Brief for a full statement of their opposition to the FTC's section 19 argument.

CONCLUSION

For the foregoing reasons, the Court should lift the asset freeze order against the Represented Individuals and Entities; order the Receiver to return to them their assets and passports; and establish a transparent process in which the FTC, the Receiver, and the Represented Individuals may participate, to enable the Court to determine the precise the Represented Individuals' outstanding debt to the FTC under the Contempt Order.

Respectfully submitted,

/s/ *John B. Williams*
John B. Williams
Williams Lopatto PLLC (admitted *pro hac vice*)
1629 K Street, N.W., Suite 300
Washington, DC 20006
Telephone: 202-296-1665
E-mail: jbwilliams@williamslopatto.com

s/ *Neil H. Koslowe*
Neil H. Koslowe
Potomac Law Group, PLLC
1300 Pennsylvania Avenue, N.W., Suite 700
Washington, DC 20004
Telephone: 202-320-8907
E-mail: nkoslowe@potomaclaw.com

Counsel for the Represented Defendants and Entities

Dated: February 6, 2023

CERTIFICATE OF SERVICE

I certify that today, February 6, 2023, I served the foregoing Opposition on plaintiff by filing it via the Court's CM/ECF system, which automatically will transmit a copy electronically to all counsel of record.

/s/ Neil H. Koslowe
Neil H. Koslowe
Attorney.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

***In re* SANCTUARY BELIZE LITIGATION**	*	**Civil No. 18-3309-PJM**

DECLARATION OF PETER BAKER

Peter Baker, a defendant in this case, declares as follows:

1. I have been personally involved in all aspects of this case from its inception, and I have read all the Court's decisions and the reports submitted to the Court by the Receiver.

2. It is my intention, and I have been advised by my co-defendants Andris Pukke and John Usher that it is their intentions, to comply fully with ¶ 4 of the Contempt Order requiring the three of us to transfer to the Federal Trade Commission ("FTC") $120.2 million "reduced by the amounts, if any, already distributed to consumers by the FTC and increased by any applicable interest."

3. Based on reports filed by the Receiver and other information, I believe the Receiver has collected from defendants who settled with the FTC in this case approximately $45 million.

4. Based on reports filed by the Receiver and other information, I believe Sanctuary Belize consumers have been credited with approximately $50 million in monthly payments due and owing by them but uncollected.

5. Based on reports filed by the court-appointed Receiver and other information, I believe that the value of the "Kanantik" property acquired and now owned by the FTC consists

of land worth approximately $35 million; a hotel worth approximately $10 million; other fixed assets worth approximately $9,125,000; and outstanding receivable in the amount of $20 million, for a total of approximately $74,125,000.

6. Thus, without taking into account the value of the Sanctuary Belize property and other assets held by the Receiver, I believe approximately $169,125,000 has been credited or otherwise distributed to Sanctuary Belize consumers. This amount satisfies and actually exceeds the $120.2 million debt Andris Pukke, John Usher, and I owe the FTC under the Contempt Order.

7. When the Sanctuary Belize property was last appraised, the value of the 14,000 acres of land was approximately $87 million. I understand that its current appraised value has more than doubled, but that a conservative estimate is that it has increased by a minimum of 20% since that appraisal, and the current value is $104 million.

8. Based on reports filed by the Receiver and other information, there is approximately $157 million (including interest) in current receivables from lot purchasers at Sanctuary Belize.

9. Based on reports filed by the Receiver and other information, the value of total "fixed" assets at Sanctuary Belize (infrastructure, homes, amenities, marina, and the like, but not including land) is approximately $26 million.

10. Based on reports filed by the Receiver and other information, the Receiver is holding approximately $1.5 million in liquid assets from bank accounts.

11. Based on reports filed by the Receiver and other information, the value of "other" current assets at Sanctuary Belize is $16 million.

12. Therefore, the current value of the Sanctuary Belize property and other frozen assets is approximately $303 million, above and beyond the $169,125,000 identified in paragraphs 6-9 of this Declaration.

13. I believe there are currently multiple parties interested in purchasing the Sanctuary Belize property, and the funds generated by a sale of the Sanctuary Belize property would far exceed the $120.2 million needed to transfer to the FTC under the Contempt Order.

14. If the Court established a transparent process in which the FTC, the Receiver, and Andris Pukke, John Usher, and I could participate to determine the value of and liquidate all available assets and property, the amounts due to the FTC under the Contempt Order would be paid in full.

15. The Court-order seizure of my passport has inflicted severe personal and family harm on me, and the immediate return of my passport would facilitate the ultimate resolution of this case.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 6, 2023.

Peter Baker

EXHIBIT A

No. 20-2215 (L), 21-1454, 21-1520, 21-1521, 21-1591, 21-1592

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

ANDRIS PUKKE, ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Maryland
No. 18-cv-3309
Hon. Peter J. Messitte

FINAL FORM BRIEF OF THE FEDERAL TRADE COMMISSION

JAMES REILLY DOLAN
Acting General Counsel
JOEL MARCUS
Deputy General Counsel
THEODORE (JACK) METZLER
Attorney
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3502
tmetzler@ftc.gov

judgment on another ground, appellants will be liable for $120.2 million no matter how *AMG* might affect the other orders. The Court therefore may stop here, affirm the $120.2 million contempt judgment against Pukke, Baker, and Usher, and reject their challenge to the receivership without even addressing *AMG*.

Moreover, as shown in the succeeding sections of this brief, *AMG* does not require the Court to reverse any of the three orders as the appellants claim. Indeed, the appellants do not explain why the decision requires the Court to vacate the three orders. *See* Br. 18-19. They simply urge the Court to follow three post-*AMG* cases in which the Commission acknowledged that the monetary judgments could not be sustained. *See id.* But this case is fundamentally different from those matters. Only one of the orders they say should be summarily reversed rested on Section 13(b)'s authority to enter monetary relief, and that judgment may be affirmed on other grounds unaffected by *AMG*. In the other two orders (the default judgment and the *AmeriDebt* enforcement order), the basis for monetary relief is not subject to challenge and *AMG* does not affect them. None of those circumstances were present in the cases appellants cite.

B. The monetary relief for violations of the Telemarketing Sales Rule may be affirmed under Section 19 of the FTC Act.

The $120.2 million judgment that the district court entered against Pukke and Baker for their deceptions in marketing Sanctuary Belize (D.Ct. Docket No. 1194 (J.A. 1070)) may be affirmed under the authority of Section 19 of the FTC Act.

Section 19 empowers the Commission to sue for violations of rules regarding unfair or deceptive practices and obtain "such relief as the court finds necessary to redress injury to consumers." 15 U.S.C. §§ 57b(a)(1), 57b(b). That relief can include monetary remedies such as "the refund of money or return of property," or "the payment of damages." 15 U.S.C. § 57b(b). The Telemarketing Sales Rule is a rule regarding unfair or deceptive practices,[4] and the district court found Pukke and Baker's false promises violated the rule. D.Ct. Docket No. 1020 at 132 (J.A. 964). Having proven the rule violation, the Commission had authority to seek monetary relief pursuant to Section 19, and *AMG* does not alter that conclusion. To the contrary, the Supreme Court specifically held that "[n]othing we say today . . . prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers." *AMG*, 141 S.Ct. at 1352.

The complaint in this case did not plead Section 19 as an express basis for monetary relief, but that does not preclude a monetary judgment under that provision. The rule violations proved at trial showed that the Commission was entitled to monetary relief under Section 19, and under Federal Rule of Civil Procedure 54(c), a "final judgment should grant the relief to which each party is entitled, *even if the party has not demanded that relief in its pleadings*." (Emphasis added).

[4] *See* 15 U.S.C. § 6102(c)(1).

As this Court has explained, Rule 54(c) "authorizes recovery under any theory supported by the facts proven at trial." *Gilbane Bldg. Co. v. FRB*, 80 F.3d 895, 900 (4th Cir. 1996). It "is an integral element of the overall plan of the federal rules to eliminate the theory-of-the-pleadings doctrine and decrease the importance of the pleading stage in federal litigation." 10 Wright & Miller, Fed. Prac. & Proc. Civ. § 2662 (4th ed.) (footnote omitted). When combined with the liberal amendment policy of Rule 15, "a party should experience little difficulty in securing a remedy other than that demanded in the pleadings as long as the party shows a right to it." *Id.* Rule 54(c) "has been liberally construed, leaving no question that it is the court's duty to grant whatever relief is appropriate in the case on the basis of the facts proved." *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir. 1971).

Applying Rule 54(c), courts have often authorized relief based on different theories of recovery than were pleaded in the complaint. For example, specific performance of a contract has been awarded on a claim seeking cancellation and rescission,[5] judgment has been allowed on theories of *quantum meruit* or unjust enrichment in actions pleading breach of contract;[6] and contract damages have been

[5] *Garland v. Garland,* 165 F.2d 131 (10th Cir. 1947).

[6] *First Nat'l Bank of Hollywood v. Am. Foam Rubber Corp.*, 530 F.2d 450, 453 n.3 (2d Cir. 1976) (*quantum meruit*); *D. Federico Co. v. New Bedford Redevelopment Auth.*, 723 F.2d 122, 130 (1st Cir. 1983) (unjust enrichment).

awarded in a case pleading only a tort.[7] Courts have likewise found that Rule 54(c) authorized district courts to award relief such as attorney's fees or prejudgment interest when no request for that relief was pleaded.[8]

Courts have also authorized recovery based a different *statutory* theory than pleaded in the complaint. For example, in *O'Hare v. Gen. Marine Transp. Corp.*, the Second Circuit affirmed a judgment in an ERISA case which included interest and attorney's fees under section of the statute that had not been pleaded and had not even been enacted when the case was filed. 740 F.2d 160, 171 (2d Cir. 1984). The court observed that the defendant would have been liable "under a different statutory provision" before the amendment, and, citing Rule 54(c), held that the district court was entitled to enter "whatever relief it felt appropriate at the trial, whether or not it was requested in the pleadings." *Id.* Similarly, the Seventh Circuit relied on Rule 54(c) to affirm the jury verdict in an employment case under a different statutory section than was cited in the complaint. *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990). The court held that "[m]isplaced reliance" on a statute that does not support the award "does not undercut the verdict" when another statute "supplies all the authority the district court

---

[7] *Thomas v. Pick Hotels Corp.*, 224 F.2d 664, 666 (10th Cir. 1955).

[8] *E.g.*, *Capital Asset Rsch. Corp. v. Finnegan*, 216 F.3d 1268, 1270 (11th Cir. 2000) (collecting cases on attorney's fees); *Williamson v. Handy Button Mach. Co.*, 817 F.2d 1290, 1298 (7th Cir. 1987) (prejudgment interest); *Newburger Loeb & Co. v. Gross*, 611 F.2d 423, 432-433 (2d Cir. 1979) (same).

required." *Id.*; *see also Hays v. State Farm Mut. Auto. Ins. Co.*, 67 F.3d 70, 75 (5th Cir. 1995) ("[A]dherence to a particular legal theory suggested by the pleadings is subordinated to the court's duty to grant the relief to which the prevailing party is entitled, whether it has been demanded or not, provided the failure to demand has not prejudiced the adversary.").

So too here. Under the law as it uniformly stood in this and all other circuits when the complaint was filed, the district court was empowered to award monetary relief under both Section 19 and a different statutory provision, Section 13(b). The Supreme Court's decision in *AMG* removed the Section 13(b) authority but not the Section 19 authority. As in *O'Hare* and *Travis*, Section 19 was not pleaded in the complaint, but Rule 54(c) required the court to enter monetary relief under that section, whether or not it was requested in the pleadings.

Courts refuse to award relief outside the pleadings only where the failure to request it "substantially prejudiced the opposing party." *Robinson*, 444 F.2d at 803. There was no such prejudice here. The Commission pleaded the appellants' violation of the Telemarketing Sales Rule in its complaint, the issue was extensively litigated before and during the trial on the merits, and the district court found the defendants liable for violating the Telemarketing Sales Rule on the basis of the evidence before it. The appellants had the full opportunity to contest the basis for the relief. The Court should therefore affirm the monetary judgment as authorized un-

der Section 19. *See MM ex rel. DM v. Sch. Dist. of Greenville Cty.*, 303 F.3d 523, 536 (4th Cir. 2002).

The appellants may argue, as they did in their reply in support of their motion for summary reversal in this Court (but not in their merits brief) that the Telemarketing Act, 15 U.S.C. § 6105(b), limits the Commission to recovering penalties in an action enforcing the Telemarketing Sales Rule because it states that "[a]ny person who violates such rule shall be subject to *the penalties* and entitled to the privileges and immunities" of the FTC Act. Doc. 49 (Oct. 5, 2021) at 5-6 (quoting 15 U.S.C. § 6105 (emphasis added by appellants)). According to the appellants, that language means that the Commission may enforce the rule only in a case for civil penalties under Section 5(m) of the FTC Act, 15 U.S.C. § 45(m), and not under Section 19. *See id.* That is incorrect.

In the Telemarketing Act, Congress directed that violations of the Telemarketing Sales Rule "shall be treated as a violation of a rule under [Section 18 of the FTC Act] regarding unfair or deceptive acts or practices." 15 U.S.C. § 6102(c). The FTC Act, in turn, authorizes an action under Section 19 for the violation of a Section 18 rule; that is, "any rule under [the FTC Act] respecting unfair or deceptive acts or practices." 15 U.S.C. § 57b(a)(1). In keeping with the statutory text, the history of the Telemarketing Act shows that Congress intended the Commission to enforce the new telemarketing rule under Section 19. The House Report lamented

shall, 585 F.2d 1327, 1335-1336 (6th Cir. 1978). Providing the constitutionally required notice of penalties does not limit an agency's remedies to the potential penalty.

C. *AMG* does not require reversal of the default judgments.

Appellants are wrong that *AMG* requires reversal of the default judgments, D.Ct. Docket No. 1112 (J.A. 1022). Having failed to appear and defend themselves below, Usher and the companies waived any challenge to the underlying merits of the judgment. Their appeal is limited to whether the district court abused its discretion by entering default judgment.

Default judgment is governed by Federal Rule of Civil Procedure 55, which sets out a two-step process for the entry of judgment against parties who fail to defend a lawsuit brought against them. *See Home Port Rentals, Inc. v. Ruben*, 957 F.2d 126, 133 (4th Cir. 1992). "The first step, entry of a default, formalizes a judicial recognition that a defendant has, through its failure to defend the action, admitted liability to the plaintiff." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 128 (2d Cir. 2011). "The second step, entry of a default judgment, converts the defendant's admission of liability into a final judgment that terminates the litigation." *Id.*

Usher and the corporate defendants were properly served with the Commission's complaint in this case but chose not to appear or defend the charges against them. *See* D.Ct. Docket Nos. 1112 at 1-2, 1020 at 135 n.54 (J.A. 967). Accordingly,

the clerk entered defaults and—following the trial on the merits—the district court entered default judgment against them. D.Ct. Docket Nos. 799, 826, 1112. Usher subsequently sought to void the default judgment, arguing unsuccessfully that the court lacked personal jurisdiction over him, and then appealed. *See* D.Ct. Docket Nos. 1191 at 6-8; 1214. The corporate defendants appealed without seeking to set aside the defaults, *see* D.Ct. Docket Nos. 1218 & 1219, but later filed a bare-bones motion to do so, without offering any reasons for relief. *See* D.Ct. Docket Nos. 1267 (motion) & 1278 (memorandum opinion denying motion).

Having defaulted below, Usher and the defaulted companies "admitted liability to the [Commission]." *Mickalis Pawn Shop*, 645 F.3d at 128. The scope of their appeal is therefore strictly limited to "whether [the district court] abused its discretion in granting a default judgment in the first instance." *Id.*; *Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc.*, 740 F.2d 1499, 1507 (11th Cir. 1984); *see also Eddins v. Medlar*, 1989 WL 87630, at *3 (4th Cir. July 21, 1989) (reviewing default judgment only for "plain error of such a fundamental nature that we should notice it"). They may not challenge the merits of the claims against them, including the basis for the relief that the district court ordered, because they opted not to mount any defense at all below.

Usher and the defaulted companies may argue that *AMG* is at issue because they cited the case in their eleventh-hour motion to vacate the default judgments

under Rule 60(b)(5), D.Ct. Docket No. 1267.[9] But that motion—like their opening brief—did not offer any argument in support of vacating the default judgment other than a simple recitation of *AMG*'s holding, and the district court was correct to deny it.

Rule 60(b)(5) authorizes relief from a final judgment when "the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). Only the last of those grounds—whether applying the order prospectively is equitable—could conceivably apply here, but the law is clear that it does not. Only judgments that have "prospective effect" qualify for relief under that ground, and a judgment like this one—"that offer[s] a present remedy for a past wrong"—does not count. *Calif. ex rel Becerra v. EPA*, 978 F.3d 708, 717 (9th Cir. 2020). Indeed, "[m]ost courts have agreed that a money judgment does not have prospective application, and that relief from a final money judgment is therefore not available under the equitable leg of Rule 60(b)(5)." *Stokors S.A. v. Morrison*, 147 F.3d 759, 762 (8th Cir. 1998).

---

[9] The district court denied the motion after the appellants filed their opening brief, D.Ct. Docket No. 1279, and the appellants amended their notice of appeal to include that order, D.Ct. Docket No. 1280. They did not, however, seek to add anything to their opening brief to address the decision, and when asked by the undersigned counsel, appellants' counsel represented that they did not intend to do so.

EXHIBIT B

No. 20-2215 (L), 21-1454, 21-1520, 21-1521, 21-1591, 21-1592

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Federal Trade Commission, *Plaintiff-Appellee*,

v.

Andris Pukke, *et al.*, *Defendants-Appellants*.

FTC'S MOTION FOR CLARIFICATION OR, IN THE ALTERNATIVE, PETITION FOR PANEL REHEARING

The Federal Trade Commission respectfully requests that the Court clarify one aspect of its opinion issued on November 1, 2022.[1] The opinion affirmed default judgments entered against John Usher and the corporate appellants, which included a monetary remedy issued pursuant to Section 13(b) of the FTC Act. The same portion of the opinion, however, mentions vacatur of monetary judgments entered under Section 13(b), leaving the status of the monetary aspect of the default judgments subject to potential dispute before the district court as it implements consumer redress. Given the Court's affirmance of the default judgments and the Court's holding that the district court did not abuse its discretion, the Court does not appear to have intended to vacate the monetary aspect of those judgments. But

[1] Counsel for the FTC attempted to obtain appellants' position on this motion by telephone on Nov. 17, 2022, but was unable to reach appellants' counsel.

to ensure the efficiency of the remaining proceedings, we ask the Court to clarify that holding. In the alternative, if the Court in fact meant to affirm only the non-monetary aspects of the default judgments, the Commission requests that the panel grant rehearing on the issue and affirm the default judgments in full because the validity of the monetary portion of the judgment was not under review and the Court lacked jurisdiction to vacate it.

The status of the monetary portion of the default judgment presents an important question because significant assets held by the Receiver for redress to the victims of the appellants' fraud came from the defaulting companies. The Court should address it now to forestall needless litigation in the district court regarding the meaning of the Court's decision, which would delay the redress process to the prejudice of the defaulting companies' victims.

A. Background and Issue of Concern.

As set forth in the Court's opinion, this case involves the unlawful telemarketing sales of purported resort properties in Belize. Andris Pukke, Peter Baker, and John Usher were principals of the scheme, which they carried out through a number of corporations, including the companies pertinent to this motion. Usher and the companies (the "defaulting appellants") did not answer the complaint or otherwise participate in the case until after judgment was entered against them as described below.

The district court entered three distinct judgments. First, the court held Pukke, Baker, and Usher in contempt of an earlier injunction that barred deceptive telemarketing and it entered a compensatory contempt sanction of $120 million. JA 1050-1053. Second, the court entered a permanent injunction and monetary judgment, also for $120 million, against Pukke and Baker under Section 13(b) of the FTC Act, which this Court had interpreted to allow such relief. JA 1070-1093. Third, after Usher and the corporate defendants failed either to appear or to challenge a default entered by the clerk, the court entered a final default judgment against them, consisting of a permanent injunction and a monetary judgment. JA 1022-1049. The default monetary judgment, like the one imposed on the individual defendants, was based on Section 13(b). The defaulting companies were not subject to the contempt judgment because they were not named in the Commission's motions for contempt, so the default judgment was the only compensatory remedy imposed on them. The defaulting companies appealed without first seeking relief from the default judgment under Rule 60(b). JA 1111.

In April 2021, the Supreme Court held that Section 13(b) permits only injunctive remedies and not monetary remedies. *AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021). Three months later, the defaulting appellants asked the district court to set aside the default judgment under Federal Rule of Civil Procedure 60(b)(5), contending that *AMG* required that result. D.Ct. Docket No. 1267. The

district court denied the motion, adopting the Commission's argument that Rule 60(b)(5) does not authorize relief from an unpaid monetary judgment. D.Ct. Docket No. 1278 at 2; *see* D.Ct. Docket No. 1272 at 4-5. The defaulting appellants then amended their notice of appeal to include the denial of their Rule 60(b) motion. JA 1121.

In an opinion addressing all of the district court's judgments, this Court affirmed the default judgments. Slip op. 36-38. The Court held that "[t]his is a clear-cut case for default judgment," *id.* at 37, and that the district court properly exercised its discretion to deny relief under Rule 60(b), *id.* at 38. That affirmance should apply to all aspects of the default judgment.

The same portion of the Court's opinion also states in passing, however, that "while the 'defendant, by his default, admits the plaintiff's well-pleaded allegations of fact,' a defaulting defendant 'is not held . . . to admit conclusions of law.'" Slip op. 37-38 (quoting *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780 (4th Cir. 2001)). The opinion then states that "*AMG* requires vacating the $120.2 million equitable monetary judgment" (*i.e.*, the Section 13(b) judgments entered against Pukke and Baker), "but the default judgments are upheld because the district court did not abuse its discretion and *AMG* does not affect the injunctive relief granted in each default judgment." *Id.* at 38.

As the district court implements victim redress on remand, the defaulting companies could attempt to use the Court's references to *Ryan* and *AMG* to argue that the default judgments were not sustained in full, but only insofar as they granted injunctive relief. The defaulting companies could then seek to obtain a return of the assets transferred to the Receiver. Litigating such disputes will inevitably lead to a delay in redress (including another possible appeal), to the prejudice of the defaulting companies' victims. The Commission therefore asks the Court to clarify its opinion now.

I. The Court should clarify that it affirmed the default judgments in full.

The Court's decision to affirm the default judgments necessarily encompasses the entirety of those judgments because the propriety of monetary relief was not before the Court and the Court resolved all the questions that were before it in the Commission's favor. Nothing in the Court's opinion shows that it intended otherwise.

A. The propriety of the monetary portion of the default judgments was not before the Court.

The defaulting companies appealed both directly from the default judgments (JA 1111) and also from the denial of Rule 60(b) relief (JA 1121), thus bringing two questions before the Court for decision. In the direct appeal, the appellants "skip[ped] the motion to vacate the default judgment," and therefore the issue was "limited to whether the district court abused its discretion in granting a default

judgment in the first instance." *City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 128 (2d Cir. 2011) (cleaned up). And as the Court noted, the question in the 60(b) appeal was whether the district court abused its discretion when it denied relief under Rule 60(b)(5). Slip op. 36. Neither question brought the propriety of the monetary portion of the default judgments before the Court, and the Court resolved both questions in the Commission's favor. Accordingly, the Court should clarify that it affirmed the default judgments in their entirety.

With regard to the direct appeal, the Court reviewed the circumstances of the defaults, held that "[t]his is a clear-cut case for default judgment," and noted with approval that the district court "conscientiously laid out the evidence supporting the same." *Id.* at 37. Those holdings fully resolved the direct appeal because the issue on review was "limited to whether the district court abused its discretion in granting a default judgment in the first instance." *Mickalis*, 645 F.3d at 128. The district court could not have abused its discretion by applying this Court's precedent rather than *AMG* because *AMG* had not been decided. Once the Court correctly found no abuse of discretion, there was nothing more to decide.

Considering the 60(b) appeal, the Court expressly noted that "an appeal from denial of Rule 60(b) relief does not bring up the underlying judgment for review." *Id.* (Citation omitted). The Court then held that "the default judgments are upheld because the district court did not abuse its discretion." Slip op. 38. Again, the

propriety of monetary relief was not at issue, the holding fully resolved the Rule 60(b) appeal, and there was nothing more to decide.

B. The Court's opinion does not evince any intent to vacate only the monetary portion of the default judgments.

Given the Court's holdings, it does not appear to have intended a radical departure from the affirmance when it stated: "[a]s noted, *AMG* requires vacating the $120.2 million equitable monetary judgment, but the default judgments are upheld because the district court did not abuse its discretion and *AMG* does not affect the injunctive relief granted in each default judgment." *Id.*

Instead, given the Court's rejection of any abuse of discretion, the Court's reference to the "equitable monetary judgment" most logically refers to its earlier discussion—and decision to vacate—the $120.2 million equitable monetary judgments against appellants Pukke and Baker (*see* slip op. 35). That reading is reinforced by the Court's holding that "the default judgments are upheld," where the only default judgments at issue were those imposed on Usher and the defaulting companies. That reading is also warranted because Rule 60(b)(5)—the only ground for relief that the defaulting companies pursued—does not authorize relief from a monetary judgment.[2]

---

[2] *E.g. Stokors S.A. v. Morrison*, 147 F.3d 759, 762 (8th Cir. 1998) ("Most courts have agreed that a money judgment does not have prospective application, and that relief from a final money judgment is therefore not available under the equitable leg of Rule 60(b)(5)."); *see* FTC Br. 27-28.

For the reasons described above, the contrary interpretation—that the Court intended to carve out and vacate the monetary portion of the default judgments while leaving the rest of the judgments intact—is both procedurally untenable and inconsistent with the Court's analysis. It is procedurally untenable because the applicability of *AMG* to the monetary portion of the default judgments was not before the Court in either of the defaulting appellants' appeals. It is inconsistent with the Court's analysis because reversing any aspect of the default judgments would have required finding the district court abused its discretion, which the Court did not do.

Nor did the Court signal any intent to backtrack from affirming the default judgments in their entirety when it noted that "while the 'defendant, by his default, admits the plaintiff's well-pleaded allegations of fact,' a defaulting defendant 'is not held . . . to admit conclusions of law.'" Slip op. 37-38 (quoting *Ryan v. Homecomings Fin. Network*, 253 F.3d 778, 780 (4th Cir. 2001)). That principle addresses the effect of a *default*, which was not at issue here; it does not address the grounds for relief from a *default judgment*, which were. The two are different, as Federal Rule of Civil Procedure 55(c) makes clear. The rule authorizes relief from the entry of default on a showing of "good cause," but once default judgment is entered, district courts are only authorized to set it aside "under Rule 60(b)."

The *Ryan* case demonstrates how the principle that a defaulting defendant does not admit conclusions of law applies. There, debtors in a bankruptcy

proceeding sued to strip the obligations of an unsecured second deed of trust from their property. 253 F.3d at 779-780. When the lender did not respond to the complaint, the bankruptcy court entered default, but then refused enter a default judgment granting the debtors' requested relief, which it found improper. *Id.* The debtors then appealed from the denial of a default judgment. *Id.* This Court explained why the bankruptcy court was correct to conduct its own analysis of the proper remedy rather than accept the theory articulated in the complaint: a defendant's default "admits the plaintiff's well-pleaded allegations of fact," but does not "admit conclusions of law." *Id.* at 780 (cleaned up). Unlike this case, *Ryan* involved neither an underlying default judgment nor a Rule 60(b) motion for relief from that judgment.

Because the *Ryan* principle applies before default judgment is entered, the Court could not have intended by citing the case to create an exception to the rule that the denial of Rule 60(b) relief does not bring up the underlying judgment for review. For the same reason, the *Ryan* principle does not bring the matters decided in a default judgment into issue when the appellant appeals without seeking relief from judgment, where the only issue is whether the district court abused its discretion. The principle thus did not change the questions at issue—whether the district court abused its discretion when it entered the default judgments or when it denied

relief from them—nor the Court's resolution of those questions in the Commission's favor.

II. In the alternative, the Court should grant rehearing and affirm.

If the Court nevertheless meant to sever and vacate the monetary portion of the default judgments, the Commission respectfully requests that the panel rehear that issue and affirm the judgments in their entirety. In the judgment of undersigned counsel, a ruling vacating the monetary portion of the default judgments would overlook a material legal matter. As discussed above, the Court did not have jurisdiction to review the monetary portion of the default judgments when reviewing the district court's denial of Rule 60(b) relief. The only question for review was whether the district court properly denied relief under Rule 60(b)(5), which the Court correctly ruled it did. And having found no abuse of discretion in the district court's entry of default judgment in the first place, the propriety of monetary relief was not at issue in the direct appeal from the default judgments. The district court's application of standing Fourth Circuit precedent to award monetary relief did not become an abuse of discretion when the Supreme Court later changed the law. Having found no abuse of discretion and having affirmed the Rule 60(b) determination, there was nothing further to decide.

III. Resolving the issue now will conserve judicial and party resources.

The Court should resolve this matter now. Left unresolved, the ambiguity in the opinion will lead to further litigation in the district court and possibly a further appeal to this Court. The result will be delay, an unnecessary expenditure of resources, and an accordant reduction in the redress for the victims of appellants' deceit.

For the individual appellants, vacating the equitable monetary awards did not change "the bottom line" because they were also ordered to pay the same amount as a sanction for contempt. *See* slip op. 36. But the default judgments are the only orders granting monetary relief against the corporate appellants. And importantly, significant assets currently held by the receiver—including the enormous parcel of land where Sanctuary Belize is located—were originally obtained from the defaulting companies. *See generally* Receiver's Declaration, D.Ct. Docket No. 1217-2. If the Court leaves this matter unresolved, appellants have a significant incentive to litigate the matter below. No matter how the district court resolves the issue, such proceedings would lead only to delay and to diminishment of the redress fund due to litigation expenses and the cost of the receivership.

Conclusion

The Court should clarify that it intended to affirm the default judgments in full. In the alternative, the Court should grant rehearing and hold that the default

judgments are affirmed in full, specifically including the monetary judgment for victim redress.

Nov. 17, 2022

Respectfully submitted,

ANISHA S. DASGUPTA
General Counsel

JOEL MARCUS
Deputy General Counsel

s/Theodore (Jack) Metzler
THEODORE (JACK) METZLER
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3502
tmetzler@ftc.gov

EXHIBIT C

Court lacked jurisdiction to vacate it."[2] The FTC says this is "an important question" because "significant assets held by the Receiver for redress to the victims of the appellants' fraud came from the defaulting companies" under the Equitable Monetary Judgment component, and if it has been vacated, none of those assets will be available for such redress.[3]

The FTC's motion and petition are groundless. The Court was ***required*** to vacate the Equitable Monetary Judgment against the defaulting appellants by the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021). The district court issued the Equitable Monetary Judgment under section 13(b) of the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 53(b). However, the Supreme Court held in *AMG* that the FTC has no authority under section 13(b) to obtain monetary relief, and that it may obtain "a refund of money or return of property" only under section 19 of the FTCA, 15 U.S.C. § 57b(b). 141 S. Ct. at 1352. Therefore, neither the FTC nor the Receiver may obtain or retain any money, assets, or other property seized from the defaulting appellants under the Equitable Money Judgment component of the default judgments.

Furthermore, the validity of the Equitable Monetary Judgment component of the default judgments was squarely raised by appellants on appeal and fully briefed

---

[2] FTC Mot. at 2.

[3] *Id.*

by the parties. As the Court held, it had jurisdiction to decide that issue under the principles of its decision in *Ryan v. Homecomings Financial Network*, 253 F.3d 778 (4th Cir. 2001), and it decided the issue correctly.

I. STATEMENT

In its Memorandum Opinion of August 28, 2020, the district court entered default judgments against appellants John Usher, the Estate of John Pukke, and 14 corporations, who had been served but not entered appearances in this case. The district court held that the defaulting appellants violated section 5(a) of the FTCA, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. § 310.3, issued by the FTC under the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. §§ 6101-6108. *In re Sanctuary Belize Litig.*, 482 F.Supp.3d 373, 459-466 (D. Md. 2020) (J.A. 965-977). The district court ordered that, pursuant to section 13(b) of the FTCA, 15 U.S.C. § 53(b), it would award the FTC both injunctive and equitable monetary relief. *Sanctuary Belize*. at 471-472, 475 (J.A. 987-988, 993).

On January 13, 2021, the district court entered a 28-page "Final Order for Permanent Injunction and Monetary Judgment" against the defaulting appellants on the authority of section 13(b) of the FTCA. J.A. 1022-1049. Two pages of the Order were devoted to the injunctive relief. J.A. 1028-1029. Seven pages, entitled "Equitable Monetary Judgment," were devoted to the monetary relief, including an

order compelling the defaulting appellants to pay the FTC $120.2 million and to transfer ownership rights in all their assets and property to the court-appointed Receiver. *Id.* at 1030-1037.

The district court entered a "Supplemental Final Order of Judgment" on March 24, 2021, which provided that the time for appeal from its prior orders would being from that date. J.A. 1064-1065. Appellant Usher timely filed a notice of appeal on April 29, 2021, and the other defaulting appellants timely filed a notice of appeal on May 14, 2021. J.A. 1107, 1111.

Meanwhile, on April 22, 2021, the Supreme Court issued its *AMG* decision. Relying on *AMG*, the defaulting appellants moved under Fed. R. Civ. P. 60(b)(5) to amend the default judgments against them by eliminating the Equitable Monetary Judgment component of those judgments. Dist. Ct. ECF Dkt. No. 1267. The district court denied that motion on August 24, 2021. J.A. 1278. The defaulting appellants filed an amended notice of appeal on August 27, 2021, to include the district court's denial of their Rule 60(b)(5) motion. J.A. 1121.

On appeal, appellants challenged the default judgments against the defaulting appellants on two grounds. First, they argued that, in light of *AMG*, this Court should vacate the Equitable Monetary Judgment component of the default

judgments.[4] Second, they argued that the default judgments should be vacated as an abuse of the district court's discretion.[5]

The FTC responded with three arguments. First, the FTC argued that the defaulting appellants were limited to challenging the district court's exercise of discretion in entering default judgments against them and were barred from challenging the Equitable Money Judgment component.[6] Second, the FTC argued that relief from the Equitable Money Judgment was unavailable under Fed. R. Civ. P. 60(b)(5).[7] Third, the FTC argued that the district court did not abuse its discretion in entering the default judgments against the defaulting appellants.[8]

In their reply, appellants reiterated their argument that the district court abused its discretion in entering default judgments against the defaulting appellants.[9] But appellants also refuted head-on the FTC's contention that they were barred from challenging the Equitable Money Judgment component of the default judgments. Appellants relied on this Court's decision in *Ryan v.*

---

[4] Brief for Appellants at 19.

[5] *Id.* at 55-56.

[6] Brief for Appellee at 26-27.

[7] *Id.* at 28.

[8] *Id.* at 39-42.

[9] Reply Brief for Appellants at 19-24.

Homecomings Financial Network, 253 F.3d 778 (4th Cir. 2001).[10] In *Ryan*, this Court endorsed the Fifth Circuit's decision in *Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975), holding that, on appeal from the entry of a default judgment, the appellant is entitled to challenge the legal basis for the relief granted in that judgment.

In the portion of its opinion dealing with the default judgments against the defaulting appellants, the Court affirmed the default judgments insofar as they granted injunctive relief. Panel Op. at 38. However, because of the Supreme Court's decision in *AMG*, the Court vacated the Equitable Monetary Judgment component of the default judgments. *Id.*

II. ARGUMENT

A. The Court Vacated the Equitable Monetary Judgment

The Court's opinion makes clear that the Court intended to and did vacate the Equitable Monetary Judgment component of the default judgments against the defaulting appellants. The FTC's argument to the contrary is groundless.

The portion of the Court's opinion dealing with the default judgments is in its own section of the opinion, headed "C." Panel Op. at 36-38. The Court first addressed and rejected appellants' argument that the entry of the default judgments

[10] Reply Brief for Appellants at 24-25.

was an unwarranted abuse of discretion. Panel Op. at 36-37. Next, the Court addressed and agreed with appellants' argument that appellants could challenge the legal basis for the relief granted in the default judgments. *Id.* at 37-38. The Court held that, as appellants argued, the Equitable Monetary Judgment component of the default judgments had to be vacated in light of *AMG*. *Id.* at 38. However, the Court held that the injunctive relief component of the default judgments was unaffected by *AMG* and it affirmed the injunctive relief component. *Id.* The Court's exact language (Panel Op. at 38) was:

> Usher and the corporate defendants now assert that the $120.2 million judgment against them must be thrown out under *AMG Capital*. As noted, *AMG* requires vacating the $120.2 million equitable money judgment, but the default judgments are upheld because the district court did not abuse its discretion and *AMG* does not affect the injunctive relief granted in each default judgment.

According to the FTC, "the Court's reference to the 'equitable monetary judgment' most logically refers to its earlier discussion – and decision to vacate – the $120.2 million equitable monetary judgment against appellants Pukke and Baker."[11] The FTC contends that a "contrary interpretation" – namely, that the Court intended to vacate the $120.2 million Equitable Monetary Judgment component of the default judgments – "is procedurally untenable because the

[11] FTC Mot. at 7.

applicability of *AMG* to the monetary portion of the default judgments was not before the Court in either of the defaulting appellants' appeals."[12]

This is absurd. The first sentence of the last paragraph of section "C" of the Court's opinion dealing exclusively with defaulting appellants' appeals says: "Usher and the corporate defendants now assert that the $120.2 million judgment ***against them*** must be thrown out under *AMG Capital* (emphasis added)." Panel Op. at 38. Thus, the Court was addressing the defaulting appellants' challenge to the validity of the Equitable Monetary Judgment component of the default judgments ***against them***. In the very next sentence, where the Court held that, "*AMG* requires vacating the $120.2 million equitable monetary judgment," the Court obviously was referring to the $120.2 million Equitable Monetary Judgment component of the default judgments entered against the defaulting appellants. The Court was not referring to the $120.2 million judgment against the non-defaulting appellants Pukke and Baker. The Court had already vacated that judgment in section "B" of its opinion. Panel Op. at 35-36.

Moreover, the issue of the validity of the Equitable Monetary Judgment component of the default judgments entered against the defaulting appellants was squarely before the Court. Appellants raised that issue in the district court in its

[12] FTC Mot. at 8.

motion for relief under Fed. R. Civ. P. 60(b)(5), which the district court denied and from which they timely appealed. The issue was briefed in appellants' opening and reply briefs and the FTC's opposition brief. Accordingly, there is no merit to the FTC's contention that the natural and common sense reading of the Court's opinion is "procedurally untenable."

B. The Court Had Jurisdiction to Vacate the Equitable Monetary Judgment Component of the Default Judgments

The Court correctly held that, under its decision in *Ryan*, it had jurisdiction to consider and adjudicate appellants' challenge to the validity of the Equitable Monetary Judgment component of the default judgments. The FTC cannot successfully distinguish *Ryan.*

In *Ryan*, debtors filed a complaint in bankruptcy court asking it to strip off a lien from their property. The lienholder did not appear and the debtors moved for a default and a default judgment against the lienholder. The bankruptcy court clerk entered the default. However, the bankruptcy court held that the allegations in the debtors' complaint were legally insufficient and it denied a default judgment and dismissed the debtors' complaint. The district court affirmed. On appeal, the debtors argued that, because of the lienholder's default, the district court had no jurisdiction to consider the legal sufficiency of the allegations in their complaint.

This Court, endorsing the Fifth Circuit's decision in *Nishimatsu*, rejected the debtors' argument. In *Nishimatsu*, the Fifth Circuit considered whether it had

jurisdiction to consider an appeal from a ***default judgment*** by a third-party defendant "who has wilfully disregarded the rules of the judicial process and ignored the trial setting of the court below, and who suffers a ***judgment by default*** as a result of his deliberate and contumacious conduct" (emphasis added). 515 F.2d at 1202. The appellant challenged, among other things, the legal sufficiency of the relief granted in the default judgment.

The Fifth Circuit, relying on the Supreme Court's "'venerable'" decision in *Thomson v. Wooster*, 114 U.S. 104, 113 (1885), ruled that it had jurisdiction to consider the validity of the relief granted in the default judgment and reversed the default judgment. The Fifth Circuit held:

> A defendant's default does not itself warrant the court in entering a default judgment. There must be a sufficient basis in the pleadings ***for the judgment entered***. As the Supreme Court stated in the 'venerable but still definitive case' of Thomson v. Wooster: a ***default judgment*** may be lawfully entered only 'according to what is proper to be decree upon the statements of the bill, assumed to be true,' and not 'as of course according to the prayer of the bill.' ... The defendant is not held to admit facts that are not well-pleaded ***or to admit conclusions of law***. ... On appeal, the defendant, although he may not challenge the sufficiency of the evidence, ***is entitled to contest the sufficiency of the complaint and the allegations to support the judgment*** (emphasis added) (cleaned up).

515 F.2d at 1206.

The FTC argues that *Ryan* is inapposite.[13] According to the FTC, the *Ryan* principle "addresses the effect of a default, which was not at issue here; it does not address the grounds for relief from a *default judgment*, which were (emphasis in the original)."[14] In other words, the FTC maintains that, because the district court entered a default judgment – rather than merely a default – against the defaulting appellants, *Ryan* does not speak to this Court's jurisdiction to consider the defaulting appellants' challenge to the validity of the Equitable Monetary Judgment portion of the default judgments against them.

The FTC is wrong. Although *Ryan* involved a default and not a default judgment, this Court properly relied on *Ryan*'s endorsement of the principle articulated by the Fifth Circuit in *Nishimatsu* and the Supreme Court in *Thomson v. Wooster* which ***did*** involve default judgments. The principle is that, on appeal from a default judgment, the court of appeals has jurisdiction to consider the validity of the underlying relief granted in that judgment.

Therefore, contrary to the FTC's contention, this Court properly exercised its jurisdiction to vacate the Equitable Monetary Judgment component of the default judgments entered against the defaulting appellants. That means the defaulting appellants are not liable to pay the FTC $120.2 million and that neither

[13] FTC Mot. at 8-10.

[14] *Id.* at 8.

the FTC nor the Receiver may obtain or retain any assets or property seized from the defaulting appellants under the Equitable Monetary Judgment.

CONCLUSION

For these reasons, the Court should deny the FTC's motion for clarification and deny rehearing. Appellants respectfully suggest that the Court reiterate in unmistakable terms that the Equitable Monetary Judgment component of the default judgments against the defaulting appellants is vacated, and that the Receiver must return and transfer back to the defaulting appellants all money, assets, and property seized or subject to seizure from them.

Dated: November 28, 2022

Respectfully submitted,

/s/ John B. Williams
John B. Williams
Williams Lopatto PLLC
1629 K Street, N.W.
Suite 300
Washington, DC 20006
Telephone: (202) 296-1665
E-mail: jbwilliams@williamslopatto.com

/s/ Neil H. Koslowe
Neil H. Koslowe
Potomac Law Group, PLLC
1300 Pennsylvania Avenue, N.W.
Suite 700
Washington, DC 20004
Telephone: (202) 320-8907
E-mail: nkoslowe@potomaclaw.com

Counsel for Appellants

EXHIBIT D

FILED: November 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-2215 (L)
(1:18-cv-03309-PJM)

FEDERAL TRADE COMMISSION

Plaintiff - Appellee

and

MARC-PHILIP FERZAN, of Ankura Consulting Group, LLC

Receiver - Appellee

v.

ANDRIS PUKKE, a/k/a Marc Romeo, a/k/a Andy Storm, individually and as an officer or owner of Global Property Alliance, Inc. (also doing business as Sanctuary Bay, Sanctuary Belize, The Reserve, Kanantik, Laguna Palms, Bamboo Springs, Eco Futures, Eco Futures Development, Eco Futures Belize); PETER BAKER, individually and as an officer or owner of Global Property Alliance, Inc. (also doing business as Sanctuary Bay, Sanctuary Belize, The Reserve, Kanantik, Laguna Palms, Bamboo Springs, Eco Futures, Eco Futures Development, Eco Futures Belize); JOHN USHER, individually and as an officer or owner of Sittee River Wildlife Reserve (also doing business as Sanctuary Bay, Sanctuary Belize, and The Reserve) and Eco-Futures Belize Limited (also doing business as Sanctuary Bay, Sanctuary Belize, and The Reserve); BUY BELIZE, LLC, d/b/a Sanctuary Bay, d/b/a Sanctuary Belize, d/b/a The Reserve, d/b/a Kanantik, d/b/a Laguna Palms, d/b/a Bamboo Springs, a California limited liability company; BUY INTERNATIONAL, INC., d/b/a Sanctuary Bay, d/b/a Sanctuary Belize, d/b/a The Reserve, d/b/a Kanantik, d/b/a Laguna Palms, d/b/a Bamboo Springs, a California Corporation; ECO FUTURES DEVELOPMENT, d/b/a Sanctuary Bay,

d/b/a Sanctuary Belize, d/b/a The Reserve, a company organized under the laws of Belize; ECO-FUTURES BELIZE LIMITED, d/b/a Sanctuary Bay, d/b/a Sanctuary Belize, d/b/a The Reserve, a California Corporation; SITTEE RIVER WILDLIFE RESERVE, d/b/a Sanctuary Bay, d/b/a Sanctuary Belize, d/b/a The Reserve, an entity organized under the laws of Belize; GLOBAL PROPERTY ALLIANCE INC., a California corporation, also doing business as Sanctuary Bay, Sanctuary Belize, the Reserve, Kanantik, Laguna Palms, Bamboo Springs, Eco Futures, Eco Futures Development, Eco Futures Belize, Sittee River Wildlife Reserve, Buy Belize, Buy International; FOUNDATION DEVELOPMENT MANAGEMENT, INC., a California Corporation; POWER HAUS MARKETING, a California Corporation; PRODIGY MANAGEMENT GROUP LLC, a Wyoming limited liability company; EXOTIC INVESTOR, LLC, d/b/a Coldwell Banker Belize, d/b/a Coldwell Banker Southern Belize, a limited liability company organized under the laws of St. Kitts and Nevis; NEWPORT LAND GROUP, LLC, a/k/a The Reserve, a Wyoming limited liability company; SOUTHERN BELIZE REALTY, LLC, a limited liability company organized under the laws of Belize; BELIZE REAL ESTATE AFFILIATES, LLC, d/b/a Coldwell Banker Belize, d/b/a Coldwell Banker Southern Belize, a limited liability company organized under the laws of St. Kitts and Nevis; SANCTUARY BELIZE PROPERY OWNERS' ASSOCIATION, d/b/a The Reserve Propery Owners' Association, a Texas non-profit corporation; THE ESTATE OF JOHN PUKKE, d/b/a The Estate of Janis Pukke, a/k/a The Estate of Andris Pukke

Defendants - Appellants

and

CROSS-FREDERICK ASSOCIATES, LLC; FOLEY & LARDNER LLP

Respondents

UNITED STATES OF AMERICA

Creditor

JERRY BROWN; STEPHANIE BROWN; DELANEY CARLSON; THERESA EDELEN; BILL EWING; CHERYL EWING; CRAIG HIBBERT; TRISHA HIBBERT; LISA MULVANIA; RICHARD MULVANIA; CINDY REEVES; DAVID REEVES; PENNY SCRUTCHIN; THOM SCRUTCHIN; CLIFF SMITH; TERRI SMITH; PHILLIP WATFORD; ANGELA WATFORD; THE HAMPSHIRE GENERATIONAL FUND LLC; DAVID PORTMAN; HARVEY

SCHULTZ; STEVEN M. SCHULTZ; JONATHAN B. SCHULTZ; JOHN A. SARACENO

Intervenors

CHAPTER 11 TRUSTEE

Trustee

O R D E R

Upon consideration of submissions relative to the Federal Trade Commission's motions for clarification or, in the alternative, petition for panel rehearing, the court denies the motions.

Entered at the direction of Judge Wilkinson with the concurrence of Senior Judge Motz and Senior Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

AMG SERVICES, INC., et al.,

Defendants, and

PARK 269 LLC, et al.,

Relief Defendants.

Case No. 2:12-cv-00536-GMN-VCF

Las Vegas, Nevada
July 13, 2021
10:14 a.m. - 11:49 a.m.
Courtroom 7D
STATUS CONFERENCE

CERTIFIED COPY

REPORTER'S TRANSCRIPT OF PROCEEDINGS CONDUCTED VIA ZOOM
BEFORE THE HONORABLE GLORIA M. NAVARRO
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff: ***KIMBERLY L. NELSON, ESQ.***
FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, NW
Washington, D.C. 20580
(202) 326-3304

(Appearances continued on pages 2 and 3.)

Court Reporter: Amber M. McClane, RPR, CRR, CCR #914
United States District Court
333 Las Vegas Boulevard South, Room 1334
Las Vegas, Nevada 89101
(702) 384-1429 or AM@nvd.uscourts.gov

Proceedings reported by machine shorthand. Transcript produced by computer-aided transcription.

I don't necessarily plan on speaking, but I'm here if necessary. And that's on the 17-2969 case.

THE COURT: All right. Thank you.

So let's go ahead and get started. Now that the U.S. Supreme Court has clarified the authority of the FTC and the Ninth Circuit has vacated its own decision and reversed and remanded to this Court for further proceedings consistent with the Supreme Court opinion, the first thing that I want to do is explain to you my inclinations and also provide to you my questions and then open it up and give you all some time -- maybe 10, 15 minutes -- to just give me an idea of where you stand. If you need -- if your recommendation is for further briefing, I am at this time open to that idea. I just don't want to order blind briefing without hopefully giving you an opportunity to focus the issues that might still exist that need to be briefed. I think there's going to be a lot of consensus on some things, and so we don't need to waste a lot of time on that and we can focus on the real questions.

For the folks who are on the video, just to let you know, this courtroom is set up a little oddly. The camera that is facing me is in front of me right now. So I'm looking at the camera, and it looks as if I can see you but I cannot. You're actually on a big drop-down movie screen that's on the right-hand side. So when you speak, it's just my common nature to turn my face to look at you to see you speaking. So

issue when they entered into the agreement to have the Monitor preserve the assets.

And so I don't think that the monitorship itself, necessarily the agreement of the monitorship itself is -- is -- is reversed or vacated or void or anything like that. I think it's a contract y'all entered into well aware of what was -- what the potential was.

Unfortunately, I'm not sure exactly how to apply it because of the wording that was used in this case. Let me see. I can go back here and find it. So, for example, Section 1C1 terminates the collection stay because the Ninth Circuit has entered its decision on the appeal. Fine. Section 2G1.C or 2G.2 gives the Court the authority to lift the asset freeze because the Ninth Circuit panel issued a mandate that otherwise rules in a manner other than affirming the order in its entirety. So fine. That's easy. I like that.

Section 18 talks about the windup, and that occurs when the asset freeze is lifted which triggers Section 8E, as in elephant, of the agreement. And that section instructs the Monitor to take possession of and liquidate all frozen assets if the asset freeze was lifted under Section 2G1A or 2G1B.

So the issue that arises here is how a windup should proceed. Because Section 18 does not actually contemplate what the windup looks like if the FTC lost the appeal and the

Monitor cannot possess and liquidate the assets under Section 8E.

So while I realize the easy answer is, oh, just have the Court exercise its inherent authority, I don't want to necessarily to do that if I don't have to. I would prefer that there's either an agreement by the parties or some other legal reference that's provided, whether it's another case where something similarly took place. But otherwise, it's clear that we have an enormous amount of assets that need to be addressed, and I think the Monitor's recommendation is reasonable in light of the information that I have. But I realize that you-all have more information than I do at this point, so I do want to hear from you about those things.

Let me see if there's any -- I keep on going back and forth. I'm sorry. I have pages of notes here of questions, and some of them actually were already answered and so I'm jumping around.

All right. So I do plan to issue an order terminating the asset freeze, but I don't know that this will necessarily trigger the windup provision that's anticipated in Section 18 because of the way that it's written. So I think I would have to order that myself and order the -- well, so the other thing that was contemplated was the report by the Monitor, there would be a final report. I don't know if we want to just accept the status report as its final report, or

MS. NELSON: Thank you, Your Honor. Again, for the record, Kimberly Nelson for the Federal Trade Commission.

I'll attempt to cover your list, but please catch me if there's something I haven't addressed and -- and skipped over.

As far as an amended order in response to the Ninth Circuit's lack of instructions, I think all that needs to happen at this point is we don't need a Rule 60(b) motion. The Supreme Court was abundantly clear in its decision that its ruling only implicated our authority to obtain monetary relief under Section 13(b) of the FTC Act. And under our actual summary judgment order, which was Docket Number 1057 -- and the Court later amended that order because there were some additional settling parties inadvertently included in the original order -- the amended order is Docket Number 1147 -- that means the only provision essentially needs to be dealt with is Section 6 of our order. And that -- Section 6 is entitled the monetary judgment, and it contains the monetary relief as to both the -- the Tucker defendants and the Relief defendants. So I think if this Court were so inclined to enter a supplemental order, it just needs to enter an order vacating Section 6.

There are important injunctive provisions regarding conduct and other -- other future actions by the defendants, and the defendants referred to in the rest of the order were

the Tucker defendants. So those need to remain in place because the 13(b) decision from the Supreme Court did not change our ability to get injunctions to prohibit future deception. So that's my proposal regarding how to deal with the leftover piece of what to do on remand.

As far as what happens next with the Monitor, I think it might be helpful for me to kind of back up and go through a couple of things. And obviously the FTC agrees -- and we've made this position in our papers -- that the defendants -- both the Relief defendants and the Tucker defendants agreed to the Monitor order. It was very heavily negotiated, and it was -- what was entered was the result of those negotiations.

To the extent that there is any open issue regarding Section 18, I think those can -- those were addressed by the additional orders extending the monitorship. So Section 18 of the order provides that the Monitor would windup the estate upon termination of the asset freeze, which terminated by operation of the agreement. I actually don't think an additional order is necessary to lift the asset freeze. We've already notified all of the affected financial institutions, so there's not any additional notice that needs to go out to parties holding assets. Mr. McNamara holds all of the -- all of the assets that he was able to locate of the defendants. And so there shouldn't be any additional need for notice to third parties of a lifting of a freeze nor [indiscernible]

there be any need for notice amongst the --

THE COURT: Oh. Just a minute. We're losing you, Ms. Nelson.

MS. NELSON: -- in this case --

THE COURT: Ms. Nelson? I'm sorry. Let's go back to the notice was provided to all of the banks, the third parties.

Is she still frozen?

COURTROOM ADMINISTRATOR: Um-hum. I believe it's on her end because it looks like --

MS. NELSON: -- we are all in agreement that that freeze [indiscernible] in the end of June --

THE COURT: I'm sorry, Ms. Nelson. We just don't hear you. So it's -- it's freezing and then we just have silence and then a couple of words and then silence. Let's see if we can...

MS. NELSON: Okay. Let me...

THE COURT: It was great at the beginning. We were loud and clear, and unfortunately it just froze.

MS. NELSON: All right. Is that any better?

THE COURT: Yes, it is.

MS. NELSON: Okay. I think it was the FTC's network slowing us down.

So there isn't any -- what I was saying is there's no need for additional notice to third parties that might have

held assets before the freeze lifted because all those parties have been notified. The Tucker defendants and Relief defendants are -- I don't think dispute that the asset freeze has lifted. So I think the agreement speaks for itself and there is not a need for an additional asset freeze lifting order.

Regarding the -- the windup provision, the Court raised in Section 18, you know, that -- that provision, as drafted, as the Court noted, was triggered by the lifting of the asset freeze. However, the Court extended the monitorship duration and the requirement to windup the estate in the end of June of last year. So I think that extension got us to June of this year, and then the Court just entered a further extension extending it to December 22nd of 2021.

So I think at this point, you know, that essentially replaces -- the Court's various extensions replace the preamble -- the first sentence in Section 18A which set the timeline for the windup and the conclusion of the estate. So I think as long as Mr. McNamara follows the -- the agreement to conclude the estate by December 22nd of this year, there isn't really a need for any additional provisions related to that.

And with regards to the Monitor's proposals, obviously the FTC defers to the Court's wishes on those issues, but we think they're all reasonable and don't oppose

any of them.

The only point I would make is regarding disposal of documents. There are provisions in Section 10 and 12 of the Court's summary judgment order and the order containing the conduct relief that have requirements for the defendants that -- the defendants being the Tucker defendants -- regarding what documents need to be maintained and how long they need to maintain those documents, and those provisions might be implicated by the proposed destruction of any documents. Section 12 affirmatively requires them to maintain documents related to the deceptive conduct in our case. So that is the only tweak I have to the Monitor's suggestions.

And then I think, once the Monitor files his final report, it will have some direction in it related to payment of the monitorship estate, and obviously proceedings in the Southern District of New York may impact that ultimate determination. But, you know, as far as the actual distribution of the funds, I leave that more to the Monitor and his counsel to address and also to Mr. Ravi, who has appeared from the Southern District of New York Assistant U.S. Attorney's Office. But obviously the FTC does not have an interest in those funds any longer in light of the Supreme Court's ruling. But I -- I believe that covers the topics Your Honor wanted us to address.

THE COURT: All right. Thank you.

EXHIBIT F

RECORD NOS. 20-2215(L), 21-1454, 21-1520, 21-1521, 21-1591, 21-1592

In The
United States Court of Appeals
For The Fourth Circuit

FEDERAL TRADE COMMISSION,
Plaintiff – Appellee,

and

ROB EVANS & ASSOCIATES, LLC,
Receiver – Appellee,

v.

ANDRIS PUKKE; PETER BAKER; JOHN USHER; GLOBAL PROPERTY ALLIANCE, INC.; SITTEE RIVER WILDLIFE RESERVE; BUY BELIZE, LLC; BUY INTERNATIONAL, INC.; FOUNDATION DEVELOPMENT MANAGEMENT INC.; ECO FUTURES DEVELOPMENT; ECO-FUTURES BELIZE LIMITED; POWER HAUS MARKETING; THE ESTATE OF JOHN PUKKE,
Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

REPLY BRIEF OF APPELLANTS

Neil H. Koslowe
POTOMAC LAW GROUP, PLLC
1300 Pennsylvania Avenue, N.W., Suite 700
Washington, DC 20004
(202) 320-8907

Counsel for Appellants

John B. Williams
WILLIAMS LOPATTO PLLC
1629 K Street, N.W., Suite 300
Washington, DC 20006
(202) 296-1665

Counsel for Appellants

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

therefore violated the TSR at 16 C.F.R. § 310.3(a)(2)(vi). That provision of the TSR prohibits misrepresenting a "material aspect of an investment opportunity including, but not limited to, risk, liquidity, earnings potential, or profitability."[26] However, the district court expressly ***rejected*** the FTC's claim that the Pukke-Baker-Usher Appellants violated the FTCA by misrepresenting the Sanctuary Belize lots as good investments. It found that, "in the jargon of real estate sales," the Pukke-Baker-Usher Appellants' statements about the appreciation of the lots' value "was puffery pure and simple," and "puffery, that is 'exaggerated advertising, blustering, and boasting upon which no reasonable buyer would rely' is not actionable under the FTC Act."[27]

3. The FTC cannot use Rule 54(c) to increase the Pukke-Baker-Usher Appellants' monetary liability from zero to $120.2 million under section 19

Even if the TSR applies to the sale of real estate, and even if the district court correctly found that the Pukke-Baker-Usher Appellants violated the TSR, the Court should not affirm the district court's judgment of $120.2 million entered on March 24, 2021, under section 19 of the FTCA. The FTC should not be allowed to misuse Fed. R. Civ. P. 54(c) to increase the liability of the Pukke-Baker-Usher Appellants from zero to $120.2. million based on proof of, at most, one lot sale.

---

[26] FTC Br. at 37.

[27] JA 898.

As this Court has noted, "Rule 54(c) is not … without its limits. *Atlantic Purchasers, Inc. v. Aircraft Sales, Inc.*, 705 F.2d 712, 716 (4th Cir. 1983). "A party will not be given relief not specified in the complaint where the failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief. … In particular, a substantial increase in the defendant's potential ultimate liability can constitute specific prejudice barring additional relief under Rule 54(c)" (internal quotation marks and citation omitted). *Id. Accord, e.g.*, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975) ("a party may not be 'entitled' to relief [under Rule 54(c)] if its conduct of the cause has improperly and substantially prejudiced the other party"); *Baker v. John Morrell & Co.*, 382 F.3d 816, 831 (8th Cir. 2004) (same); *Kaszuk v. Bakery & Confectionary Union*, 791 F.2d 548, 559 (7th Cir. 1986) (same).

For example, in *Atlantic Purchasers*, plaintiff pleaded for and obtained a jury verdict against defendant of compensatory and punitive damages for fraud and breach of express warranty. Post-verdict, plaintiff submitted a claim for treble damages under a state statute that it had never previously mentioned or relied upon. The district court denied the claim and plaintiff appealed. On appeal, plaintiff invoked Rule 54(c) and argued that the district court erred in failing to award it treble damages under the unpleaded state statute. This Court rejected that argument and affirmed. It reasoned (705 F.2d at 717):

> Stella Maris in its pleadings and throughout the trial sought punitive damages, not treble damages. Having selected this theory, it should not be permitted for the first time after verdict to make such a fundamental change in its strategy. It has made its legal bed and the district court was completely justified in requiring that it lie in it.

Here, the FTC is attempting to increase the Pukke-Baker-Usher Appellants' liability for violating the TSR from zero – which it would be under *AMG* if the statutory authority for the district court's equitable monetary judgment were based on pleaded section 13(b) of the FTCA, to $120.2 million if it were based on unpleaded section 19. Under *Atlantic Purchasers*, such a substantial increase in the Pukke-Baker-Usher Appellants' monetary liability constitutes "specific prejudice barring additional relief under Rule 54(c)." As in *Atlantic Purchasers*, the FTC "made its legal bed" by bringing this case exclusively under section 13(b) and it must now "lie in it."

4. The TSR evidence and findings by the district court on the TSR violation are insufficient to support a judgment of $120.2 million

Even if the Court were to re-imagine that the FTC sued the Pukke-Baker-Usher Appellants under section 19 for violating the TSR, the district court's equitable money judgment of $120.2 million entered on March 24, 2021, could not be affirmed by section 19. The TSR evidence submitted by the FTC and the district court's TSR findings are insufficient under the remedial provision of section 19 to support that judgment.

Although the relief available to the FTC under section 19 includes "the refund of money or return of property, [or] the payment of damages," the court may grant only such relief as it "finds necessary to redress injury to consumers or other persons … resulting from the rule violation or the unfair or deceptive act or practice." 15 U.S.C. § 57b(b). Therefore, if the Court were to re-imagine that the FTC sued the Pukke-Baker-Usher Appellants under section 19 for violating the TSR, it could sustain only such monetary relief as the FTC proved and the district court found was "necessary to redress injury to consumers."

However, the FTC did not put ***any*** evidence into the record regarding the amount of money necessary to redress the injury to purchasers of Belize lots resulting from the Pukke-Baker-Usher Appellants violations of the TSR, and the district court did not make ***any*** such findings. On the contrary, although the district court held that the Pukke-Baker-Usher Appellants violated the TSR by selling lots to some consumers "sight unseen," the district court found it was "unnecessary to determine the precise amount of the payments made by lot owners who purchased their lots sight unseen."[28] The reason is that, because the FTC sued the Pukke-Baker-Usher Appellants under section 13(b) both for engaging in deceptive practices within the meaning of section 5(a)(1) of the FTCA and for

[28] JA 964.

violating the TSR, the district court thought that "any monetary recovery for violation of the TSR would be redundant with and subsumed by the restitution the Court will order for direct violations of the FTC Act."[29]

Thus, this case is similar to *FTC v. Washington Data Resources*, 704 F.3d 1323 (11th Cir. 2013). There the FTC sued defendants for violating section 5(a) of the FTCA and the TSR under sections 13(b) and 19. The district court, relying on *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-08 (9th Cir. 1993), noted that "Section 19(b) confers no authority to award monetary relief that exceeds redress to consumers," and observed that "the FTC concedes that the record lacks evidence to accurately determine consumer loss." *FTC v. Washington Data Resources*, 856 F.Supp. 2d 1247, 1280-1281 (M.D. Fla. 2012). Accordingly, the district court granted the FTC monetary relief solely under section 13(b). *Id.* at 1281-1282.

On appeal, the Eleventh Circuit affirmed this pre-*AMG* award of monetary relief under section 13(b). The Eleventh Circuit noted that "the FTC was entitled to seek relief under both section 13(b), 15 U.S.C. § 53(b), and section 19(b), 15 U.S.C. § 57b, of the FTC Act." 704 F.3d at 1326. However, it, too, held that, because "the FTC conceded that the record lacked evidence to accurately

[29] JA 964.

determine consumer loss," the district court properly denied the FTC monetary relief under section 19. *Id.*

Furthermore, the FTC has not cited any evidence in the record or findings as to how many consumers were injured by TSR violations. The FTC also has not cited any evidence in the record showing the FTC brought suit within three years after the Pukke-Baker-Usher Appellants allegedly violated the TSR. Section 19, at 15 U.S.C. § 57b(d), provides: "No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) of this section relates."[30] This three-year limitation period

[30] Recognizing these fatal evidentiary flaws in its section 19 argument, the FTC filed a motion in the district court on August 6, 2021, seeking leave to file an amended complaint under section 19 against the Pukke-Baker-Usher Appellants for violating the TSR (ECF Dkt. No. 1273). The district court has not acted on that motion, and in any event it lacks jurisdiction to grant it. *See, e.g. Lytle v. Griffith*, 240 F.3d 404, 407 n. 2 (4th Cir. 2001). After litigating this case for three years under section 13(b), it also would be prejudicial to the Pukke-Baker-Usher Appellants to allow the FTC to amend its complaint and try the TSR issue all over again under section 19. *See Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.2d 369, 379 (4th Cir. 2012) (affirming denial of post-judgment motion for leave to amend the complaint two and a half years after the complaint was filed because it would prejudice defendants); *Eckstein v. Balcor Film Investors*, 58 F.3d 1162, 1170 (7th Cir. 1995) ("it is too late to say 'Never Mind!' and scoot off in a different direction"). The "claims splitting" doctrine bars the FTC from filing a new lawsuit against the Pukke-Baker-Usher Appellants under section 19. *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 635 (4th Cir. 2015).

ran out on the "sight unseen" lot sale to Paul Boskovich, which occurred in 2005,[31] and is the only one that arguably was subject to the TSR.

In sum, re-imagining that the FTC sued the Pukke-Baker-Usher Appellants under section 19 for violating the TSR would not yield the FTC any monetary relief, much less can it sustain the $120.2 million judgment the district court entered on March 24, 2021. Therefore, the Court should hold the FTC to reality: (i) the FTC sued the Pukke-Baker-Usher Appellants for violating section 5(a) and the TSR exclusively under section 13(b); (ii) the district court granted the FTC an equitable money judgment of $120.2 million under section 13(b); and (iii) *AMG* invalidates that $120.2 million judgment.

B. The Default Judgment of January 13, 2021, Against the Defaulting Entities and Appellant Usher was an Abuse of Discretion and its $120.2 Million Component is Invalid Under *AMG*

The FTC has failed to defeat the Pukke-Baker-Usher Appellants' argument that the district court's default judgment of January 13, 2021, against the defaulting entities owned or controlled by Appellants Pukke and Baker and Appellant Usher was an abuse of discretion. But even if that default judgment and its injunctive component survive challenge, the $120.2 million component of that default judgment, entered under section 13(b) of the FTCA, is invalid under *AMG*.

---

[31] PX 1400 [P. Att. at 29-34].