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

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JURISDICTION

The district court had subject matter jurisdiction over the Commission's claims pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Whether the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021), that Section 13(b) of the FTC Act does not authorize monetary relief requires reversal of the district court's monetary judgments that were entered by default, or were supported by authority other than Section 13(b)?

2. Whether the district court clearly erred in finding that appellants' conduct of their business was deceptive; and whether to prove deception the Commission must show that some number of consumers were actually deceived rather than that consumers acting reasonably under the circumstances were likely to be deceived?

3. Whether due process required the district court to release to the appellants a greater amount of frozen assets than it did for attorney's fees?

4. Whether the district court abused its discretion by entering default judgment against companies and an individual who did not appear or answer the charges against them?

5. Whether the district court was barred by laches or statute from finding appellants in contempt of its prior orders, and whether its findings were supported by evidence?

6. Whether the district court's permanent injunction was time barred or is overbroad?

7. Whether the district court was barred by laches or statute from finding Pukke had not complied with the conditions of an earlier judgment or from requiring him to pay the outstanding balance of the judgment?

8. Whether the district court abused its discretion by declining to transfer the *Sanctuary Belize* case to California when identical issues were set to be litigated in Maryland as part of the consolidated *AmeriDebt* contempt case?

STATEMENT OF THE CASE

These appeals arise from a consolidated district court proceeding involving (1) an FTC enforcement action to stop a real-estate scam and recover redress for victimized consumers (*Sanctuary Belize*); and (2) contempt proceedings charging that several defendants' involvement with the scam also violated a permanent injunction and associated orders entered in an earlier FTC enforcement action (*AmeriDebt*).

A. The AmeriDebt scam and the Commission's enforcement case

In 2003, the Commission filed an enforcement action against appellant Andris Pukke and others to halt a credit-counseling scam through which they stole more than $172 million from consumers. *See FTC v. AmeriDebt, Inc.*, 373 F. Supp. 2d 558, 560-561 (D. Md. 2003). In the course of the scam, Pukke and appellant Peter Baker purchased a 12,000-acre parcel of land in Belize. D.Ct. Docket No. 1020 at 11-12 (J.A. 843-44).

1. The stipulated permanent injunction and monetary judgment in *AmeriDebt*

On the eve of the *AmeriDebt* trial, Pukke agreed to a permanent injunction and monetary judgment against him for $172 million. *Id.* at 19 (J.A. 851); *AmeriDebt* Docket No. 473 (J.A. 1123). The court suspended all but $35 million of the judgment on the condition that (among other things) Pukke assign all of his assets to the Commission, waive any claim to them, and "cooperate fully with the Commission" to effect the transfer. *AmeriDebt* Docket No. 473 at 11-12 (J.A. 1133-1134). The order provided that if Pukke failed to satisfy the stated conditions, "[t]he Judgment shall not be suspended, and defendants shall owe the FTC $172,000,000." *Id.* at 12 (J.A. 1134).

2. Pukke's failure to cooperate in *AmeriDebt*

Far from cooperating, Pukke actively obstructed the Commission's efforts to gather his assets and compensate victims in *AmeriDebt*. Pukke concealed assets he

had agreed to relinquish and lied about it so egregiously that he was charged with and pleaded guilty to obstruction of justice, ultimately serving 18 months in prison. D.Ct. Docket No. 1020 at 22 (J.A. 854); *United States v. Pukke*, No. 10-cr-734 (D. Md.) Docket No. 7 (J.A. 1181). The district court also held Pukke in contempt of the *AmeriDebt* order multiple times, first for concealing many of the same assets, including the Belize property, *AmeriDebt* Docket No. 571 at 2-5, and then again for failing to turn the property over. *AmeriDebt* Docket No. 604 at 2; D.Ct. Docket No. 1020 at 20, 166 (J.A. 852, 998). In the latter order, the court placed Pukke in coercive confinement until he purged the contempt "by complying with the [first] Contempt Order." Even then, Pukke did not comply, though he was released from confinement as described in the next section.

Despite Pukke's patent failure to cooperate with the Commission, the district court did not formally rule that the condition it placed on suspending most of the $172 million *AmeriDebt* judgment was not met and the full amount was therefore due until two orders in the proceedings below, which are now on appeal.[1]

3. The Vipulis payment

Pukke was released from confinement (with the agreement of the Commission and the *AmeriDebt* receiver) when his associate John Vipulis transferred $3.25 million to the receiver. D.Ct. Docket No. 1020 at 172-173 (J.A. 1004-1005); *AmeriDebt* Docket

[1] D.Ct. Docket Nos. 1020 & 1080 (J.A. 833-1011 & 1012-1016).

No. 625. To prevent Pukke from repaying Vipulis with assets he could otherwise apply to the *AmeriDebt* judgment, the district court imposed a condition on Pukke's release: "Pukke shall not repay all or any portion of the Vipulis Loan to Vipulis until such time as the FTC judgment is satisfied in full under the terms of the [*AmeriDebt*] Stipulated Final Judgment, as such terms and satisfaction shall be agreed to by the FTC and Pukke or determined by the Court." D.Ct. Docket No. 1020 at 173 (J.A. 1005).

Despite the efforts of the district court, the Commission, and the *AmeriDebt* receiver, Pukke and Baker retained control of the Belize property. They avoided turning the property over to the receiver by purporting to terminate their rights in the land via a company run by appellant John Usher, which then entered into a settlement with the receiver for a modest payment. *Id.* at 20-21, 168-169 (J.A. 852-853, 1000-1001). By that time, Pukke, Baker, and Usher had already begun telemarketing lots in the property as a development called "Sanctuary Bay," which ultimately evolved into Sanctuary Belize. *Id.* at 12-13 (J.A. 844-845).

B. The Sanctuary Belize scam

Sanctuary Belize was a classic land scam. Pukke, in charge of sales and marketing, lured consumers to the Sanctuary Belize website through television and internet advertising, encouraging them to submit contact information to learn more about the development. *Id.* at 13-14 (J.A. 845-846). Telemarketers then called those who responded, pitching lots as a low-risk investment that would quickly appreciate in value. *Id.*

at 35-36 (J.A. 867-868). They told consumers that every dollar from the resort's sales would be reinvested in the property, and described a host of luxury amenities that would be completed at the resort within 2-5 years, including an airstrip, a championship-caliber golf course, a casino and hotel, a medical center, and high-end boutiques and restaurants. *Id.* at 44, 50-51, 56-57 (J.A. 876, 882-883, 888-889).

The telemarketers urged consumers to attend webinars in which other telemarketers reiterated the same promises. *Id.* at 14-15, 17-18 (J.A. 846-847, 849-850). Those telemarketers pressed consumers to either purchase a property sight-unseen or reserve a property with a substantial deposit and purchase an all-inclusive tour (for $799 or $999) to see Sanctuary Belize in person. *Id.* at 15-16 (J.A. 847-848). Some consumers bought without visiting; others traveled to Belize, where Sanctuary Belize representatives repeated the same claims about the property and even encouraged consumers to buy multiple lots in order to profit from the purported "robust" resale market for the lots. *Id*. Almost all consumers who went on the trip wound up purchasing one or more properties.

Sanctuary Belize's promises were lies. The salespeople told consumers that the development did not carry any debt when it did; that every dollar from lot sales would be invested in the property when substantial funds were diverted to the appellants' pockets; that a host of luxury amenities would quickly be built when in fact they never came as promised, never came at all, or were never even seriously

planned; and that the investment was low risk with easy opportunities for resale when the investment was actually very risky and there was virtually no way to resell the lots. *Id.* at 35-72 (J.A. 867-905).

C. Procedural History

1. The *Sanctuary Belize* complaint

To stop the Sanctuary Belize scam, the Commission sued Pukke, Baker, Usher, numerous corporate entities under their control, and several other defendants. *See* D.Ct. Docket No. 114 (amended complaint) (J.A. 297). The complaint charged that Sanctuary Belize made six core false claims about the Sanctuary Belize development: (1) that the project carried no debt and was therefore a safe investment; (2) that every dollar from lot sales would be reinvested in the project; (3) that Sanctuary Belize would host a variety of luxury amenities comparable to a small American city; (4) that the project would be complete within a specific time frame, usually two to five years; (5) that lots would quickly appreciate in value; and (6) that there was a robust market for the resale of Sanctuary Belize lots. *Id.* at 6-7 (J.A. 302-303). The complaint charged that those claims were false and material to consumers' purchasing decisions, and therefore violated section 5 of the FTC Act, 15 U.S.C. § 45(a), which prohibits deceptive conduct in commerce. *Id.* at 34-37 (J.A. 330-333). The complaint further charged that the representations made in the course of telemarketing Sanctuary Belize violated the Telemarketing Sales Rule,

16 C.F.R. § 310.3, which prohibits misrepresentations in telemarketing. *Id.* at 39-44 (J.A. 335-340).

2. The *AmeriDebt* contempt charges

Along with the *Sanctuary Belize* lawsuit, the FTC filed three contempt motions in the *AmeriDebt* case, alleging (1) that Pukke, Baker, and Usher violated the *AmeriDebt* permanent injunction by engaging in deceptive telemarketing practices for Sanctuary Belize (D.Ct. Docket No. 266 (J.A. 389)); (2) that they violated the district court's orders in *AmeriDebt* to transfer the Belize property to the receiver (D.Ct. Docket No. 267 (J.A. 395)); and (3) that Pukke and Vipulis violated the order releasing Pukke from coercive confinement in *AmeriDebt* when Pukke repaid Vipulis without having satisfied the *AmeriDebt* judgment (D.Ct. Docket No. 268 (J.A. 421)). In light of the extensive factual overlap between the *AmeriDebt* contempt motions and the allegations in the Sanctuary Belize complaint, the district court consolidated the matters. D.Ct. Docket No. 261.

To prevent the dissipation of assets, the court entered an ex-parte temporary restraining order, froze the defendants' assets, and appointed a receiver. D.Ct. Docket No. 615 at 2. Following a two-week hearing in March 2019, the court issued a preliminary injunction continuing the asset freeze and injunction. D.Ct. Docket Nos. 539, 615. The court held a trial on the merits in January 2020.

3. The district court's release of funds for living and attorney expenses

Though the district court had frozen the defendants' assets, it allowed the defendants to withdraw money from frozen funds from time to time for living and legal expenses. For example, the court initially authorized any named defendant to access up to $3,000 per month from frozen funds. D.Ct. Docket No. 102. In 2019, the court additionally authorized Baker to withdraw $10,000 from his personal accounts and $20,000 from his business account for legal expenses. Docket No. 202. Before trial, the court permitted the individual defendants to withdraw an additional $30,000 for "travel, incidentals, and at least some consultations with counsel." D.Ct. Docket No. 649.

4. The defaults

More than a year after the Commission filed the *Sanctuary Belize* complaint, Usher and several corporate defendants had not answered the complaint, appeared in the proceeding, or otherwise defended themselves, despite having been properly served. The Commission sought entry of default against them. After receiving responses from Pukke and Baker, who were then proceeding *pro se*, the court held that they could not represent their corporate entities and directed the clerk to enter defaults. D.Ct. Docket No. 772 (J.A. 630). The Commission then moved for default judgment, which the district court entered at the same time as its decisions on the merits of the Commission's complaint and the contempt charges. D.Ct. Docket

Nos. 990, 1112. In the default judgment, the district court found Usher and the corporate appellees liable for Sanctuary Belize's misrepresentations and Telemarketing Sales Rule violations. It permanently enjoined the corporations from any involvement in real estate ventures and enjoined both the companies and Usher from any involvement in telemarketing and from making material misrepresentations in connection with the sale of any goods or services. D.Ct. Docket No. 1112 at 7-8 (J.A. 1028-1029). The default judgment ordered $120.2 million in monetary relief against Usher and the defaulted companies, representing the court's determination of the amount lost by duped consumers. *Id.* at 9 (J.A. 1030).

5. The district court's decision

In a 179-page opinion, the district court ruled that the defendants had violated the FTC Act and the Telemarketing Sales Rule through five of the six core claims charged in the complaint. D.Ct. Docket No. 1020 at 33-79, 132 (J.A. 855-911, 164). The court also found the Commission had proved two of the three contempt charges arising from *AmeriDebt*. *Id.* at 163-177 (J.A. 995-1009).

Sanctuary Belize Misrepresentations. The district court found that five core claims about Sanctuary Belize (of the six alleged by the Commission) were made to prospective purchasers, were likely to mislead consumers acting reasonably, and were material to their purchasing decisions. Specifically, Sanctuary Belize told consumers (1) that the development carried "no debt" and was therefore a safe in-

vestment when in fact the development did carry debt and was riskier than promised; (2) that “every dollar the developer collected from the sales of lots would go back into the development,” when in fact Pukke and the other appellants diverted millions of dollars from the project; (3) “that the completed development would boast extraordinary amenities comparable to those of a small American city,” which would “be completed within a definite time frame,” when in fact the amenities were never delivered, never delivered as promised, or never even contemplated; (4) “that the Sanctuary Belize development would be completed within a specific time frame,” which was false because Sanctuary Belize “never had sufficient funds to finish the development, luxury amenities included, in the time promised,” and “Sanctuary Belize could never be completed as promised even assuming revenue for the next five years would be at a historic high”; and (5) that there was a strong and healthy resale market for Sanctuary Belize lots, when in truth there was no resale market and never could be one. The court found that the same misrepresentations violated the Telemarketing Sales Rule.[2] *Id.* at 44, 50, 52, 61, 68-69, 132 (J.A. 876, 882, 884, 893, 900-901, 964).

[2] The court also found that appellants misled consumers by hiding Pukke’s involvement with the project. D.Ct. Docket No. 1020 at 72-79 (J.A. 904-911). On the sixth claim, the court found that while Sanctuary Belize regularly promised purchasers that their lots would appreciate, the claims were not deceptive but mere “puffery.” *Id.* at 66 (J.A. 898).

The court entered permanent injunctions tailored to the circumstances of each defendant. *Id.* at 146-156; D.Ct. Docket No. 1194 at 6-7 (J.A. 1075-1076). As to Pukke, the court found a "cognizable danger of recurring violation" based on his recurrent deceptive conduct, which included criminal convictions, multiple contempts of the *AmeriDebt* judgment, and masterminding the Sanctuary Belize scam. D.Ct. Docket No. 1020 at 147-149 (J.A. 979-981). The court enjoined Pukke from engaging in any real estate ventures, from any involvement in telemarketing, and from making material misrepresentations in connection with the sale of any goods or services. *Id.* at 149-150; D.Ct. Docket No. 1194 at 6-7 (J.A. 1075-1076). The court found Baker less culpable than Pukke and enjoined him from telemarketing and making material misrepresentations, but not from real estate ventures (other than Sanctuary Belize and a related Belize development). D.Ct. Docket Nos. 1020 at 150-151; 1194 at 6-7 (J.A. 1075-1076). The court entered the same injunctive relief against Usher, based on the evidence that he was "intimately involved" in Sanctuary Belize. D.Ct. Docket Nos. 1020 at 155-156; 1194 at 6-7 (J.A. 1075-1076).

The district court entered a compensatory monetary judgment of $120.2 million against Pukke and Baker, representing revenues from the sale of Sanctuary Belize lots less deductions for refunds and buybacks, and sales taxes paid to the Belizean government. D.Ct. Docket Nos. 1020 at 159-161; 1194 at 8 (J.A. 1077).

AmeriDebt Contempt Charges. The court also found that the Commission proved two of the three contempt charges. First, the court found that Pukke, Baker, and Usher violated the *AmeriDebt* judgment's prohibition on the use of deceptive claims in telemarketing through the same false promises described above. D.Ct. Docket Nos. 1120 at 162-164; 1113 (J.A. 994-997; 1050). The court found that the harm from the telemarketing contempt was equal to the consumer losses from the FTC Act violations and imposed compensatory sanction of $120.2 million. D.Ct. Docket Nos. 1109 at 1-2; 1113 at 3 (J.A. 1017-1018; 1052).

The court also found Pukke in contempt for violating the terms of his release from coercive confinement by repaying the amount Vipulis had paid to secure that release without having satisfied the full amount of the *AmeriDebt* order. D.Ct. Docket No. 1020 at 172-177 (J.A. 1004-1009). In the course of that decision, the court formally held that Pukke had not cooperated with the Commission in turning over his assets as required by the *AmeriDebt* order, and that he therefore owed the full amount of the judgment rather than the suspended amount. *Id.* at 175-176 (J.A. 1007-1008). Vipulis had earlier paid the Commission $4.1 million to settle charges against him, and the court therefore entered a compensatory contempt sanction of approximately $148,000, representing the difference between Vipulis's settlement

payment and the amount Pukke had diverted from Sanctuary Belize lot sales to repay him.[3] *Id.* at 176-177 (J.A. 1008-1009).

6. The *AmeriDebt* enforcement order

The district court's decision that Pukke did not fulfill his obligation to cooperate under the *AmeriDebt* order—and that he consequently owes the full judgment of $172 million—is reflected both in its final contempt order, D.Ct. Docket No. 1113 at 3 (J.A. 1052), and in a separate order involving payments to a class that had sued Pukke in connection with the *AmeriDebt* scam, D.Ct. Docket No. 1080 at 2-3 (J.A. 1013-1014).

7. These appeals

Pukke and Baker appeal from the $120.2 million monetary judgment and permanent injunction entered as a result of their FTC Act and Telemarketing Sales Rule violations, D.Ct. Docket No. 1194 (J.A. 1070-1093).

Pukke, Baker, and Usher appeal from the separate $120.2 million monetary judgment entered as a result of the telemarketing contempt, D.Ct. Docket No. 1113 (J.A. 1050-1053).

Pukke appeals the contempt finding and $148,000 judgment arising from the Vipulis payment. *Id.* He also appeals from the separate order that he pay the re-

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[3] The court found that the Commission had not proved the third contempt charge—that Pukke and Baker had violated the order to turn over the Sanctuary Belize parcel through a series of sham transactions that tricked the *AmeriDebt* receiver into releasing the property. *Id.* at 165-172.

maining balance of the $172 million *AmeriDebt* judgment, D.Ct. Docket No. 1080 (J.A. 1012-1016).

Usher and the corporate appellants appeal from the $120.2 million default judgment. D.Ct. Docket No. 1112 (J.A. 1022-1053).

SUMMARY OF THE ARGUMENT

The orders on appeal ultimately boil down to (1) the permanent injunctions to prevent further violations of the FTC Act and the Telemarketing Sales Rule; (2) the three overlapping $120.2 million judgments; and (3) the order that Pukke pay the outstanding balance of the *AmeriDebt* judgment. The appellants most assiduously challenge two of the $120.2 million monetary judgments and the separate order that Pukke pay the outstanding balance of the *AmeriDebt* judgment on the ground that they cannot stand in the wake of the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021), that Section 13(b) of the FTC Act does not authorize monetary relief. Importantly, however, they do not argue that *AMG* requires the same result for the $120.2 million contempt sanction. As we show, all of the district court's monetary orders are sound notwithstanding *AMG*. But because of the contempt sanction, *AMG* would not change the bottom line for the appellants even if it were cause to reverse the other orders. Accordingly, if the Court sustains the contempt sanction, it need not even reach the effect of *AMG* on the overlapping judgments.

If the Court reaches the issue, appellants' claim that *AMG* automatically requires reversal fails. *AMG* addressed only district courts' remedial authority under Section 13(b) of the FTC Act. But the one monetary judgment on appeal that rests on the authority of Section 13(b) may be upheld under Section 19 of the FTC Act, which, as the Supreme Court recognized in *AMG*, expressly authorizes monetary relief to remedy violations of FTC rules such as the Telemarketing Sales Rule.

Separately, Usher and the corporate appellants get no help from *AMG* because the $120.2 million judgment against them was entered as a consequence of their default, and they may not challenge its underlying basis now. Nor can Pukke invoke *AMG* to avoid liability for the outstanding balance of the $172 million *AmeriDebt* judgment because that judgment is not on appeal here.

The appellants' other arguments all fail. The evidence amply supports the district court's findings that they used deceptive claims to sell Sanctuary Belize lots, and appellants' recitation of some contrary evidence does not show those findings were erroneous. The Commission proved appellants' promises were both false and material to purchasers' decisions, and it was not required to show that any particular number or percentage of consumers were actually deceived. The appellants are incorrect that the Telemarketing Sales Rule does not apply to real estate because (even if that were true) they promised considerable services in addition to bare lots,

and their argument that the rule was not violated ignores the district court's findings.

The district court released funds to pay for the appellants' lawyers, and it acted well within its discretion in declining to release even more funds. The court properly entered default judgment against Usher and the appellant companies who never appeared to defend themselves. Neither the statute of limitations nor the doctrine of laches barred the district court from entering a permanent injunction, from finding the appellants in contempt, or from determining that Pukke did not cooperate as required by the *AmeriDebt* judgment and therefore must pay its outstanding balance. Lastly, the district court acted well within its discretion when it determined not to transfer the case to California to avoid duplicative trials on the same facts.

STANDARD OF REVIEW

This Court "review[s] a judgment resulting from a bench trial under a mixed standard of review—factual findings may be reversed only if clearly erroneous, while conclusions of law are examined de novo." *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346, 357 (4th Cir. 2014).

ARGUMENT

I. *AMG* DOES NOT CHANGE HOW MUCH APPELLANTS OWE OR UNDERMINE THE RECEIVERSHIP.

A. The telemarketing contempt order alone justifies both the $120.2 million judgment against Pukke, Baker, and Usher, and the receivership.

The appellants first ask the Court to "summarily reverse" three orders: (1) the $120.2 million judgment against Pukke and Baker to remedy the harm from their false promises to Sanctuary Belize purchasers (D.Ct. Docket No. 1194 (J.A. 1070)); (2) the $120.2 million default judgment against Usher and the appellant companies for the same violations (D.Ct. Docket No. 1112 (J.A. 1022)); and (3) the order that Pukke pay the outstanding balance of the $172 million judgment in *AmeriDebt* (D.Ct. Docket No. 1080 (J.A. 1012)). They argue that no other course is permissible in the wake of the Supreme Court's holding that Section 13(b) of the FTC Act grants authority to enter a permanent injunction, but not monetary relief. Br. 18-19; *see AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021). They argue further that *AMG* obliges the Court to nullify the district court's appointment of a receiver and everything the receiver has done, and to require Sanctuary Belize lot purchasers to resume payments to the appellants. Br. 19-21.

But appellants left a gaping hole in their position: they do not argue that *AMG* requires reversal of the $120.2 million contempt sanction against them (D.Ct. Docket No. 1113 (J.A. 1050-1053)). *See* Br. 19-21. Unless the Court reverses that

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

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[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

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[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

that the Commission could not use Section 19 against telemarketers "[b]ecause the FTC currently does not have any rule concerning telemarketing," but stated that the "lack of FTC authority would be changed by the subject legislation." H.R. Rep. No. 102-688 (1992).

The appellants thus would be incorrect to argue that Telemarketing Act limits the enforcement of the Telemarketing Sales Rule to actions seeking civil penalties. The section they have relied on does not state that the rule may only be enforced through suits for a civil penalty; to the contrary, it uses expansive language, directing the Commission to enforce the rule "in the same manner, by the same means, and with the same jurisdiction, power, and duties as though *all* applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act." 15 U.S.C. § 6105(b) (emphasis added). And while it states that those who violate the Rule "shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act," that language does not directly or even indirectly limit the Commission's enforcement authority. To the contrary, that language (and similar language in other laws) is meant to give fair notice that violators may be subject to civil penalties, which have been treated as similar to criminal sanctions for purposes of notice. *See, e.g.*, *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997); *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329-1330 (D.C. Cir. 1995); *Diebold, Inc. v. Mar-*

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).

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[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.

D. *AMG* does not affect the district court's order that Pukke pay the remaining balance due from *AmeriDebt*.

Pukke argues that *AMG* requires the Court to reverse the district court's order that he pay the remaining balance of the judgment he agreed to pay in the stipulated *AmeriDebt* order, D.Ct. Docket No. 1080 (J.A. 1012). The claim fails because the *AmeriDebt* order is not on appeal or subject to review here, and Pukke waived any right to contest its validity.

The $172 million judgment against Pukke in *AmeriDebt* is not on appeal here. It was entered by stipulation in 2006; Pukke agreed to the order; and he did not appeal its basis for monetary relief or any other aspect of it. To the contrary, he affirmatively agreed to "waive all rights to seek judicial review or otherwise challenge or contest the validity of [the] Order." *AmeriDebt* Docket No. 473 at 3 (J.A. 1125). The order that Pukke appeals is a postjudgment order that interprets and enforces the *AmeriDebt* judgment, finding that (1) Pukke did not comply with conditions on which suspension of all but $35 million of the judgment was premised; and (2) he is liable to the Commission for the unpaid portion of the original judgment according to its plain terms. D.Ct. Docket No. 1080 (J.A. 1012).

Pukke's *AMG* argument effectively seeks to challenge not the postjudgment order but instead the *AmeriDebt* judgment itself, claiming that its original basis for monetary relief is no longer valid after the *AMG* decision. That challenge is not open to him, however, under "the rule that appeal from a postjudgment order does

not revive a lost opportunity to appeal the judgment." 15B Wright & Miller, Fed. Prac. & Proc. § 3916 (2d ed.). It is equally foreclosed by Pukke's express waiver of "all rights to seek judicial review or otherwise challenge or contest the validity of [the] Order." *AmeriDebt* Docket No. 473 at 3 (J.A. 1125).

II. THE EVIDENCE AND THE LAW SUPPORT THE DISTRICT COURT'S FINDINGS THAT APPELLANTS VIOLATED THE FTC ACT AND THE TELEMARKETING SALES RULE.

Beyond their reliance on *AMG*, appellants argue that the district court's liability findings should be reversed because (1) the Commission did not adduce sufficient evidence of their deceptive conduct, Br. 22-42; and (2) the Telemarketing Sales Rule does not apply because the appellants did not sell "goods or services" and because most of the sales were completed in person, Br. 42-48. As noted above, the Court "review[s] the district court's factual findings for clear error and its legal conclusions de novo." *United States ex rel. Modern Mosaic, Ltd. v. Turner Constr. Co.*, 946 F.3d 201, 208 (4th Cir. 2019). There was no error here.

First, appellants' claim that the Commission could prove deception only by showing some threshold number or percentage of consumers were actually misled by promises about Sanctuary Belize misstates the law, and appellants do not otherwise come close to showing that the district court's factual findings amount to clear error.

Second, the argument that the Telemarketing Sales Rule does not cover the deceptive marketing of Sanctuary Belize lots was not raised below and is therefore waived; it is also incorrect. And the contention that the Telemarketing Sales Rule does not apply because all but one Sanctuary Belize sale was made "in-person" is contrary to the district court's factual findings.

A. The district court correctly found that the Commission proved deception.

The district court found that the appellants violated the FTC Act's prohibition on the use of deceptive acts or practices by making five core misrepresentations in their marketing of Sanctuary Belize lots, that each of the representations was likely to mislead consumers acting reasonably under the circumstances, and that the misrepresentations were material to consumers' decisions to purchase Sanctuary Belize lots. D.Ct. Docket No. 1020 at 33-64, 68-72 (J.A. 865-896, 900-904); *see* 15 U.S.C. § 45(a)(1). The Commission produced, as the district court put it, "'an ocean, a continent of evidence' to the effect that [Sanctuary Belize] misled consumers." *Id.* at 33 (J.A. 865) (quoting Mark Twain). The evidence included sales scripts found at Sanctuary Belize's headquarters, depositions and in-court testimony from Sanctuary Belize salespeople and lot purchasers, recorded webinars, recordings of calls by investigators posing as potential purchasers, and other marketing materials. *Id.* at 35-37, 44, 50-52, 56-57, 68 (J.A. 867-869, 876, 882-884, 888-889, 900).

The appellants do not seriously grapple with the weight of evidence cited by the district court or attempt to show that the court clearly erred in finding that the representations about Sanctuary Belize were false. Instead, they argue primarily that the Commission can show deception under the FTC Act only if it adduces evidence that some threshold number or percentage of consumers were actually misled by their misrepresentations, and that the Commission did not do so. Br. 23-27. The appellants variously describe their proffered requirement as "a legally significant minority," "a substantial percentage," "a substantial number," or a "threshold minimum," Br. 23, 24, 26, and they claim that the Commission has adhered to such a requirement "for over 50 years." Br. 23. But they have misstated the law.

To establish a violation of the FTC Act, the Commission must show that the defendants made (1) a representation that is (2) likely to mislead consumers and (3) material to their decision to purchase. *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *see also*, *e.g.*, *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015); FTC, *Policy Statement on Deception*, 103 F.T.C. 110, 174 n.4 (1984). In certain cases (particularly those involving false advertising), the first element—proving that there was a representation in the first place—requires the Commission to determine whether an ad conveys a particular message. To make that determination, the Commission considers "whether at least a *significant minority* of reasonable consumers would likely interpret the ad to assert the claim." *POM Wonderful*,

777 F.3d at 490 (cleaned up) (emphasis added). Thus, in *ECM Biofilms, Inc. v. FTC* (cited by appellants at Br. 23, 24), the question was whether the evidence supported the Commission's conclusion that an unqualified claim that plastic is "biodegradable" would be understood by at least a "significant minority of consumers" to convey that the material will completely break down within five years. 851 F.3d 599, 610 (6th Cir. 2017).

But this case does not involve the first element of the deception test; there is no dispute over whether appellants made the representations challenged here, or what they meant.[10] The "significant minority" standard therefore plays no role in the deception inquiry. Rather, this case turns on the second prong of the test, which asks whether the defendants' representations were likely to mislead consumers acting reasonably under the circumstances, not whether "a substantial number of Sanctuary Belize purchasers were misled." Br. 24. The district court found that the appellants' claims about Sanctuary Belize were likely to mislead consumers and were material to consumers' decision to purchase. The law required no more.

To the extent the appellants argue that the Commission failed to prove that enough consumers actually *relied* on their misrepresentations, that is not required

[10] To the extent the district court found it necessary to consider how consumers acting reasonably would understand the appellants' claims about Sanctuary Belize, D.Ct. Docket No. 1020 at 37-38, 39-40, 49 (J.A. 869-872, 881) the appellants do not challenge its conclusions.

either. The FTC Act forbids "deceptive acts or practices," 15 U.S.C. § 45(a), and "[i]t would be inconsistent with the statutory purpose for the court to require proof of subjective reliance by each individual consumer." *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1316 (8th Cir. 1991). Accordingly, "[a] presumption of actual reliance arises once the Commission has proved that the defendant made material misrepresentations, that they were widely disseminated, and that consumers purchased the defendant's product." *Figgie Int'l v. FTC*, 994 F.2d 595, 605-606 (9th Cir. 1993). Nor does testimony that some Sanctuary Belize purchasers were satisfied (Br. 27-29) excuse the appellants' empty promises.[11] *See, e.g.*, *FTC v. Tashman*, 318 F.3d 1273, 1277-1278 (11th Cir. 2003) (rejecting the argument that "satisfied customers" excuse a defendant's material misrepresentations).

The appellants' other challenges to the district court's findings do not show clear error. For example, they claim that their promise to reinvest "every dollar"

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[11] Appellants falsely claim that the Commission's counsel acknowledged that a majority of Sanctuary Belize purchasers were satisfied with their purchase and that the Commission must show a specific percentage of consumers were misled. Br. 24-25. In the passage cited, counsel responded to the claim that most purchasers never heard the misrepresentations. Counsel disputed that claim by noting that the purchasers' testimony about what they were promised was consistent with Sanctuary Belize's sales scripts and the testimony of Sanctuary Belize employees. Feb. 12, 2020 Tr. at 159-161 (J.A. 808-810). Their claim that the receiver testified that most purchasers were satisfied (Br. 25 & n. 57) is also false. The receiver testified only that during a one-month period identified by Pukke—in what the receiver believed was "clearly an orchestrated email campaign"—most of the communications he received from lot purchasers were positive. Jan. 23, 2020 Tr. at 95-96 (J.A. 667-668).

from lot sales back into the development excluded interest earned on revenue, and all of the diverted funds came from interest. Br. 38. But they do not explain why the district court was required to credit testimony to that effect in the face of what it considered "incontrovertible evidence that Pukke diverted enormous sums of sales revenue away from the development." D.Ct. Docket No. 1020 at 45 (J.A. 877). Similarly, their claim that their sales scripts changed in response to changing circumstances and that their promises of amenities were true when made, *e.g.*, Br. 34-36, simply ignores the district court's finding that the amenities "were definitely promised" and "not merely aspirational." D.Ct. Docket No. 1020 at 53 (J.A. 885). And even if appellants were correct that the so-called "Vision Book" was shown to consumers only after they purchased, Br. 39, it would not negate the mountain of evidence showing the promises of luxury amenities that appellants made to lot purchasers. D.Ct. Docket No. 1020 at 50-51 (J.A. 882-883). In sum, the appellants have shown neither clear error of fact nor any erroneous legal conclusion.[12]

B. The district court correctly found that appellants violated the Telemarketing Sales Rule.

The district court held that appellants violated the Telemarketing Sales Rule, 16 C.F.R. §§ 310.3(a)(2)(iii) & 310.3(a)(2)(vi), by making misrepresentations in their

[12] The appellants' claim that their proffered expert showed that Sanctuary Belize lots are worth more than purchasers paid for them (Br. 29-30) is not supported by the record; the district court did not accept that witness as an expert on the matter and the appellants do not argue there was any error in that decision.

telemarketing calls about (a) material aspects of Sanctuary Belize's "goods or services;" and (b) material aspects of an "investment opportunity." D.Ct. Docket No. 1020 at 30-31, 132 (J.A. 862-863, 964); *see* Amended Complaint, D.Ct. Docket No. 114 at 39-40, 41-42 (J.A. 335-338).

The appellants argue that the Telemarketing Sales Rule does not apply because Sanctuary Belize lots are not "goods or services" as defined by the Rule and the Telemarketing Act, and also that Sanctuary Belize's misrepresentations are exempt from the Rule under 16 C.F.R. § 310.6 because (they claim) all but one Sanctuary Belize customer completed their lot purchases during face-to-face meetings in Belize. They are wrong on both counts.

First, appellants waived the argument that Sanctuary Belize's sales were not "goods and services" by failing to raise it below. *Dean v. Jones*, 984 F.3d 295, 303 n.3 (4th Cir. 2021) (arguments not made below are "forfeited on appeal."); *see also Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 242 (4th Cir. 2009) ("Absent exceptional circumstances, of course, we do not consider issues raised for the first time on appeal.").

The argument is also incorrect. The appellants' offering to sell Sanctuary Belize lots qualifies as "goods or services" because the lots were marketed with express claims that the lots would be part of an extensive planned community with resort facilities and extensive luxury amenities. As numerous state courts have held, even

where the sale of real property alone is not considered "goods or services," it may nevertheless qualify when accompanied by promises to provide goods or services beyond the land itself. *E.g.*, *Polonetsky v. Better Homes Depot, Inc.*, 760 N.E.2d 1274 (N.Y. 2001); *Fogelson v. Wallace*, 405 P.3d 1012, 1031 (N.M. 2017) (lot with a promise to build a home); *Brown v. Liberty Clubs, Inc.*, 543 N.E.2d 783, 786-787 (Ohio 1989); *McKinney v. Indiana*, 693 N.E.2d 65, 71 (Ind. 1998); *Delaware ex rel. Brady v. Wellington Homes, Inc.*, No. Civ. A. 99C-09-168, 2003 WL 22048231, *4 (Del. Super. Ct. Aug. 20, 2003).

Moreover, when it passed the Telemarketing Act, Congress intended "the phrase 'goods or services' . . . to be broadly construed so as not to exclude activities currently addressed by the FTC." S. Rep. No. 103-80 at 8 (2003). By that time, the Commission had long addressed unfair or deceptive acts in the sale of real estate. *See*, *e.g.*, *Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1437-1439 (9th Cir. 1986) (affirming order against misrepresentation in the sale of home sites in West Texas); *AMREP Corp. v. FTC*, 768 F.2d 1171, 1175 (10th Cir. 1985) (affirming Commission's "jurisdiction to regulate interstate land sales"). The language of the Rule also makes clear that "goods and services" goes beyond movable goods by prohibiting telemarketing misrepresentations regarding "[a]ny material aspect of an *investment opportunity*." 16 C.F.R. § 310.3(a)(2)(vi) (emphasis added). Here, appellants falsely touted Sanctuary Belize lots as good investments, and the Commis-

sion charged them with violating that very section. D.Ct. Docket No. 114 at 39-43 (J.A. 335-339).

Second, the appellants are incorrect that the Telemarketing Sales Rule was not violated because many sales were completed in person when consumers visited Belize. Br. 45-48. Appellants base that argument on the factual claim that, with one exception, “every single purchase at Sanctuary Belize” was made after a face-to-face meeting. Br. 45. The district court held otherwise, finding as fact that “some consumers did purchase lots sight unseen, and indeed that [Sanctuary Belize] salespeople were encouraged to sell lots sight unseen.” D.Ct. Docket No. 1020 at 131. The court relied on evidence and testimony that Sanctuary Belize wanted sales people to close lot purchases over the phone, that sales scripts encouraged them to do so, that they told consumers that 23% of lots were sold over the phone, and that some sales people did close sales over the phone. *Id.* at 131-132. The appellants’ bare assertion that there was only one such sale does not show that the district court’s findings were clear error.

III. APPELLANTS WERE NOT DENIED DUE PROCESS.

The appellants next argue that they were denied due process because the district court did not allow them to access frozen assets to hire trial counsel. Br. 48-54. In fact, the court did release substantial amounts of frozen assets, though not enough

to satisfy appellants. *E.g.*, D.Ct. Docket Nos. 102, 202, 649. They had no right to additional sums.

"There is no constitutional right to counsel in a civil case." *Adir Int'l, LLC v. Starr Indem. & Liab. Co.*, 994 F.3d 1032, 1038-1039 (9th Cir. 2021) (cleaned up). Although courts have recognized a due process right to *retained* counsel, they have construed the right "very narrowly," to require little beyond that the court accept filings from and allow the client to consult with the attorney. *See id.* (collecting cases). In particular, the limited due process right to hire counsel does not oblige district courts to unfreeze assets to pay for an attorney. *CFTC v. Noble Metals Int'l, Inc.*, 67 F.3d 766 (9th Cir. 1995). The district court may exercise its discretion to release funds (as the district court did here), but it is not an abuse of discretion to deny such a request, particularly where, as here, the frozen assets are not sufficient to cover the anticipated amount of redress to victims of misconduct. *See id.*; *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989); *CFTC v. Morse*, 762 F.2d 60, 63 (8th Cir. 1985).

IV. DEFAULT JUDGMENT WAS PROPERLY ENTERED AGAINST USHER AND THE CORPORATE APPELLANTS.

The district court did not abuse its discretion when it entered default judgment against John Usher and the corporate appellants. *See* Br. 55. With regard to the corporate entities, appellants argue that the district court placed Pukke and Baker in a catch-22 by denying their requests to access funds to hire counsel yet also for-

bidding them to represent the companies on their own. Br. 7. With regard to Usher, they argue only that the district court's asset freeze deprived him of the funds needed to hire counsel. *Id.* Neither argument has merit.

A. Pukke and Baker's companies did not default for lack of resources.

Pukke and Baker's companies failed to appear in district court because Pukke and Baker chose not to have them appear. Pukke and Baker were both represented by counsel in the early part of the proceedings but neither directed their attorneys to enter appearances on behalf of their companies. Pukke's attorneys appeared soon after the complaint was filed and participated in the case for more than eight months, including by filing an answer on Pukke's behalf. *See* D.Ct. Docket Nos. 43-46, 175, 515, 530. Pukke offers no reason why his attorneys could not have represented his companies and prevented them from defaulting. Baker's failure to have his companies represented is even more egregious: he asked the district court to release funds to pay for both their legal defense and his, and the court *granted* the motion, releasing $20,000 from Baker's companies' accounts and $10,000 from his personal accounts. *See* D.Ct. Docket Nos. 198, 202. But no attorney ever appeared for Baker's companies because Baker decided to spend all of the money on his own defense and none of it on theirs. Indeed, Baker told the district court that he made a "strategic calculation . . . to focus on [his] personal defense." D.Ct. Docket No. 538 at 15. The court released an additional $30,000 in advance of the

trial in January 2020, *see* D.Ct. Docket No. 649, yet Baker continued to represent only himself while his companies never appeared.

Nor can Pukke and Baker—neither of them lawyers—claim any error in the district court's refusal to let them represent their companies on their own: "It has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel." *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Coun.*, 506 U.S. 194, 202 (1993) (footnote omitted). The companies' default thus resulted directly from Pukke's and Baker's choices, not from any abuse of the district court's discretion.

B. The asset freeze did not cause Usher to default.

Usher's claim that he was prevented from appearing because the asset freeze deprived him of funds to hire counsel (Br. 7) is wrong for multiple reasons. To begin with, Usher did not need an attorney to appear, as amply demonstrated not only by Pukke, Baker, and the other defendants who appeared *pro se*, but also by Usher himself, who appeared on his own behalf in district court *after* judgment was entered against him. *See* D.Ct. Docket Nos. 1171, 1190, 1208. But even if he had needed an attorney, Usher never asked the court to release funds for his defense, as other defendants like Baker successfully did. If that weren't enough, Usher was in fact represented by counsel. As the district court acknowledged, Usher's attorney Joseph Rilotta was served with court filings throughout the proceedings

even though "he never formally appeared on Usher's behalf." D.Ct. Docket No. 1020 at 135 n.54 (J.A. 967). In short, Usher defaulted because he chose to, not because he had to.

V. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS CONTEMPT HOLDINGS.

The appellants make multiple arguments that the district court abused its discretion in holding them in contempt of the *AmeriDebt* permanent injunction's ban on deceptive telemarketing. None of them is persuasive. Pukke, Baker, and Usher argue that contempt was time barred by statute or principles of equity, Br. 56-64, but neither the statute of limitations nor laches applies to a district court's enforcement of its own order. They also argue that the contempt finding was not supported by evidence, but the record shows otherwise. Separately, Pukke offers multiple reasons why he should not have been held in contempt for violating the terms of his release from coercive confinement, but they also lack merit.

A. 28 U.S.C. § 2462 does not apply to the telemarketing contempt.

Pukke, Baker, and Usher first argue that the telemarketing contempt was barred by the five-year statute of limitations stated in 28 U.S.C. § 2462. Br. 56. Section 2462 requires that a "proceeding for the enforcement of any civil fine, penalty, or forfeiture" be "commenced within five years from the date when the claim first accrued." Appellants argue that the contempt sanction qualifies as a "penalty" under the Supreme Court's decision in *Kokesh v. SEC*, 137 S.Ct. 1635 (2017), and that

the "claim" for contempt accrued more than five years before the Commission's complaint. Br. 57-58.

That is incorrect. As appellants acknowledge, in *Kokesh* the Supreme Court held that under Section 2462, a sanction may be "a 'penalty' if the wrong sought to be redressed is 'a wrong to the public' for the violation of '*public laws*' and if it is imposed, at least in part, 'for the purpose of deterring infractions of *public laws*,' which is 'inherently punitive.'" Br. 57 (quoting *Kokesh*, 137 S.Ct. at 1642-1643) (emphasis added). The contempt sanction here does not qualify as a "penalty" because the sanction is compensatory rather than punitive and because the wrong it addressed was appellants' violation of a court order—the final order in *AmeriDebt*—not a "public law."

In *Kokesh*, the Supreme Court was clear that "a sanction operates as a penalty only if it is sought for the purpose of punishment, and to deter others from offending in like manner—as opposed to compensating a victim for his loss." 137 S. Ct. at 1642 (cleaned up). The contempt sanction here is not a penalty on that understanding because it was expressly intended to compensate victims for their loss. The district court explained that it was imposing a "compensatory sanction," that "the injured parties are the lot purchasers in the present litigation who were deceived by Pukke, Baker and Usher's contumacious conduct," and that "a monetary

sanction . . . is appropriate for the injuries to purchasers caused by" the contempt. D.Ct. Docket No. 1109 at 1-2 (J.A. 1017-1018).

More fundamentally, the statutory structure shows that Section 2462 does not apply to an action for contempt at all. Section 2462 is contained within Title 163 of the U.S. Code, which addresses "Fines, Penalties and Forfeitures." Title 163 begins by authorizing a civil action for the recovery of a "civil fine, penalty or pecuniary forfeiture," 28 U.S.C. § 2461, and then limits—in Section 2462—the time for commencing such proceedings. Importantly, however, the civil action authorized by Section 2461, and to which Section 2462 therefore applies, is available "[w]henever a civil fine, penalty or pecuniary forfeiture is prescribed *for the violation of an Act of Congress*." 28 U.S.C. § 2461(a) (emphasis added). Again, the contempt sanction here was ordered for the violation of a court order, not the violation of a "public law" and not the violation of an act of Congress. Section 2462's limitations period therefore does not apply.[13]

B. Laches does not apply to the telemarketing contempt.

The appellants next assert that laches barred the district court from entering a contempt sanction "15 years after their claimed violation occurred." Br. 59. The

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[13] Section 2462 does not apply to the contempt sanction against Usher for another reason: the limitations period only applies "if, within the same period, the offender . . . is found within the United States," 28 U.S.C. § 2462, but Usher has been a resident of Belize since the beginning of the Sanctuary Belize scam. *See* Br. 75 (arguing that Usher "reside[s] outside the United States (in Belize)").

applicability of laches "is primarily left to the sound discretion of the trial court, and [the court of appeals] may not reverse unless it is so clearly wrong as to amount to an abuse of discretion." *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990) (cleaned up). The district court was correct to deny the appellants' laches defense for multiple reasons.

To begin with, laches is not properly applied to the Commission's contempt charge. The Supreme Court has "consistently adhered" to "the principle that laches is not a defense against the sovereign." *Costello v. United States*, 365 U.S. 265, 281 (1961). Generally, the United States "is not bound by . . . laches in enforcing its rights." *Chevron, U.S.A., Inc. v. United States*, 705 F.2d 1487, 1491 (9th Cir. 1983). Appellants' laches claim fails for that reason alone.

Even if laches could apply, the appellants have failed to establish the required elements. "Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello*, 365 U.S. at 282. The appellants show neither element.

They do not argue that the Commission lacked diligence or unreasonably delayed seeking contempt sanctions; they simply say that the telemarketing contempt sanction was entered "15 years after their claimed violation occurred." Br. 59. But "[d]elay alone cannot warrant laches." *McKeon Products, Inc. v. Howard S. Leight & Assocs., Inc.*, 15 F.4th 736, 742 (6th Cir. 2021). The party asserting laches must

show "the plaintiff delayed inexcusably or unreasonably." *White*, 909 F.2d at 102 (internal quotation marks omitted).

There was no unreasonable delay here because Pukke, Baker, and Usher *hid* Pukke's involvement with Sanctuary Belize from the Commission. As the district court found, that deception began with using a shell buyer to release the *AmeriDebt* receivership's claim to the property, D.Ct. Docket No. 1020 at 21-22 & n.21 (J.A. 853-854). Later, it included testimony and affidavits in another matter, seeking "to convince the Court that Pukke's role in the Sanctuary Belize development was only very minor." *Id.* at 22 (J.A. 854). And while Pukke in fact "was effectively the Chief Executive Office in control of the entire Sanctuary Belize operation," he "frequently undertook either to deny or minimize to others his role in the development." *Id.* at 23 (J.A. 855). Pukke's own obfuscations thus prevented the Commission from learning of his contempt. At the same time, the Commission diligently enforced the *AmeriDebt* order, seeking contempt against Pukke for other violations on multiple occasions, as described at pages 3-4 above. In addition, it is not true that the contempt was based on 15-year-old conduct. As the district court found, the appellants' false promises about Sanctuary Belize were made continuously from the inception of the project until after the Commission filed suit. *Id.* at 33 (J.A. 865).

Appellants' repeated attempts to hide their unlawful conduct from discovery would bar equitable relief even if they had shown some fault of the Commission. A

party seeking an equitable remedy "must come with clean hands." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). Given their efforts to evade detection, appellants' hands are particularly dirty.

Nor have the appellants shown any prejudice from the claimed delay in bringing the contempt action. Prejudice "is demonstrated by a disadvantage on the part of the defendant in asserting or establishing a claimed right or some other harm caused by detrimental reliance on the plaintiff's conduct." *White*, 909 F.2d at 102. The appellants do not even attempt to show that any delay in seeking contempt caused them disadvantage or that they detrimentally relied on the lack of a contempt prosecution when they decided to sell Sanctuary Belize lots through deceptive telemarketing.

C. Appellants were in contempt of the *AmeriDebt* order.

Appellants challenge the merits of the telemarketing contempt finding on two grounds. First, they argue that they did not violate the *AmeriDebt* order because it prohibited misrepresentations only in connection with the telemarketing of "goods and services," not real estate. Br. 59. That claim parallels their argument that the Telemarketing Sales Rule applies only to the sale of "goods and services" and it fails for the same reasons. *See supra* part II.B, pp. 35-38. For one thing, appellants did not pursue the argument below and the district court did not rule on it. For another, the product that Sanctuary Belize offered was not simply plots of land; it in-

cluded access to a luxury resort development that included numerous "services" as a part of the package. *See id.*

Second, appellants argue that the Commission did not introduce "evidence of loss" attributable to the contempt. Br. 59-60. But the Commission introduced abundant evidence of consumer loss, and the district court specifically found that "the harm from Defendants' contumacious conduct" was "the same as the harm caused by their FTC Act violations." D.Ct. Docket No. 1109 at 1-2 (J.A. 1017-1018). The court held that "Pukke and his associates were indisputably prohibited from engaging in the exact wrongdoing that they practiced" in selling Sanctuary Belize lots. *Id.* at 2 (J.A. 1018). The court thus entered the sanction expressly to redress "the injuries to purchasers caused by the [telemarketing] contempt." *Id.* The Commission therefore did not need to adduce evidence of contempt-specific harm different from or in addition to the evidence already in the record.[14]

D. The district court did not abuse its discretion by entering the Vipulis contempt against Pukke.

Separate from appellants' challenges to the telemarketing contempt, Pukke argues that the district court abused its discretion by holding him in contempt individually for violating an order that it entered in the course of the effort to implement the *AmeriDebt* order. To recall: in 2007, the district court found that Pukke

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[14] Appellants' assertion that the properties were worth more than the purchase price, Br. 60, fails for the same reasons described in note 12, *supra*.

violated the *AmeriDebt* order by concealing and failing to turn over assets to the *AmeriDebt* receiver, held him in contempt, and ordered him coercively confined. *Supra* pp. 3-5. To secure his release, Pukke's associate John Vipulis transferred $3.25 million to the receiver. D.Ct. Docket No. 1020 at 172-173 (J.A.1004-1005). But as a condition of the release, the district court forbade Pukke from repaying Vipulis until he had fully satisfied the *AmeriDebt* judgment. Its order stated: "Pukke shall not repay all or any portion of the Vipulis Loan to Vipulis until such time as the FTC judgment is satisfied in full under the terms of the Stipulated Final Judgment, as such terms and satisfaction shall be agreed to by the FTC and Pukke or determined by the Court." *Id.* at 173 (J.A. 1005) (quoting *AmeriDebt* Docket No. 625)). The requirement that Pukke obtain the Commission's agreement or a court order determining that the *AmeriDebt* judgment had been satisfied was sensible because the amount required to satisfy the judgment was very much a live question—the district court had suspended all but $35 million of the $172 million judgment on the condition that Pukke cooperate in turning over his assets, but he was before the court seeking release from coercive confinement precisely for repeatedly *failing* to turn over assets.

Despite the court's order—and without any agreement from the Commission or determination by the court—Pukke repaid $4.26 million to Vipulis with proceeds from Sanctuary Belize lot sales. *Id.* at 47, 173-174 (J.A. 879, 1005-1006). In the

proceedings below, the district court found that the payment violated the terms of the release order and adjudged Pukke in contempt. As a sanction, it ordered Pukke to pay the Commission approximately $148,000, representing the difference between Pukke's payments to Vipulis and the amount Vipulis paid to settle the Commission's claim against him as a relief defendant. *Id.* at 177 (J.A. 1009). As part of that decision, the court found that Pukke had not fulfilled his cooperation obligations and still owed the remaining balance of the $172 million *AmeriDebt* judgment. *Id.*

Pukke argues generally that the Vipulis payment did not violate the release order because (he claims) he had paid $35 million—the portion of the *AmeriDebt* judgment that was not initially suspended—before repaying Vipulis. Br. 61. As we explain in part VII below, that is incorrect because Pukke failed to comply with the conditions the district court placed on suspending the *AmeriDebt* judgment. He argues further that the Vipulis contempt order finding "cannot stand" for four reasons, but none of them is persuasive.

First, Pukke claims that the Vipulis contempt proceeding was criminal rather than civil, and should be reversed because Pukke did not receive the constitutional protections afforded to criminal defendants. Br. 61-62. But as Pukke acknowledges, when the relief in a contempt action is intended to "compensate the complainant for losses sustained, the contempt is civil." Br. 61 (quoting *Buffington v. Baltimore County, Md.*, 913 F.2d 113, 133 (4th Cir. 1990)). The Vipulis contempt was

civil rather than criminal because the remedy was intended to compensate the Commission for the loss it sustained when Pukke directed money to Vipulis while he still owed millions of dollars to the Commission.[15] *See* D.Ct. Docket No. 1020 at 177 (J.A. 1009).

Second, Pukke argues that the contempt finding denied him due process because the district court "retroactively" determined that he was required to satisfy the full amount of the *AmeriDebt* judgment rather than the suspended amount before repaying Vipulis. Br. 63. He says he "could not have foreseen" that the district court would later determine that he had not cooperated, the *AmeriDebt* judgment was not suspended, and he was therefore forbidden from repaying Vipulis. *Id.* But the release order anticipated that very question and directly answered it: Pukke could not repay Vipulis merely because *he* believed that the *AmeriDebt* judgment had been satisfied; he was required to obtain either the Commission's agreement or a court order saying so. *See* D.Ct. Docket No. 1020 at 173 (J.A. 1005).

Third—and contrary to his argument that the sanction was criminal—Pukke claims that the sanction was a civil penalty subject to the five-year statute of limitations described in 28 U.S.C. § 2462. Br. 63-64. As described above, Section 2462

[15] To ensure that the sanction was purely compensatory, the district court deducted the amount that Vipulis paid to settle the Commission's claims against him and ordered Pukke to pay only the difference, approximately $148,000. D.Ct. Docket No. 1020 at 177 (J.A. 1009).

does not apply to an action for contempt of a court order. *See supra* pp. 42-44. Moreover, the Commission sought and the district court imposed only a compensatory sanction and not a penalty for the Vipulis contempt. *See* D.Ct. Docket No. 1020 at 177 (J.A. 1009).

Finally, Pukke claims that the Commission introduced no evidence showing that he failed to cooperate with the Commission as required by the *AmeriDebt* order. Br. 64. But Pukke's failure to cooperate was established over and again, including being held in contempt of the *AmeriDebt* order multiple times and pleading guilty to obstruction of justice for concealing assets in the *AmeriDebt* case. *See AmeriDebt* Docket No. 571 at 2-5, 604 at 2; *United States v. Pukke*, No. 10-cr-734 (D. Md.) Docket No. 7 at 2, D.Ct. Docket No. 1020 at 19-20, 176 (J.A. 851-852, 1008). The district court was entitled to take judicial notice of such matters of public record, which amply supported a finding of non-cooperation. *See Goldfarb v. Mayor & City Council of Balt.*, 791 F.3d 500, 508 (4th Cir. 2015).

VI. THE PERMANENT INJUNCTION SHOULD BE AFFIRMED.

A. The permanent injunction is not barred by 28 U.S.C. § 2462.

Appellants say that the permanent injunction against them is a "penalty" and therefore barred by the five-year statute of limitations of 28 U.S.C. § 2462. Br. 65. They contend that, after the Supreme Court's decision in *Kokesh*, courts have found that non-monetary injunctive relief may be a "penalty" subject to the limita-

tions period of Section 2462, *id.* (citing *SEC v. Collyard*, 861 F.3d 760, 763 (8th Cir. 2017)), and the injunction here is therefore barred. That is incorrect. Section 2462 does not apply to injunctions, the injunction here would not qualify as a "penalty" if it did, and no limitations period could have expired because the appellants' misconduct was ongoing when the Commission filed its complaint.

As explained above, Section 2462 must be read in light of its companion statute, 28 U.S.C. § 2461, which creates a civil action for the recovery of "a civil fine, penalty or pecuniary forfeiture [which] is prescribed for the violation of an Act of Congress without specifying the mode of recovery or enforcement." That language makes clear that the civil action described in Section 2461—which is subject to the five-year limitations period of Section 2462—applies to *monetary* sanctions, not injunctions. Indeed, the Eleventh Circuit has categorically held for that reason that "[a]n injunction therefore is not a penalty within the meaning of § 2462." *SEC v. Graham*, 823 F.3d 1357, 1361 (11th Cir. 2016); *see also SEC v. Gentile*, 939 F.3d 549, 562 (3d Cir. 2019) ("[I]njunctions that are properly issued and valid in scope are not penalties and thus are not governed by § 2462."). To the extent one unpublished court of appeals case and one judge in a concurring opinion have thought otherwise (*see* Br. 66-67), this Court should not follow them.

Moreover, even if an injunction theoretically could be a "penalty" subject to Section 2462, the permanent injunction in this case is not. As the Eighth Circuit

held in *Collyard*, an injunction that seeks “to protect the public prospectively” does not operate to punish the defendant. 861 F.3d at 764. Here, the permanent injunction was not punitive because it was necessary to protect the public and supported by findings that the appellants had engaged in a pattern of deception by lying to consumers about Sanctuary Belize for multiple years and were likely to do so again. Specifically, the court found that Pukke was the “mastermind” of the Sanctuary Belize scam “and many of the deceptive practices attributable to it.” D.Ct. Docket No. 1020 at 147 (J.A. 979). It also noted his prior conviction for mail fraud, his involvement in the *AmeriDebt* credit-counseling scheme, and his conviction for obstruction of justice for hiding assets. *Id.* at 147-148 (J.A. 979-980). It found that “Pukke’s deceptive conduct . . . has been recurrent, starting as early as 2005,” and that he “is very much positioned to commit similar violations in the future.” *Id.* at 149 (J.A. 981). The court found that Baker “was very much in league with Pukke before, during and after the *AmeriDebt* proceeding,” and it tailored the injunction against Baker to prevent future harm in light of his different level of participation. The court also found there was “clearly a ‘cognizable danger of recurring violation’” with regard to Usher, and likewise tailored the injunction to prevent future harm based on his involvement. *Id.* at 156 (J.A. 988).

And even if the statute of limitations could apply, it did not run. The district court found that the appellants’ false promises about Sanctuary Belize were made

continuously from the inception of the project until after the Commission filed suit. *See id.* at 33 (J.A. 865).

B. The permanent injunction is not overbroad.

Appellants argue that the injunction in this case is overbroad because it has "no reasonable relation" to the unlawful practices found by the district court. Br. 67-68 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-395 (1965)). They argue that the injunction may not go beyond prohibiting "the commission of such violations in the future." *Id.*

That is not the law. The Supreme Court has long held that an order to prevent violations of the FTC Act need not be "limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). And those who are found to have violated the Act "must expect some fencing in." *Colgate-Palmolive*, 380 U.S. at 395 (quoting *FTC v. Nat'l Lead Co.*, 352 U.S. 419, 431 (1957)). "Accordingly, injunctive relief under the FTC Act may be framed 'broadly enough to prevent respondents from engaging in similarly illegal practices'" in the future, and "[t]he injunction will be upheld so long as it bears a 'reasonable relation to the unlawful practices found to exist.'" *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014) (quoting *Colgate-Palmolive*, 380 U.S. at 394-395).

Here, the injunction's prohibitions on participating in the real estate business (for Pukke) and telemarketing operations (for Pukke, Baker, and Usher) are individually tailored to each appellant's conduct and reasonably related to the scam that they perpetrated on consumers. The restrictions are well within the district court's discretion.

VII. PUKKE'S CHALLENGES TO THE *AMERIDEBT* ENFORCEMENT ORDER ARE WITHOUT MERIT.

Next, Pukke argues that the district court's order directing him to pay the outstanding balance of the $172 million judgment in *AmeriDebt*, D.Ct. Docket No. 1080 (J.A. 1012), must be reversed. Br. 66-77. None of his many claims has merit.[16]

A. *AMG* has no effect on the *AmeriDebt* enforcement order.

As explained in Part I.D, *supra*, Pukke's argument that *AMG* requires this Court to reverse the order that he pay the outstanding balance of the stipulated judgment in *AmeriDebt* fails because (1) the *AmeriDebt* order is not on appeal or subject to review here and (2) Pukke waived any right to contest the validity of the order. Pukke's repetition of that argument later in his brief, Br. 69, fails for the same reasons.

[16] Pukke and the Commission informally briefed this issue in No. 20-2215 before Pukke retained counsel. Although appellants' brief cites only D.Ct. Docket No. 1080, a separate order, D.Ct. Docket No. 1113, also orders him to pay the outstanding *AmeriDebt* balance.

B. 28 U.S.C. § 2462 does not apply to this order either.

Pukke once again raises the five-year statute of limitations stated in 28 U.S.C. § 2462. This time, he claims that the district court's finding that he had not cooperated with the Commission as required by the *AmeriDebt* order amounts to a "penalty" within the meaning of Section 2462, and the district court was therefore required to make that determination within five years of Pukke's plea-agreement admission that he had hidden assets from the Commission in *AmeriDebt*, which occurred in 2010. Br. 69.

The argument fails at the starting gate because the order Pukke appeals did not grant any new relief to the Commission. Pukke already owed the Commission the full amount of the *AmeriDebt* judgment by the judgment's own terms. The new order simply acknowledged the fact of Pukke's non-cooperation—which had long been evident from the proceedings in the case—and restated its consequences. Moreover, district courts are not bound by statutes of limitations when they interpret their own orders. The district court has "inherent authority over its own judgment," and "retains jurisdiction to enforce its judgments, including consent decrees." *Thompson v. U.S. Department Of Housing & Urban Development*, 404 F.3d 821, 833 (4th Cir. 2005) (cleaned up). In addition, Pukke's argument that the finding of non-cooperation and its monetary consequences amounted to a "penalty" within the meaning of Section 2462 is undermined by his agreement—in the

AmeriDebt order itself—that its relief is "remedial in nature and shall not be construed as the payment of a fine, penalty, punitive assessment, or forfeiture." *AmeriDebt* Docket No. 473 at 4 (J.A. 1126).

C. Pukke was not denied due process.

Pukke next offers a loosely connected string of complaints that, he says, "[b]y any measure" show that the district court denied him due process when it found he had failed to fulfil his obligation to cooperate under the *AmeriDebt* order. Br. 70-73. He says that: (1) the issue of his non-cooperation was not raised until late in the trial; (2) whether he cooperated was somehow governed by contract law; (3) contract law required the Commission to show that it complied with the *AmeriDebt* order and it failed to do so; (4) contract law entitled him to a jury trial that he did not receive; (5) the Commission did not produce evidence that he failed to cooperate; and (6) most of the conduct he admitted to in his obstruction-of-justice plea (which the district court relied on to find that he failed to cooperate) occurred before the *AmeriDebt* judgment was entered. *Id.*

Pukke received due process. "The basic requirements of notice and an opportunity to be heard demand only that the complaining party receive notice of the reasons for the deprivation, an explanation of the evidence against him, and an opportunity to present his side of the story." *D.B. v. Cardall*, 826 F.3d 721, 743 (4th Cir. 2016). Pukke received notice that his cooperation under the *AmeriDebt* order

was at issue when the Commission moved the district court to hold him in contempt for repaying Vipulis without having satisfied the *AmeriDebt* judgment. D.Ct. Docket No. 267 (J.A. 421). Indeed, Pukke raised the issue himself by claiming he was *not* in contempt because he had satisfied the *AmeriDebt* judgment. D.Ct. Docket No. 1020 at 175-176 (J.A. 1007-1008). He then received ample explanation of the evidence against him in briefing and argument before the district court, which also afforded him a full opportunity to tell his side of the story. D.Ct. Docket No. 861 at 1-4; 965, 1020 at 175-176 (J.A. 1007-1008) (describing Pukke's arguments). Due process was satisfied.

Beyond that, Pukke is simply wrong that the conduct he admitted to in his plea agreement predated his obligation to cooperate. Pukke admitted that he obstructed the *AmeriDebt* proceeding "by concealing and making false statements" about his assets both before and after the *AmeriDebt* order was entered. *United States v. Pukke*, No. 10-cr-734 (D. Md.) Docket No. 7 at 2 (J.A. 1189). The obstruction specifically included lying about his ownership interest in a company at a December 20, 2006, deposition—which was *after* the May 17, 2006, *AmeriDebt* order. *Id.* at 5 (J.A. 1192); *see also* Br. 73.

More generally, Pukke's argument misreads his obligation to cooperate. In the stipulated *AmeriDebt* order, Pukke agreed that substantially *all* of his assets were "derived from consumers" as a result of the *AmeriDebt* scam and that he had no

"legitimate claim" to them. *AmeriDebt* Docket No. 473 at 3; *see also id.* at 6-7 (J.A. 1125; 1128-1129). As a condition of suspending all but $35 million of the $172 million judgment, Pukke agreed to "irrevocably assign, waive, release, discharge, and disclaim" his interest in that property to the Commission, and to cooperate with the Commission by effecting its transfer to the receiver. *Id.* at 10-11 (J.A. 1132-1133). He could not fulfill that obligation unless he fully and accurately disclosed the very assets to which he admitted he had no legitimate claim. But as his plea agreement shows, Pukke concealed and lied about those assets instead. *United States v. Pukke*, No. 10-cr-734 (D. Md.) Docket No. 7 at 2-5 (J.A. 1189-1192). Although the plea agreement also recites actions Pukke took with regard to various assets before the *AmeriDebt* order, those facts simply trace Pukke's ownership to establish that he retained and hid assets despite his obligation to disclose them and disclaim his interest in them.

Lastly, Pukke's argument that contract law governs his cooperation under the *AmeriDebt* order is frivolous. This is not a contract case.

VIII. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED APPELLANTS' MOTIONS TO TRANSFER VENUE.

Appellants' final argument is that the district court abused its discretion by failing to transfer the case to the Central District of California. Br. 74-77. They argue that venue in the District of Maryland was improper under 28 U.S.C. § 1391 because most of the defendants reside or do business in California whereas only one

defendant has an address in Maryland and two (including appellant Usher) reside outside the United States. Br. 75. They argue that further proceedings in this case should be held in the Central District of California. Br. 77.

"Decisions whether to transfer a case pursuant to 28 U.S.C. § 1404 are committed to the discretion of the transferring judge." *Brock v. Entre Computer Centers, Inc.*, 933 F.2d 1253, 1257 (4th Cir. 1991). A district court may transfer a civil action to any other district for the convenience of the parties and witnesses and in the interests of justice. 28 U.S.C. § 1404(a); *In re Ralston Purina Co.*, 726 F.2d 1002, 1005 (4th Cir. 1984). This Court reviews the district court's denial of a motion to transfer venue for an abuse of discretion. *Brock*, 933 F.2d at 1257.

There was no abuse of discretion here. Venue was proper in the District of Maryland under Section 13(b) of the FTC Act, and the district court was well within its discretion to keep the case because the Commission's allegations in the *Sanctuary Belize* case rested on the same facts as the telemarketing contempt charges in *AmeriDebt*, which no party asked to transfer. Transferring the case would have resulted in the same parties litigating identical allegations in two different courts.

First, the appellants are incorrect that venue in the District of Maryland was improper from the beginning. As they acknowledge, the generous venue provision of Section 13(b) of the FTC Act allows "[a]ny suit" brought under its authority to "be brought where [a defendant] resides or transacts business, *or* wherever venue is

proper under section 1391 of title 28." 15 U.S.C. § 53(b) (emphasis added); Br. 76. And the court may, in the interest of justice, allow other defendants to be added to such a case "without regard to whether venue is otherwise proper in the district in which the suit is brought." *Id.* Here, the appellants admit that at least one defendant transacted business in Maryland, and that venue was proper under Section 1391 for two other defendants. Br. 75-76. The remaining defendants could properly be added under Section 13(b) without regard to whether venue in the District of Maryland would have been proper for them.

Second, the district court did not abuse its discretion when it denied Pukke's motion to transfer. "District courts within this circuit consider four factors when deciding whether to transfer venue: (1) the weight accorded to plaintiff's choice of venue; (2) witness convenience and access; (3) convenience of the parties; and (4) the interest of justice." *Trs. of the Plumbers & Pipefitters Nat'l Pension Fund v. Plumbing Servs., Inc.*, 791 F.3d 436, 444 (4th Cir. 2015).

The district court considered those factors, noting that the Commission's choice of forum was entitled to some weight, and while Maryland was less convenient for the defendants and some witnesses, it was convenient for the Commission and no less convenient for witnesses who are in neither D.C. nor California. March 1, 2019 Tr. at 36-37 (J.A. 381-382). The "key component" of the court's decision, however, was the interest of justice, which strongly favored keeping *Sanctuary Belize* together

with the *AmeriDebt* contempt charges because the two actions shared a common factual basis. *Id.* That decision was sound. The same facts that establish Pukke, Baker, and Usher's violation of the Telemarketing Sales Rule also establish that they violated the *AmeriDebt* final order by engaging in deceptive telemarketing.[17] *Compare* D.Ct. Docket No. 114 at 26-28 (amended complaint) *with* D.Ct. Docket No. 266 (telemarketing contempt). As this Court has held, "the simultaneous trial of two complex and elaborate cases involving substantially the same factual issues" would be an "extravagantly wasteful and useless duplication of the time and effort of the federal courts." *Gen. Tire & Rubber Co. v. Watkins*, 373 F.2d 361, 362 (4th Cir. 1967).

CONCLUSION

The judgment of the district court should be affirmed.

[17] Although ultimately unsuccessful, the Commission's charge that Pukke, Baker, and Usher violated the *AmeriDebt* order by failing to turn over the Sanctuary Belize parcel (*see* D.Ct. Docket No. 267) also depended on facts central to the *Sanctuary Belize* case.

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December 10, 2021

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the expanded 18,000 word limit approved by the Court in its order of November 2, 2021, because it contains 15,095 words.

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