ORAL ARGUMENT SCHEDULED FOR JULY 30, 2021

No. 20-17324

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

JAMES D. NOLAND JR, ET AL.,
Defendants-Appellants,

SUCCESS BY MEDIA HOLDINGS INC., ET AL.,
Defendants,

KIMBERLY FRIDAY,
Receiver-Appellee.

On Appeal from the United States District Court
for the District of Arizona
No. 2:20-cv-47-DWL

SUPPLEMENTAL BRIEF OF THE FEDERAL TRADE COMMISSION

JAMES REILLY DOLAN
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

MARK S. HEGEDUS
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2115
mhegedus@ftc.gov

Of Counsel:
EVAN M. MENDELSON
JONATHAN W. WARE
Attorneys

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

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INTRODUCTION

The FTC submits this supplemental brief addressing *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021). As explained in our merits brief, the Court lacks jurisdiction and should dismiss this appeal—and *AMG* has no effect on that issue. While *AMG* may require alteration of the scope or terms of the preliminary injunction, that is a matter to be addressed in the first instance by the district court. Dismissing this appeal will allow the court below to modify the injunction as necessary to reflect: (1) the effect of *AMG*; (2) another provision of the FTC Act that authorizes monetary remedies independent of Section 13(b) and is unaffected by *AMG*, and (3) an upcoming motion for compensatory contempt sanctions. For efficiency's sake, the Court should vacate the scheduled oral argument.

DISCUSSION

A. *AMG* Does Not Change the Court's Lack of Jurisdiction.

AMG addressed whether Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), "authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement." *AMG*, 141 S. Ct. at 1344. The district court relied upon this Court's pre-*AMG* precedent interpreting Section 13(b) when it maintained the preliminary injunction, including its provisions for an asset freeze and receivership. ER-008. But while *AMG* may affect the scope or terms of the

district court's freeze of appellants' assets, it does not change the fact that this Court lacks jurisdiction over this appeal.

Our merits brief fully addressed the jurisdictional issues. Briefly, the appeal involves two district court decisions. One is the court's October 27, 2020, denial of the appellants' ("the Nolands") motion to dissolve the preliminary injunction. But the "denial of a motion to modify or dissolve an injunction" is appealable "only if the motion raises new matter not considered when the injunction was first issued." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1418 n.4 (9th Cir. 1984). The Nolands' motion to dissolve involved no legal argument that the district court had not previously considered. ER-008.[1] This Court thus lacks jurisdiction over the October 27 Order. *See* FTC Br. at 12-15.

The second order on appeal is the district court's July 29, 2020, order rejecting the Nolands' motion to modify the PI to permit them to exercise authority assigned to the Receiver. That appeal is time-barred because the Nolands filed it well beyond the 60-day limit of Federal Rule of Appellate Procedure 4. *See* FTC Br. at 15-16.

Nothing in *AMG* makes either order appealable. The Supreme Court did not address the appealability of an order declining to modify an injunction. And

[1] On appeal, the Nolands challenge only the district court's legal authority and not the court's conclusion (ER-009–027) that the Nolands failed to prove changed factual circumstances justifying dissolution of the PI.

nothing in *AMG* changes or excuses a failure to timely appeal. While *AMG* makes it appropriate for the district court to modify its PI, in the current procedural posture, this Court has no power to do so. The Court should dismiss the appeal and leave the district court free to address this issue in the first instance as discussed immediately below.

B. The District Court Should Determine in the First Instance How to Modify the PI to Conform to *AMG*.

AMG recognized that another provision of the FTC Act continues to authorize monetary remedies. Specifically, Section 19 of the Act, 15 U.S.C. § 57b(a)-(b), expressly authorizes monetary and other remedies for violations of FTC-issued rules. *See AMG*, 141 S. Ct. at 1346. Thus, as the district court observed, "resolution of *AMG Capital* will have a limited impact on the issues in this case" because it "will not address liability, the propriety and scope of a permanent injunction, [or] monetary remedies under § 19." FTCSER-13–14. Moreover, in February 2020, the FTC initiated a contempt action against the Nolands and will later this month ask the district court to impose compensatory contempt sanctions in an amount equal to what the FTC originally sought under Section 13(b). The district court has acknowledged that *AMG* will not affect "what remedies are available should the FTC eventually prevail in the parallel contempt action" FTCSER-13–14.

The district court should address all these issues in the first instance for several reasons. To begin with, the Nolands challenge the court's refusal to dissolve the PI, but not the PI itself, which therefore is not on appeal.[2] Perhaps recognizing this, the Nolands have asked this Court to "direct the district court to limit the PI strictly to the express, plain words of § 13(b)." Noland Br. at 44. We agree that it would be appropriate for the district court to revisit the terms of the PI. But the district court has questioned whether the pending appeal deprives it of authority to do so. FTCFEC-4–7. The most efficient way to proceed would be to dismiss the appeal forthwith and remove any uncertainty over the lower court's authority.

It would also advance judicial efficiency for the district court to address several other issues currently teed up for resolution before this Court rules on the case.

- *Preliminary Injunction, Asset Freeze and Receivership*: On May 18, 2021, the FTC filed a Motion for Preliminary Injunction With Asset Freeze and Receivership. That Motion explained that although Section 13(b) no longer supports the asset freeze and receivership, those preliminary remedies remain

[2] The Nolands' failure to appeal the PI distinguishes this case from *FTC v. VPL Medical, Inc.*, where, in light of *AMG*, this Court vacated a preliminary injunction that had been appealed. *FTC v. VPL Medical, Inc.*, No. 20-55858, 2021 WL 1664404 (9th Cir. Apr. 28, 2021).

necessary to preserve a monetary judgment under Section 19 of the FTC Act and in the related contempt matter, as well as to ensure that Corporate Defendants do not continue to defraud consumers. ECF No. 351 at 1. In addition, on May 21, 2021, the Nolands filed what appears to be a motion to dismiss the FTC's complaint and to dissolve the PI, ECF No. 352, which the FTC opposed on May 28, 2021, ECF No. 355.

- *Liability*: The FTC filed a motion for summary judgment on March 12, 2021, ECF No. 285, which will soon be ripe for consideration. *See* ECF Nos. 335 (opposition), 340 (June 28, 2021, reply due date).
- *Remedies*: No later than June 23, 2021, the FTC will file a motion for summary judgment addressing appropriate remedies under Section 19.[3] ECF No. 338 at 5.
- *Contempt*: Also no later than June 23, 2021, the FTC will file a Motion for Entry of Civil Contempt Judgment and for Compensatory Civil Contempt Sanctions. ECF No. 338 at 5; *see also* FTC Br. at 3 n.2.

[3] The Nolands' Reply Brief argues that the FTC has not met the criteria to obtain relief under Section 19, including entry by the Commission of a cease-and-desist order under Section 5(b). Nolands Reply Br. at 4. But Section 19 also authorizes the Commission to seek relief for violations of "any rule under this subchapter respecting unfair or deceptive acts or practices." 15 U.S.C. § 57b(a)(1). That is the provision under which the Commission is proceeding, and it does not require entry of a cease and desist order. *AMG* did not disturb the Commission's authority under this provision.

All of these matters can be most effectively resolved below upon dismissal of this appeal.

C. Oral Argument Is Not Necessary

The Court has scheduled oral argument in this appeal for July 30, 2021. We respectfully urge the Court to cancel oral argument.

Dispensing with argument is by far the most efficient means of proceeding. Beyond that, the jurisdictional question is fit for summary resolution. The Nolands have not disputed that their motion to dissolve the PI relied on no new law, which makes the October 27 Order unappealable. Nolands' Reply Br. at 23. And the Nolands appear to have abandoned their argument that they may appeal the July 29 Order on an interlocutory basis under the collateral order doctrine. Reply Br. at 24-25.[4] If the Court decides that it has jurisdiction, the FTC agrees that remand is appropriate to allow the district court to modify the PI as necessary to conform with *AMG*. *See* Nolands Br. at 44. No matter what, oral argument seems unnecessary.

[4] On reply, the Nolands argue for the first time that the order is appealable because it is causing continuing harm. Reply Br. at 24-25. But harm is irrelevant; the time for appeal under FRAP 4 begins on the date of the order appealed, not the date of an appellant's injury.

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction to allow the district court to modify the PI to conform to *AMG*.

Respectfully submitted,

JAMES REILLY DOLAN
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

June 4, 2021

/s/ *Mark S. Hegedus*
MARK S. HEGEDUS
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with this Court's Supplemental Briefing Order in that it contains 1,451 words.

June 4, 2021

/s/ *Mark S. Hegedus*

Mark S. Hegedus
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

CERTIFICATE OF SERVICE

I certify that on the 4th day of June 2021, an electronic copy of the foregoing Supplement Brief of the Federal Trade Commission was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system and that service will be accomplished via that system.

/s/ *Mark S. Hegedus*
Mark S. Hegedus
Attorney
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580