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

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Federal Trade Commission, *Plaintiff-Appellee*,

v.

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

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

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

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

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

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

A. Background and Issue of Concern.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

Nov. 17, 2022

Respectfully submitted,

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