CASE NO. 23-1742

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

and

MARC-PHILLIP FERZAN,

Receiver-Appellee,

v.

ANDRIS PUKKE; PETER BAKER; JOHN USHER,

Defendants- Appellants,

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

REPLY BRIEF OF APPELLANT

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Introduction and Summary

Stripped of its redundant disparaging remarks about the PBU Appellants, the FTC's responsive brief contains little relevant law. The FTC's principal argument is that the PBU Appellants lack Article III standing to appeal the district court's order[1] imposing "asset freezes against Andris Pukke and Peter Baker … and also against John Usher" and ordering them to "relinquish, transfer, and turn over all assets that they directly or indirectly own or control" to the Receiver "because they do not directly own the Sanctuary Belize property or any of the other underlying assets" subject to the district court's order.[2]

This argument is refuted by the FTC's own motion to "reform" the Contempt Order against the PBU Appellants. The FTC told the district court that, regardless of whether the PBU Appellants owned the Sanctuary Belize assets, it was "necessary" and important" to amend the Contempt Order by freezing those assets and ordering the PBU Appellants to turn them over to the Receiver because "Pukke, Baker, and Usher control these assets."[3] "Control is all that matters."[4] The

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[1] JA 497, JA 499-500.

[2] Brief of the Federal Trade Commission ("FTC Br.") at 16.

[3] JA 419, JA 123.

[4] JA 423.

district court granted the FTC's motion on that premise. Therefore, the district court's order inflicted a concrete injury on the PBU Appellants' control of the Sanctuary Belize assets, and the PBU Appellants have standing to challenge it in this Court.

The FTC's other arguments are groundless. First, the FTC argues that, because in the prior appeal this Court affirmed asset freeze and seizure provisions entered by the district court, the PBU Appellants are barred by the law of the case doctrine and the mandate rule from challenging on this appeal the asset freeze and turnover provisions the district court added to the Contempt Order.[5] But this Court could not and did not address the viability of the asset freeze and turnover provisions added by the district court to the Contempt Order because that happened ***after*** the prior appeal. Therefore, the law of the case doctrine and the mandate rule are facially inapplicable.

Moreover, in the present appeal the basis for the PBU Appellants' challenge to the asset freeze and turnover provisions the district court added to the Contempt Order is that the district court failed to make required factual findings to support those provisions. In the prior appeal, this Court had no reason to and did not address that issue. Instead, it affirmed the prior asset freeze and receivership provisions on the ground that they were appropriate to protect against ongoing

[5] FTC Br. at 25-28.

violations of the Federal Trade Commission Act ("FTCA") and the Telemarketing Sales Rule ("TSR") by the PBU Appellants and as an ancillary to the grant of injunctive relief. Accordingly, the PBU Appellants have every right to raise this new issue in the present appeal.

Second, the FTC erroneously contends that the PBU Appellants "misstate the facts" in arguing that the district court abused its discretion in failing to determine, on the basis of evidence they presented on remand, that the PBU Appellants could pay the contempt sanction of $120.2 million or that consumers already had been credited with substantial payments toward that sanction.[6] This evidence included the Baker Declaration and the district court's approval of the Receiver's plan that consumers would be required to pay only 65% of the original sales prices if they opted to purchase those lots now, thereby fully compensating them for their injury. The FTC's appellate counsel criticize the Baker Declaration as unreliable and claim the district court "considered" it but "declin[ed] to credit" it.[7] But in fact, the FTC did not submit any evidence of its own to contradict the evidence presented by the PBU Appellants, including the district court's approval of the Receiver's plan allowing consumers to purchase their lots for 65% of the original sales price. The PBU Appellants did not "misstate" any facts.

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[6] FTC Br. at 33-37.

[7] *Id*. at 34.

Third, the FTC's claim that the PBU Appellants "forfeited" their alternative request for an accounting "by failing to make that argument in the district court"[8] is demonstrably false. In response to the district court's request, the PBU Appellants filed a proposed order which provided that the Receiver "shall file a document calculating and stating the amounts of all assets and property seized from each one of the Represented Defendants," as well as documents calculating all amounts credited to lot purchasers and recalculating the amount owed by the PBU Appellants under the contempt sanction.[9] Although the proposed order did not use the word "accounting," that is clearly what the PBU Appellants requested and the district court wrongly denied. Accordingly, the PBU Appellants did not "forfeit" this claim.

I. The PBU Appellants Have Appellate Standing

Contrary to the FTC's contention, the PBU Appellants have standing to appeal. The district court's order they are challenging amended the Contempt Order by freezing assets they control and compelling them to turnover those assets to the Receiver for use in paying off the $120.2 million contempt sanction. Because that constitutes a "concrete and particularized injury" which is "fairly traceable to the challenge [order]" and is "likely to be addressed by a favorable

[8] *Id*. at 41.

[9] JA 470-471.

decision" by this Court, the PBU Appellants have satisfied the standing requirements of Article III. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). *Accord, e.g., Cawthorn v. Amalfi*, 35 F.4th 245, 251 (4th Cir. 2022).

The FTC argues that the PBU Appellants "lack standing" to challenge the amendment to the Contempt Order "because Appellants ***do not own*** the Sanctuary Belize property or any other assets (emphasis added)" subject to that amendment.[10] The FTC says that "[t]hose assets are owned by corporate entities that are legally distinct from Appellants and that did not join this appeal," and the PBU Appellants cannot appeal on behalf of those corporate entities.[11]

But as the FTC acknowledged in its motion seeking the freeze and turnover order, "it does not matter" whether the PBU Appellants own the Sanctuary Belize assets.[12] Rather, "[***c***]***ontrol is all that matters*** (emphasis added).[13] The FTC went to extraordinary lengths in its motion to demonstrate that Andris Pukke, Peter Baker, and John Usher ***controlled*** all the Sanctuary Belize assets.

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[10] FTC Br. at 20.

[11] *Id*.

[12] JA 423.

[13] JA 423.

Thus, the FTC endorsed the district court's finding that "Pukke held a 'commanding position in SBE [Sanctuary Belize Enterprise]' with 'massive evidence' confirming his total control."[14] It referred to "compelling evidence of Pukke's control over SBE's finances" based on "his ability to divert approximately $18 million of consumer lot payments for his own benefit and that of his family and friends."[15] Similarly, the FTC pointed out that Baker "was the 'top guy' for the Belizean operations," and "'Usher had authority to control SBE.'"[16] The FTC concluded that, "some combination of Pukke, Baker, and Usher ***controls*** the Corporate Defendants, the Estate of John Pukke, and their assets (emphasis added)."[17] And as the FTC specifically stated, "***more importantly, the [district] Court's prior findings already establish that Pukke, Baker, and Usher control these assets"*** (emphasis added).[18]

It was expressly "because Pukke, Baker, and Usher ***control*** the Corporate Defendants and The Estate of John Usher [sic] (emphasis added)" that the FTC moved the district court to amend the Contempt Order by adding provisions "requiring Pukke, Baker, and Usher to take precise steps to transfer specific assets,

[14] JA 411.

[15] JA 411.

[16] JA 412.

[17] JA 423.

[18] JA 423.

including placing assets in the Receivership for the benefit of consumers."[19] Over the PBU Appellants' opposition, that is exactly what the district court did. The district court's order challenged on this appeal by the PBU Appellants provides: "Andris Pukke, Peter Baker, John Usher, the Defaulting Corporate Defendants, and the Estate of John Pukke are obligated to relinquish, transfer, and turn over all assets that they directly or indirectly own ***or control*** (emphasis added)" to the Receiver.[20]

Although the PBU Appellants did claim ownership of entities that owned Sanctuary Belize assets, the district court's order freezing those assets and compelling the PBU Appellants to turn them over to the Receiver inflicted a "concrete and particularized injury" on the PBU Appellants' acknowledged control of those assets, and that injury can be redressed by this Court if it vacates that order. Therefore, the PBU Appellants have standing under Article III to appeal the grant of that order.

II. The Law of the Case Doctrine and the Mandate Rule are Inapplicable

There is no merit to the FTC's contention that the law of the case doctrine and the mandate rule bar the PBU Appellants from challenging the district court's amendment to the Contempt Order freezing the assets they control and compelling

[19] JA 419.

[20] JA 497, JA 500.

them to turn those assets over to the Receiver.[21] According to the FTC, "this Court specifically affirmed both the receivership and the asset freeze in its prior decision."[22] Therefore, argues the FTC, "this Court is bound by its rulings in the prior appeal."[23]

The FTC is wrong on two accounts. First, in the prior appeal this Court could not and did not address the asset freeze and turnover provisions in the order by which the district court amended the Contempt Order. That order was entered by the district court only ***after*** the prior appeal, when the case was remanded to the district court. Consequently, the law of the case doctrine and the mandate rule are facially inapplicable.

Second, the issues related to the receivership and asset freeze that this Court considered in the prior appeal have nothing to do the issue the PBU Appellants raise in this appeal to the asset freeze and turnover provisions by which the district court amended the Contempt Order. In the prior appeal, this Court affirmed the receivership the district court imposed because it "was the district court's means of ensuring that further FTC Act and TSR violations would not occur and that Pukke would not continue to profit from these deceptions." *Pukke*, 53 F.4th at 108.

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[21] FTC Br. 25-28.

[22] FTC Br. at 26.

[23] *Id*.

Similarly, this Court affirmed the asset freeze the district court imposed "given the risk of Pukke diverting funds to his personal accounts" and in light of the FTC's "request [for] equitable relief." *Id*. at 109.

In the present appeal, however, the PBU Appellants are challenging the asset freeze and turnover provisions by which the district court amended the Contempt Order on the very different ground that the district court failed to make factual findings supporting those provisions. This Court neither considered nor ruled on that issue in the prior appeal. That is another reason why the law of the case doctrine and the mandate rule are inapplicable here.

III. The District Court Abused its Discretion in Amending the Contempt Order

The FTC's defense of the district court's amendment to the Contempt Order adding asset freeze and turnover provisions is unavailing. First, the FTC claims that "[t]he district court made extensive findings about Appellants' history of fraud, diversion of assets for personal and familial gain, failure to follow court orders, and concealment of assets."[24] However, those findings were made by the district court in its opinion of August 28, 2020, to support its conclusion that the PBU Appellants violated the FTCA and the TSR. They were not made to support the asset freeze the district court imposed at that time. And those findings certainly

[24] FTC Br. at 29.

were not made to support the asset freeze and turnover provisions by which the district court amended the Contempt Order on remand.

The district court made no factual findings at all to support the asset freeze and turnover provisions by which it amended the Contempt Order. As the PBU Appellants showed in their opening brief,[25] this Court held in *Kemp v. Peterson*, 940 F.3d 110, 114 (4th Cir. 1991), and the Ninth Circuit similarly held in *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009), that a district court is required to make such factual findings to support an asset freeze. Astonishingly, the FTC does not even mention those cases, much less try to distinguish them.

Second, the FTC disputes the PBU Appellants' submission that the prior asset freeze the district court imposed because of the PBU Appellants FTCA and TSR violations cannot support the one by which it amended the Contempt Order "because the contempt sanction addresses the same harm as the FTC Act violations."[26] However, the prior asset freeze was tied to the district court's grant of equitable monetary relief under section 13(b) of the FTCA. This Court vacated that relief in the prior appeal on the authority of *AMG Capital Mgmt. LLC v. FTC*, 141 S. Ct. 1341 (2021). *FTC v. Pukke*, 53 F.4th at 105. As the Eleventh Circuit held in *FTC v. On Point Capital Partners, LLC*, 17 F.4th 1066, 1078-1079 (11th

[25] Opening Brief of Appellants ("App. Br.") at 15, 21-22.

[26] FTC Br. at 29-30.

Cir. 2021), the *vacatur* of equitable monetary relief due to *AMG* mandates *vacatur* of an asset freeze imposed in conjunction with that relief. Therefore, the prior asset freeze was effectively nullified, and it cannot support the asset freeze and turnover provisions by which the district court amended the Contempt Order.

The FTC says the PBU Appellants "misplace their reliance" on *On Point* because "it did not involve a Section 13(b) case and contempt proceeding consolidated into a single proceeding with a single docket number and caption."[27] So what? The holding in *On Point* is squarely relevant, and the FTC has offered no persuasive reason why this Court should not follow it.

Third, the FTC erroneously claims the PBU Appellants "misstate the facts" in arguing that the district court denied them the opportunity to pay off the contempt sanction.[28] In the FTC's view, "[n]othing prevents Appellants from paying the contempt sanction with any assets that they own or control."[29]

That is not true. In its Default Order, the district court ordered the defaulting corporate entities who directly owned the Sanctuary Belize assets to pay $120.2 million in equitable monetary relief to the FTC and to transfer the Sanctuary Belize

[27] *Id*. at 30.

[28] *Id*. at 33.

[29] *Id*.

assets to the Receiver to secure that payment.[30] In the prior appeal, this Court vacated that portion of the Default Order under *AMG*.[31] Nevertheless, the district court refused to order the FTC or the Receiver to return the $120.2 million to the defaulting corporate entities or the PBU Appellants who controlled them. As a result, the district court prevented the PBU Appellants from using that $120.2 million to pay the contempt sanction.[32]

Fourth, the FTC belittles the evidence presented to the district court on remand to show that much if not all the $120.2 million contempt sanction had been paid or otherwise credited to consumers.[33] This evidence included the Baker Declaration and the district court's approval of the Receiver's plan permitting

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[30] JA 273, JA 281-288.

[31] This Court held: "Usher and the corporate defendants now assert that the $120.2 million judgment against them must be thrown out under *AMG Capital*. As noted, ***AMG requires vacating the $120.2 million equitable monetary judgment*** (emphasis added)." *FTC v. Pukke*, 53 F.4th at 107.

[32] The FTC argues that, "[g]iven Appellants long and well-documented history of fraud and concealment of assets, the district court did not abuse its discretion in concluding that Appellants could not be trusted to manage and sell the receivership assets." FTC Br. at 33-34. It also argues that, in light of the injunctive decrees prohibiting the PBU Appellants from any further involvement in Sanctuary Belize, the PBU Appellants "cannot sell the Sanctuary Belize property" and use the proceeds to pay the contempt sanction. *Id*. at 38. However, the district court easily could have modified the injunctive decrees to allow the PBU Appellants to do nothing more with the Sanctuary Belize assets than sell them, under supervision by the FTC or the Receiver, for the purpose of raising the $120.2 million to pay the contempt sanction.

[33] FTC Br. 34-37.

consumers to purchase their lots for only 65% of their original sales price, thereby fully compensating them for their injury.[34] The FTC's appellate counsel criticize the Baker Declaration as unreliable and assert that the district court "considered the Baker declaration" but "declin[ed] to credit" it.[35] In fact, the district court did not say anything about the Baker Declaration.

But putting aside the Baker Declaration, the FTC does not challenge the other evidence revealing that much if not all the $120.2 million contempt sanction was satisfied by credits to injured consumers, including the district court's approval of the Receiver's plan permitting consumers to purchase their lots for only 65% of their original sales price. The district court abused its discretion by adding the asset freeze and turnover provisions to the Contempt Order without considering this evidence.

IV. The PBU Appellants Did Not Forfeit Their Request for an Accounting

Finally, the PBU Appellants did not "forfeit( )" their alternative request for an accounting, as the FTC claims.[36] In a proposed order that they filed in response to the district court's instruction, the PBU Appellants requested that the Receiver perform a full series of detailed calculations.

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[34] App. Br. 20-21,

[35] FTC Br. at 34.

[36] *Id*. at 41.

In the proposed order, the PBU Appellants asked the Receiver to: "file a document calculating and stating the amounts of all assets and property seized from [them];" "file a document calculating and stating the amounts of all assets and property it has acquired in this case from each one of the individuals and entities other than the Represented Defendants;" and "file a document calculating and stating for each lot purchaser at Sanctuary Belize the monthly amounts each purchaser was contractually bound to pay the Represented Defendants but was excused from paying since this litigation began."[37] They also requested that "the Federal Trade Commission shall calculate the amounts owed by defendants Andris Pukke, Peter Baker, and John Usher under the Court's contempt sanction by subtracting from those imposed sanctions the total amount of all excused payments determined by the Receiver … and any other amounts returned to the lot purchasers."[38] This was a request for an "accounting" under anyone's book.

This alternative request by the PBU Appellants for an accounting was justified because neither the FTC nor the Receiver had advised the PBU Appellants or the district court about whether payments made by the Receiver to consumers or credits granted to consumers after the final orders entered in 2021 had reduced or eliminated the $120.2 contempt sanction imposed on their behalf. Contrary to the

[37] JA 470.

[38] JA 471.

FTC's implication,[39] neither the FTC nor the Receiver claimed below that the "regular reports" submitted by the Receiver contained this information. It was reversible error for the district court to deny this reasonable alternative request.

CONCLUSION

For these reasons and the reasons given in the PBU Appellants' opening brief, the Court should vacate the asset freeze and turnover provisions by which the district court amended the Contempt Order and remand the case to the district court for further proceedings.

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Respectfully submitted,

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[39] FTC Br. at 41.