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Filed August 30, 2023

In the
United States Court of Appeals
for the Seventh Circuit

No. 21-2945

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

v.

CREDIT BUREAU CENTER, LLC,
and MICHAEL BROWN,

Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 17-cv-194 — Matthew F. Kennelly, *Judge*.

ARGUED JUNE 3, 2022 — DECIDED AUGUST 30, 2023

Before SYKES, *Chief Judge*, and FLAUM and BRENNAN, *Circuit Judges*.

SYKES, *Chief Judge*. This appeal is the latest chapter in a complicated case that has had a long and winding journey through the federal courts, including a trip to the Supreme Court and back. Michael Brown owns and operates Credit Bureau Center, a credit-monitoring business. His company used an online marketing device known as a "negative option feature" on its websites. The websites offered visitors a free credit report but automatically enrolled them in a $29.94 monthly membership subscription when they applied for the free report; the information about the monthly membership was scant and buried in much smaller text. *FTC v. Credit Bureau Ctr.*, 937 F.3d 764, 766 (7th Cir. 2019). Brown's contractors ginned up website traffic by posting Craigslist advertisements for fake rental properties and directing applicants to the company's websites for a "free" credit score. *Id.*

This activity soon attracted the attention of the Federal Trade Commission, which sued Brown and Credit Bureau Center (collectively "Brown") alleging violations of several consumer-protection statutes. The litigation centered on section 13(b) of the Federal Trade Commission Act ("FTCA" or "the Act"), which authorizes the Commission to seek restraining orders and permanent injunctions to enjoin conduct that violates the Act's prohibition of unfair or deceptive trade practices. On its face, section 13(b) authorizes only injunctive relief. But the Commission had long interpreted it to also permit restitution awards—an interpretation adopted in this circuit, *see FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 571 (7th Cir. 1989), and in others as well.

The district court entered a permanent injunction and ordered Brown to pay more than $5 million in restitution. We affirmed the judgment in all respects but one: we held that section 13(b) does not authorize restitution awards. We therefore overruled *Amy*

Travel and broke with the consensus in other circuits adopting the Commission's reading of section 13(b).

To resolve the circuit split, the Supreme Court granted certiorari in this case and one from the Ninth Circuit, *FTC v. AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018). Ruling in the Ninth Circuit's case, the Court held that section 13(b) does not authorize equitable monetary relief such as restitution and disgorgement. *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341, 1344 (2021).

Having endorsed our interpretation of the statute in *AMG Capital*, the Court returned this case to us, and we sent it back to the district court. The Commission immediately moved to amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure, arguing that the Court's decision in *AMG Capital* (and ours in this case) had significantly changed the law. The Commission asked the judge to reimpose the restitution award under the Restore Online Shoppers' Confidence Act ("ROSCA") and section 19 of the FTCA. The judge granted the motion and reinstated the $5 million restitution award.

Brown now attacks the amended judgment on multiple grounds. While numerous, his arguments are mostly meritless. The only error in the new judgment is its direction that any funds remaining after providing consumer redress shall be "deposited to the U.S. Treasury as disgorgement." That exceeds the remedial scope of section 19, which is limited to redressing consumer injuries, as the Commission conceded in oral argument. To wind up more than six years of litigation, we modify the judgment to excise that portion and affirm the judgment as modified.

I. Background

We described the background of this case in the first appeal, *Credit Bureau Ctr.*, 937 F.3d at 767–68, so we provide an abbreviated overview of Brown's scheme here. In January 2014 Brown contracted with Danny Pierce to increase traffic to websites advertising his credit-monitoring services. These websites—with names like "eFreeScore.com" and "FreeCreditNation.com"—promised visitors a "free credit report and score." *Id.* at 767. But requesting the free report automatically enrolled applicants in a paid monthly subscription. Fine print on the websites warned visitors that ordering the free report would enroll them in an unspecified "membership" subscription that cost $29.94 each month. A letter from Brown followed, explaining to new subscribers that the fee-based subscription was for credit monitoring.

Pierce later subcontracted with Andrew Lloyd to drum up more referrals to Brown's websites. Lloyd posted Craigslist advertisements for fake rental properties at cheap prices. Posing as the landlord, he directed prospective tenants to Brown's websites to obtain a free credit report. Pierce and Lloyd's efforts paid off. They referred more than 2.7 million customers to Brown, yielding just over $6.8 million in revenue. Unsuspecting customers complained, but Brown denied any involvement with Pierce and refused to grant refunds. Ultimately, credit-card companies canceled more than 10,000 of Brown's charges.

The Commission eventually stepped in, suing Brown and his company and alleging that the websites and the Craigslist advertisements violated the FTCA, ROSCA, and two other consumer-protection statutes not relevant here. Proceeding under section 13(b) of the FTCA, 15 U.S.C. § 53(b), the Commission sought a permanent injunction and restitution. The remedial options listed in section 13(b) are limited to restraining orders and injunctions, but the Commission had long and frequently used this provision to win equitable monetary relief as well. *AMG Capital*, 141 S. Ct. at 1346–47. Our circuit blessed this practice in *Amy Travel*, 875 F.2d 564, holding that section 13(b) implicitly authorizes restitution in addition to injunctive relief; other circuits also endorsed this approach. *Credit Bureau Ctr.*, 937 F.3d at 779.

Ruling on cross-motions for summary judgment, the district judge found Brown liable, issued a detailed permanent injunction, and ordered Brown to pay over $5 million in restitution to the Commission. *Id.* at 768.

Brown appealed, contesting the judge's liability ruling and challenging the court's authority to award monetary relief under section 13(b). We first addressed the judge's determination that Brown had violated ROSCA, agreeing with his liability ruling and rejecting Brown's arguments to the contrary. As we explained, ROSCA specifically addresses the use of a so-called "negative option feature" to sell goods or services on the internet. *Id.* at 769. A negative-option feature is "a provision [in an offer] under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." 16 C.F.R. § 310.2(w); *see also* 15 U.S.C. § 8403 (incorporating the definition by reference). As relevant here, the statute makes it unlawful for any person to use a negative-option marketing device unless he "clearly and conspicuously discloses all material terms of the transaction before obtaining the consumer's billing information." § 8403(1).

We had no difficulty affirming the judge's determination that Brown's websites violated this provision. And because "ROSCA violations are 'unfair or deceptive acts or practices' under the FTCA," we explained that the Commission could "use the FTCA's enforcement regime against violators." *Credit Bureau Ctr.*, 937 F.3d at 769 (quoting 15 U.S.C. § 8404). We thus had no need to consider the Commission's other theories of liability. *Id.*

Turning to the restitution award, we explained that an award of monetary relief—legal or equitable—was incompatible with the text of section 13(b), which by its terms authorizes only injunctive relief. *Id.* at 771–75. That text, and the language and structure of the FTCA's other remedial provisions—notably, section 19, which provides for monetary relief but only if specific preconditions are met—called into question the Commission's view that section 13(b) implicitly authorizes restitution awards. *Id.* We traced the doctrinal path to our decision in *Amy Travel*, which had "developed in the shadow of two [Supreme Court] decisions that took a capacious view of implied remedies." 937 F.3d at 776. "[T]he Court ha[d] [since] adhered to [a] more limited understanding of judicially implied remedies," so we revisited and overruled *Amy Travel*, concluding that "section 13(b)'s permanent-injunction provision does not authorize monetary relief." *Id.* at 781, 786.

The Commission petitioned for certiorari, so we stayed the issuance of our mandate pending the disposition of the petition. The Supreme Court ultimately granted certiorari in two cases—this one and *AMG Capital*, 910 F.3d 417, a case from the Ninth Circuit—to resolve the circuit split over the remedial scope of section 13(b). The Court initially consolidated the two cases for decision but later reversed course and separated them. The Court then proceeded to the merits in the Ninth Circuit's case, concluding in a unanimous opinion that section 13(b) "does not grant the Commission authority to obtain equitable monetary relief" such as restitution or disgorgement. *AMG Capital*, 141 S. Ct. at 1352. The Court's analysis followed the same path as ours in this case. The decision in *AMG Capital* rests on the plain text of section 13(b), the language and structure of the other remedial provisions in the FTCA, and the Court's recent caselaw cautioning against judicially implied remedies. *Id.* at 1347–51.

After issuing its decision in *AMG Capital*, the Court vacated its order granting certiorari in this case and returned it to us. We lifted the stay, issued our mandate, and sent the case back to the district court. The Commission immediately moved to amend the judgment, arguing that our decision on appeal and the

Supreme Court's decision in *AMG Capital* worked an intervening change in the controlling law, justifying relief under Rule 59(e). *See Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1121 n.3 (7th Cir. 2001). The Commission asked the judge to reimpose the restitution award under ROSCA and section 19 of the FTCA. Brown's liability for violating ROSCA had already been established earlier in the litigation; the Commission now pointed to section 5 of ROSCA, which treats a statutory violation as a rule violation under the FTCA and permits the Commission to seek relief under section 19 of the Act. That section, in turn, permits the court to "grant such relief as the court finds necessary to redress injury to consumers," including "the refund of money" and "the payment of damages." 15 U.S.C. §§ 57b(a)–(b), 8404(a).

Brown lodged a host of objections. He argued that the Commission had knowingly "misused" section 13(b) and should be barred by the doctrine of "unclean hands" from seeking relief under ROSCA and section 19. He argued that awarding monetary relief would defy the mandate rule and the law-of-the-case doctrine. He insisted that no intervening change in the law justified an amended judgment and that the Commission had waived reliance on section 19. Still more, he argued that the judgment covered websites that had not been proved to violate ROSCA, that any award must be limited to net profits, and that the Commission must trace the funds to the underlying fraud. The judge rejected each argument, reimposed the restitution award under section 5 of ROSCA and section 19 of the FTCA, and entered the requested amended judgment.

II. Discussion

Brown's appeal rehashes the litany of objections we've just described. Some are frivolous and the rest are meritless, with one exception.

We begin with Brown's claim that the amended judgment violates the mandate rule and runs counter to the law of the case. "The mandate rule requires a lower court to adhere to the commands of a higher court on remand." *United States v. Polland*, 56 F.3d 776, 777 (7th Cir. 1995). The law-of-the-case doctrine "is a corollary to the mandate rule and prohibits a lower court from reconsidering on remand an issue expressly or impliedly decided by a higher court." *Id.* at 779. In Brown's first appeal, we held that section 13(b) does not authorize equitable monetary relief. He casts our decision more broadly, claiming that by vacating the monetary award, we necessarily concluded that the Commission could not obtain *any* monetary award. This argument plucks our mandate from its context. We addressed only the availability of restitution under section 13(b); we did not consider (let alone decide) whether the Commission could obtain monetary relief under any other statutory provision. The amended judgment relies on ROSCA and section 19—not section 13(b)—so it does not exceed the scope of the mandate or disregard the law of the case.

Brown's next argument targets the judge's authority to grant the Rule 59(e) motion. An "intervening change in the controlling law" may justify a motion to amend the judgment. *Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998). Brown insists that our decision in the first appeal and the Supreme Court's decision in *AMG Capital* do not fit the bill. This argument ignores the widespread consensus that had developed before these decisions. *Amy Travel* was controlling law in our circuit for over 30 years. Six other circuits had similarly concluded that section 13(b) authorizes equitable monetary relief. Our decision in Brown's first appeal and the Supreme Court's in *AMG Capital* overturned a longstanding—but mistaken—consensus among the circuits. In other words, the decisions worked a radical change in the law that supports the Commission's Rule 59(e) motion.

Section 19 is the focus of Brown's next cluster of arguments. He claims that the Commission waived reliance on section 19 by not raising it in the first round of litigation. But the Commission's original complaint alleged that Brown violated section 5 of ROSCA. That provision incorporates section 19 of the FTCA by reference, treating a statutory violation under ROSCA as a rule violation under section 18 of the FTCA, which the Commission can redress under section 19.[1] Still, Brown suggests that because the Commission chose to rely on section 13(b) of the FTCA over ROSCA and section 19 earlier in the litigation, it cannot shift course now. But as we've explained several times over, the Commission relied on its established interpretation of section 13(b), long

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[1] Moreover, section 5 of ROSCA generally provides: "The Federal Trade Commission shall enforce this chapter in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act … were incorporated into and made a part of this chapter." 15 U.S.C. § 8404(a).

endorsed by the appellate courts. Pursuing the same monetary relief under ROSCA and section 19 was unnecessary and redundant. That route became relevant only after our decision in the first appeal and the Supreme Court's decision in *AMG Capital*. The ROSCA violation was established in the first judgment, and we affirmed that liability finding in the first appeal. The Commission moved to amend the judgment—to reflect a permissible alternative basis for the monetary award—on the same day the case returned to the district court. That is not waiver.

Brown suggests that we should penalize the Commission for "circumventing" congressional limits on its authority by originally seeking restitution under section 13(b). Once again, this argument fails to contend with the widespread consensus among the circuits prior to our first decision in this case.

Brown next seizes on language in our earlier opinion to argue that the Commission did not comply with the statutory requirements for relief under section 19. This argument is a nonstarter. We explained that the Commission's practice of seeking restitution awards under section 13(b) threatened to undermine the conditions precedent for monetary relief outlined in section 19. *Credit Bureau Ctr.*, 937 F.3d at 774. But ROSCA expressly bypasses these procedural requirements, authorizing the Commission to go directly to court to seek relief under section 19 to enforce its provisions. So permitting the Commission to enforce ROSCA through section 19—unlike section 13(b)—does not undermine the remedial structure that Congress created in the FTCA. To the contrary, it ensures that we respect

Congress's decision to use the Act's enforcement mechanisms to implement ROSCA.[2]

Brown's last set of arguments challenge the amount of the restitution award. The judge reinstated the original award—a total of $5,260,671.36, which equals the revenue Brown obtained through traffic that Pierce directed to the websites minus refunds already paid, chargebacks customers obtained, and a settlement paid by Pierce and Lloyd. Brown contends that the Supreme Court's decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), requires us to vacate the award and remand for recalculation of the amount. In *Liu* the Court considered the scope of equitable relief available in an SEC civil-enforcement action and concluded that a disgorgement award could not exceed a firm's "net profits from wrongdoing." *Id.* at 1946. In *CFPB v. Consumer First Legal Group, LLC*, we recognized that *Liu*'s holding extends to equitable remedies authorized in other statutes. 6 F.4th 694,

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[2] Two related arguments merit less attention. Brown suggests that ROSCA does not actually incorporate section 19. But the plain text of the statute defeats that argument. *See* § 8404(a) ("Violation of this chapter or any regulation prescribed under this chapter shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act … ."); 15 U.S.C. § 57b (identifying a rule violation under the Act as the basis for a civil action).

Brown also suggests that the Commission has not complied with the requirement to notify the Attorney General of its litigation. He cites no evidence to support his claim that the Commission has not communicated with the Attorney General; he does not explain why his allegation, if true, would require reversal; and he does not recognize that the statute provides—for actions both under sections 13(b) and 19—that "the Commission shall have exclusive authority to commence or defend … such action." 15 U.S.C. § 56(a)(2), (a)(2)(A)–(B).

710–11 (7th Cir. 2021) (extending *Liu* to a restitution award granted in favor of the CFPB). Relying on *Liu*, Brown argues that a monetary award under ROSCA and section 19 must be limited to net profits that can be traced to the underlying fraud.

One commonality stands out between *Liu* and our decision in *Consumer First*: equity. The statute at issue in *Liu* authorizes "equitable relief," so the Court analyzed "those categories of relief that were *typically* available in equity." *Liu*, 140 S. Ct. at 1942 (quotation marks omitted). And although the statute at issue in *Consumer First* authorized legal and equitable relief, the district court had granted only equitable relief. In both cases, respecting Congress's remedial decision required cabining relief to the traditional scope of the remedies available in equity.

Section 19 is not so limited; it permits all forms of redress to make consumers whole, including "the refund of money." Accordingly, the amended monetary award appropriately refunds to customers the amount that has not yet been returned by Brown or his coconspirators. Brown's argument ignores Congress's choice in section 19 to authorize the court to "grant such relief as the court finds necessary to redress injury to consumers," including "the refund of money" and "the payment of damages." § 57b(b) Because the monetary award consists of direct consumer redress in the form of refunds—a form of relief expressly permitted by the statute—it need not be measured by net profits and tracing is not required.

Brown's final argument challenges the temporal scope of the award. He draws a line between websites activated before and after December 1, 2015, arguing that the Commission's complaint focused on the websites that were specific to the Craigslist scam and that were activated on December 1, 2015. He contends that the award should be limited to the 14-month period in which the December 2015 websites were active and that his websites before that date did not violate ROSCA.

But Brown has a problem: this argument was both "underdeveloped" and raised too late (in his reply brief) in the first round of this litigation in the district court, so the judge declined to consider it in his original decision. *FTC v. Credit Bureau Ctr., LLC*, 325 F. Supp. 3d 852, 869 n.5 (N.D. Ill. 2018) (finding the argument forfeited for both reasons). Based on our review of the record, that ruling was sound. Brown's summary-judgment brief did not explain why the websites in place before December 2015 differed in a way that would affect his liability under ROSCA, and he has offered us no reason to excuse his failure to develop this argument at an appropriate time in the district court or here. We decline to disturb the judge's forfeiture ruling.

* * *

The amended judgment contains one error that requires correction. As we've explained, section 19 is limited to "such relief as the court finds necessary to redress injury to consumers." § 57b(b). The judgment directs the Commission to deposit any excess money not used for consumer redress and administrative expenses "to the U.S. Treasury as disgorgement." The Commission acknowledged at oral argument that this part of the judgment sweeps beyond the statute. We therefore modify part IX.D of the amended judgment to remove this sentence: "Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement." As modified, the judgment is

AFFIRMED.

Filed September 13, 2021

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. CREDIT BUREAU CENTER, LLC, a limited liability company, formerly known as MYSCORE LLC, also doing business as EFREESCORE.COM, CREDITUPDATES.COM, and FREECREDITNATION.COM, MICHAEL BROWN, individually and as owner and manager of CREDIT BUREAU CENTER, LLC, DANNY PIERCE, individually, and ANDREW LLOYD, individually, Defendants.	Case No. 17-cv-194 Judge Kennelly

MODIFIED FINAL JUDGMENT AND ORDER FOR PERMANENT INJUNCTION AND OTHER EQUITABLE RELIEF AGAINST DEFENDANTS CREDIT BUREAU CENTER, LLC AND MICHAEL BROWN

Plaintiff, the Federal Trade Commission ("Commission" or "FTC"), filed its Complaint for Permanent Injunction and Other Equitable Relief ("Complaint"), pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b); Section 5 of the Restore Online Shoppers' Confidence Act ("ROSCA"), 15 U.S.C. § 8404; and Section 621(a)(1) of the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681s(a)(1). The FTC now having filed its Motion for Summary Judgment Against Defendants Credit Bureau Center, LLC and Michael Brown ("Defendants"), and the Court having considered the FTC's motion, and supporting exhibits, and the entire record in this matter, the FTC's motion is hereby granted, and **IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** as follows:

FINDINGS

1. This Court has jurisdiction over this matter.

2. The Complaint charges that Defendants participated in deceptive and illegal acts or practices in violation of Section 5 of the FTC Act, 15 U.S.C. § 45; Section 4 of ROSCA, 15 U.S.C. § 8403; Section 612(g) of the FCRA, 15 U.S.C. § 1681j(g); and the Free Annual File Disclosures Rule, 16 C.F.R. Part 610 ("Free Reports Rule"), recodified at 12 C.F.R. §§ 1022.130–1022.138, in the advertising, marketing,

promoting, offering for sale, or sale of credit monitoring services.

3. The Court now finds that Defendants have violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by falsely representing to consumers, expressly or by implication, that a residential property described in an online ad is currently available for rent from someone consumers can contact through that ad, and the property will be shown to consumers who obtain their credit reports and scores through Defendants' website.

4. The Court further finds that Defendants have violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), by representing to consumers, expressly or by implication, that they are offering consumers their credit scores and reports for free, while failing to disclose or disclose adequately to consumers, material terms and conditions of the offer, including: (a) that Defendants will automatically enroll consumers in a negative option continuity plan with additional charges; (b) that consumers must affirmatively cancel the negative option continuity plan before the end of a trial period to avoid additional charges; (c) that Defendants will use consumers' credit or debit card information to charge consumers monthly for the negative option continuity plan; (d) the costs associated with the negative option continuity plan; and (e) the means consumers must use to cancel the negative option continuity plan to avoid additional charges.

5. The Court further finds that Defendants have violated Section 4(1) of ROSCA, 15 U.S.C. § 8403(1),

by charging or attempting to charge consumers for Defendants' credit monitoring service through a negative option feature while failing to clearly and conspicuously disclose all material terms of the transaction before obtaining consumers' billing information.

6. The Court further finds that Defendants have violated Section 4(2) of ROSCA, 15 U.S.C. § 8403(2), by charging or attempting to charge consumers for Defendants' credit monitoring service through a negative option feature while failing to obtain consumers' express informed consent before charging their credit card, debit card, bank account, or other financial account.

7. The Court further finds that Defendants have violated Section 612(g)(1) of the FCRA, 15 U.S.C. § 1681j(g)(1), and the Free Reports Rule, 12 C.F.R. § 1022.138, by failing to prominently disclose in advertisements for free credit reports that free credit reports are available under federal law from AnnualCreditReport.com or (877) 322–8228, and by operating websites offering free credit reports, including eFreeScore.com and CreditUpdates.com, without displaying across the top of each page that mentions free credit reports, and across the top of each page of the ordering process, the prominent disclosure required by the Free Reports Rule, 12 C.F.R. § 1022.138, to inform consumers of their right to obtain a free credit report from AnnualCreditReport.com or (877) 322–8228.

8. It is proper to enter this Final Judgment and Order for Permanent Injunction and Other Equitable

Relief Against Defendants ("Order") to prevent a recurrence of Defendants' violations of Section 5 of the FTC Act, 15 U.S.C. § 45, Section 4 of ROSCA, 15 U.S.C. § 8403, Section 612(g) of the FCRA, 15 U.S.C. § 1681j(g), and the Free Reports Rule, 12 C.F.R. §§ 1022.130–1022.138, and to enter equitable monetary relief against Defendants.

9. Defendants' net sales to consumers (total sales minus refunds and chargebacks) amounted to at least $6,022,671.36 from the conduct alleged in the Commission's Complaint; and the Commission has recovered $762,000 from Defendants' affiliate marketers Danny Pierce and Andrew Lloyd.

10. Pursuant to Section 5 of ROSCA, 15 U.S.C. § 8404, and Section 19(b) of the FTC Act, 15 U.S.C. § 57b(b), the Commission is therefore entitled to equitable monetary relief against Defendants for their violations of ROSCA in the amount of $5,260,671.36, for which Defendants are jointly and severally liable.

11. This Order is in addition to, and not in lieu of, any other civil or criminal remedies that may be provided by law.

12. Nothing in this Order shall affect the compensatory sanction previously entered against Defendant Michael Brown in the civil contempt order dated July 18, 2017 (Dkt. 106).

13. Entry of this Order is in the public interest.

Appendix 21a

DEFINITIONS

For the purpose of this Order, the following definitions apply:

1. "**Affiliate**" means any person, including third-party marketers, who participates in an affiliate program.

2. "**Affiliate Network**" means any person who provides another person with affiliates for an affiliate program or whom any person contracts with as an affiliate to promote any product, service, or program.

3. "**Affiliate Program(s)**" means (a) any arrangement under which any marketer or seller of a product, service, or program pays, offers to pay, or provides or offers to provide any form of consideration to any Defendant, either directly or indirectly, to (i) provide the marketer or seller with, or refer to the marketer or seller, potential or actual customers; or (ii) otherwise market, advertise, or offer for sale the product or service on behalf of the marketer or seller; or (b) any arrangement under which any Defendant pays, offers to pay, or provides or offers to provide any form of consideration to any third party, either directly or indirectly, to (i) provide any Defendant with, or refer to any Defendant, potential or actual customers; or (ii) otherwise market, advertise, or offer for sale any product, service, or program on behalf of any Defendant.

4. "**Mobile Application**" means any software application that can be installed on a mobile device.

5. “**Billing Information**” means any data that enables any person to access a consumer’s account, such as a credit card, checking, savings, share or similar account, utility bill, mortgage loan account, or debit card.

6. “**Charge**,” “**charged**,” or “**charging**” means any attempt to collect money or other consideration from a consumer, including but not limited to causing billing information to be submitted for payment, including against a consumer’s credit card, debit card, bank account, phone bill, or other account.

7. “**Clear(ly) and conspicuous(ly)**” means that a required disclosure is difficult to miss (i.e., easily noticeable) and easily understandable by ordinary consumers, including in all of the following ways:

a. In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made in only one means.

b. A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

c. An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

d. In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

e. The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the representation that requires the disclosure appears.

f. The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

g. The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

h. When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, "ordinary consumers" includes reasonable members of that group.

8. "**Close Proximity**" means immediately adjacent to the triggering representation. In the case of advertisements disseminated verbally or through audible means, the disclosure shall be made as soon as practicable after the triggering representation.

9. "**Corporate Defendant**" means Credit Bureau Center, LLC, a Delaware limited liability

company, formerly known as MyScore LLC, and also doing business as eFreeScore.com, CreditUpdates.com, and FreeCreditNation.com, and its successors and assigns.

10. "**Credit Monitoring Service**" means any service, plan, program or membership that includes, or is represented to include, alerts or monitoring of changes to consumers' credit files, credit reports, or credit scores.

11. "**Defendants**" means Credit Bureau Center, LLC, formerly known as MyScore LLC, also doing business as eFreeScore.com, CreditUpdates.com and FreeCreditNation.com, and its successors and assigns, and Michael Brown, individually, collectively, or in any combination.

12. "**Free Credit Report**" means a file disclosure prepared by or obtained from, directly or indirectly, a nationwide consumer reporting agency, including without limitation Equifax, Experian or TransUnion, that is represented, either expressly or impliedly, to be available to the consumer at no cost if the consumer purchases a product or service, or agrees to purchase a product or service subject to cancellation.

13. "**Individual Defendant**" means Michael Brown, by whatever names he may be known.

14. "**Negative Option Feature**" means, in an offer or agreement to sell or provide any good or service, a provision under which the consumer's silence or failure to take affirmative action to reject a good or service or to cancel the agreement is

interpreted by the seller or provider as acceptance or continuing acceptance of the offer.

15. "**Preliminary Injunction**" means the Preliminary Injunction as to Defendants Credit Bureau Center, LLC and Michael Brown entered on February 21, 2017 (Dkt. No. 59).

16. "**Receiver**" means Robb Evans & Associates LLC, appointed as Receiver pursuant to Section VII of the Preliminary Injunction, and any deputy receivers named by the Receiver.

17. "**Receivership Defendant**" means Credit Bureau Center, LLC, a Delaware limited liability company, formerly known as MyScore LLC, and also doing business as eFreeScore.com, CreditUpdates.com, and FreeCreditNation.com, and its successors and assigns, as well as any subsidiaries, affiliates, divisions, or sales or customer service operations, and any fictitious business entities or business names created or used by these entities.

18. "**Telemarketing**" means any plan, program, or campaign which is conducted to induce the purchase of any product, service, plan, or program by use of one or more telephones, and which involves a telephone call, whether or not covered by the Telemarketing Sales Rule, 16 C.F.R. Part 310.

19. "**TRO**" means the *Ex Parte* Temporary Restraining Order With Asset Freeze, Appointment of a Receiver, Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue, entered in this matter on January 11, 2017 (Dkt. No. 16).

I. BAN ON NEGATIVE-OPTION CREDIT MONITORING SERVICES

IT IS ORDERED that Defendants, whether acting directly or indirectly, are permanently restrained and enjoined from advertising, marketing, promoting, offering for sale, or selling, or assisting in the advertising, marketing, promoting, offering for sale, or sale of any Credit Monitoring Service with a Negative Option Feature.

II. PROHIBITION AGAINST MISREPRESENTATIONS

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, offering for sale, or sale of any good or service, are permanently restrained and enjoined from misrepresenting, or assisting others in misrepresenting, expressly or by implication, any material fact, including, but not limited to:

A. That a residential property described in an online ad is currently available for rent from someone consumers can contact through that ad;

B. That a residential property will be shown to consumers who obtain their credit reports or scores from any particular source;

C. The purpose of any communication with consumers; or

D. Any other fact material to consumers concerning any good or service, such as: the total costs; any material restrictions, limitations, or conditions; or any material aspect of its performance, efficacy, nature, or central characteristics.

III. PROHIBITED AFFILIATE PROGRAM ACTIVITIES

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with the advertising, marketing, promoting, offering for sale, or sale of any good or service through an Affiliate Network or Program that a Defendant owns, operates, or controls, or through an Affiliate or Affiliate Network to which a Defendant provides or offers to provide any payment or other form of consideration, are permanently restrained and enjoined from failing to:

A. Require each Affiliate and/or Affiliate Network to provide the following identifying information:

1. In the case of a natural person, the Affiliate's or Affiliate Network's first and last name, physical address, country, telephone number, email address, and complete bank account information as to where payments are to be made to that person;

2. In the case of a business entity, the Affiliate's or Affiliate Network's name and any and all names under which it does business, state of incorporation, registered agent, and the first and last name, physical

address, country, telephone number, and email address for at least one natural person who owns, manages, or controls the Affiliate or Affiliate Network, and the complete bank account information as to where payments are to be made to the Affiliate or Affiliate Network;

3. If Defendants have access to certain Affiliates only through an Affiliate Network, then Defendants shall contractually require each Affiliate Network to obtain and maintain from those Affiliates the identifying information set forth in Subsections A.1 and A.2 of this Section prior to the Affiliate's or Affiliate Network's participation in any Defendant's Affiliate Program.

B. As a condition of doing business with any Affiliate or Affiliate Network or such Affiliate or Affiliate Network's acceptance into any Defendant's Affiliate Program: (a) provide each such Affiliate or Affiliate Network a copy of this Order; (b) obtain from each such Affiliate or Affiliate Network a signed and dated statement acknowledging receipt of this Order and expressly agreeing to comply with this Order; and (c) clearly and conspicuously disclose in writing that engaging in acts or practices prohibited by this Order will result in immediate termination of any Affiliate or Affiliate Network and forfeiture of all monies owed to such Affiliate or Affiliate Network; *provided, however*, that if Defendants have access to certain Affiliates only through an Affiliate Network, then Defendants shall contractually require that the Affiliate Network provide the information required by this Subsection to each of those Affiliates and retain proof of the same prior to any such Affiliate being used in any Defendant's Affiliate Program; and if any Defendant should acquire an entity that has an existing program of selling through Affiliates, the entity must complete all steps in this Subsection prior to Defendant's acquisition of the entity.

C. Require that each Affiliate or Affiliate Network, prior to the public use or dissemination to consumers of any marketing materials, including, but not limited to, advertisements, websites, emails, and pop-ups used by any Affiliate or Affiliate Network to advertise, promote, market, offer for sale, or sell any goods or services, provide Defendants with the following information: (a) copies of all marketing materials to be used by the Affiliate or Affiliate Network, including text, graphics, video, audio, and photographs; (b) each location the Affiliate or Affiliate Network maintains, or directly or indirectly controls, where the marketing materials will appear, including the URL of any website; and (c) for hyperlinks contained within the marketing materials, each location to which a consumer will be transferred by clicking on the hyperlink, including the URL of any website. Defendants shall also require each Affiliate or Affiliate Network to maintain and provide to Defendants upon request records of the dates when the marketing materials are publicly used or disseminated to consumers. *Provided, however*, that if Defendants have access to certain Affiliates only through an Affiliate Network, then Defendants shall contractually require that the Affiliate Network obtain and maintain the same information set forth above from each of those Affiliates who are part of any Defendant's Affiliate Program prior to the public use or dissemination to consumers of any such marketing materials, and provide proof to such Defendant of having obtained the same.

D. Promptly review the marketing materials specified in Subsection C of this Section as necessary to ensure compliance with this Order. Defendants shall also promptly take steps as necessary to ensure that the marketing materials provided to Defendants under Subsection C of this Section are the marketing materials publicly used or disseminated to consumers by the Affiliate or Affiliate Network. If a Defendant determines that use of any marketing materials does not comply with this Order, such Defendant shall inform the Affiliate or Affiliate Network in writing that approval to use such marketing materials is denied and shall not pay any amounts to the Affiliate or Affiliate Network for such marketing, including any payments for leads, "click-throughs," or sales resulting therefrom. *Provided, however*, that if Defendants have access to certain Affiliates only through an Affiliate Network, then Defendants shall contractually require that the Affiliate Network comply with the procedures set forth in this Subsection as to those Affiliates.

E. Promptly investigate any complaints that any Defendant receives through any source to determine whether any Affiliate or Affiliate Network is engaging in acts or practices prohibited by this Order, either directly or through any Affiliate that is part of any Defendant's Affiliate Program.

F. Upon determining that any Affiliate or Affiliate Network has engaged in, or is engaging in, acts or practices prohibited by this Order, either directly or through any Affiliate that is part of any Defendant's Affiliate Program, immediately:

1. Disable any connection between the Defendant's Affiliate Program and the marketing materials used by the Affiliate or Affiliate Network to engage in such acts or practices prohibited by this Order;

2. Halt all payments to the Affiliate or Affiliate Network resulting from such acts or practices prohibited by this Order; and

3. Terminate the Affiliate or Affiliate Network; provided, however, Defendants shall not be in violation of this Subsection if Defendants fail to terminate an Affiliate Network in a case where Defendants' only access to an Affiliate who has engaged in acts or practices prohibited by this Order is through an Affiliate Network and Defendants receive notice that the Affiliate Network immediately terminated the Affiliate violating this Order from any Defendant's Affiliate Program.

IV. PROHIBITION AGAINST MISREPRESENTATIONS RELATING TO NEGATIVE OPTION FEATURES

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service with a Negative Option Feature, are permanently restrained and enjoined from misrepresenting or assisting others in misrepresenting, expressly or by implication:

A. Any cost to the consumer to purchase, receive, use, or return the initial good or service;

B. That a consumer will not be Charged for any good or service;

C. That a good or service is offered on a "free," "trial," "sample," "bonus," "gift," "no obligation," "discounted" basis, or words of similar import, denoting or implying the absence of an obligation on the part of the recipient of the offer to affirmatively act in order to avoid Charges, including where a Charge will be assessed pursuant to the offer unless the consumer takes affirmative steps to prevent or stop such a Charge;

D. That consumers can obtain a good or service for a processing, service, shipping, handling, or administrative fee with no further obligation;

E. The purpose(s) for which a consumer's Billing Information will be used;

F. The date by which a consumer will incur any obligation or be Charged unless the consumer takes an affirmative action on the Negative Option Feature;

G. That a transaction has been authorized by a consumer;

H. Any material aspect of the nature or terms of a refund, cancellation, exchange, or repurchase policy for the good or service; or

I. Any other material fact.

Compliance with this Section is separate from, and in addition to, the disclosures required by Sections V and VI of this Order.

V. REQUIRED DISCLOSURES RELATING TO NEGATIVE OPTION FEATURES

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service with a Negative Option Feature, are permanently restrained and enjoined from:

A. Representing directly or indirectly, expressly or by implication, that any good or service that includes a Negative Option Feature is being offered on a free, trial, no obligation, reduced, or discounted basis, without disclosing Clearly and Conspicuously, and in Close Proximity to, any such representation:

1. The extent to which a consumer must take affirmative action(s) to avoid any Charges: a) for the offered good or service, b) of an increased amount after the trial or promotional period ends, and c) on a recurring basis;

2. The total cost (or range of costs) the consumer will be Charged and, if applicable, the frequency of such Charges unless the consumer timely takes steps to prevent or stop such Charges; and

3. The deadline(s) (by date or frequency) by which the consumer must affirmatively act in order to stop all recurring Charges.

B. Obtaining Billing Information from a consumer for any transaction involving a good or service that includes a Negative Option Feature, without first disclosing Clearly and Conspicuously, and in Close Proximity to where a consumer provides Billing Information:

1. The extent to which a consumer must take affirmative action(s) to avoid any Charges: a) for the offered good or service, b) of an increased amount after the trial or promotional period ends, and c) on a recurring basis;

2. The total cost (or range of costs) the consumer will be Charged, the date the initial Charge will be submitted for payment, and, if applicable, the frequency of such Charges unless the consumer timely takes affirmative steps to prevent or stop such Charges;

3. The deadline(s) (by date or frequency) by which the consumer must affirmatively act in order to stop all recurring Charges;

4. The name of the seller or provider of the good or service and, if the name of the seller or provider will not appear on billing statements, the billing descriptor that will appear on such statements;

5. A description of the good or service;

6. Any Charge or cost for which the consumer is responsible in connection with the cancellation of an order or the return of a good; and

7. The simple cancellation mechanism to stop any recurring Charges, as required by Section VII of this Order.

C. Failing to send the consumer:

1. Immediately after the consumer's submission of an online order, written confirmation of the transaction by email. The email must Clearly and Conspicuously disclose all the information required by Subsection B of this Section, and contain a subject line reading "Order Confirmation" along with the name of the product or service, and no additional information; or

2. Within 2 days after receipt of the consumer's order by mail or telephone, a written confirmation of the transaction, either by email or first class mail. The email or letter must Clearly and Conspicuously disclose all the information required by Subsection B of this Section. The subject line of the email must Clearly and Conspicuously state "Order Confirmation" along with the name of the product or service, and nothing else. The outside of the envelope must Clearly and Conspicuously state "Order Confirmation" along with the name of the product or service, and no additional information other than the consumer's address, the Defendant's return address, and postage.

VI. OBTAINING EXPRESS INFORMED CONSENT

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service with a Negative Option Feature, are permanently restrained and enjoined from using or assisting others in using Billing Information to obtain payment from a consumer, unless Defendant first obtains the express informed consent of the consumer to do so. To obtain express informed consent, Defendants must:

A. For all written offers (including over the Internet or other web-based applications or services), obtain consent through a check box, signature, or other substantially similar method, which the consumer must affirmatively select or sign to accept the Negative Option Feature, and no other portion of the offer. Defendant shall disclose Clearly and Conspicuously, and in Close Proximity to such check box, signature, or substantially similar method of affirmative consent, only the following, with no additional information:

1. The extent to which a consumer must take affirmative action(s) to avoid any Charges: a) for the offered good or service, b) of an increased amount after the trial or promotional period ends, and c) on a recurring basis;

2. The total cost (or range of costs) the consumer will be Charged and, if applicable, the frequency of such Charges unless the consumer timely takes affirmative steps to prevent or stop such Charges; and

3. The deadline(s) (by date or frequency) by which the consumer must affirmatively act in order to stop all recurring Charges.

B. For all oral offers, prior to obtaining any Billing Information from the consumer:

1. Clearly and Conspicuously disclose the information contained in Section V.B of this Order; and

2. Obtain affirmative unambiguous express oral confirmation that the consumer a) consents to being Charged for any goods or services, including providing, at a minimum, the last four (4) digits of the consumer's account number to be Charged, b) understands that the transaction includes a Negative Option Feature, and c) understands the specific affirmative steps the consumer must take to prevent or stop further Charges. For transactions conducted through telemarketing, Defendants shall maintain for 3 years from the date of each transaction an unedited voice recording of the entire transaction, including the prescribed statements set out in Subsection B of this Section. Each recording must be retrievable by date and by the consumer's name, telephone number, or Billing Information, and must be provided upon request to the consumer, the consumer's bank, or any law enforcement entity.

VII. SIMPLE MECHANISM TO CANCEL NEGATIVE OPTION FEATURE

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with promoting or offering for sale any good or service with a Negative Option Feature, are permanently restrained and enjoined from failing to provide a simple mechanism for the consumer to: (1) avoid being Charged, or Charged an increased amount, for the good or service; and (2) immediately stop any recurring Charges. Such mechanism must not be difficult, costly, confusing, or time consuming, and must be at least as simple as the mechanism the consumer used to initiate the Charge(s). In addition:

A. For consumers who entered into the agreement to purchase a good or service including a Negative Option Feature over the Internet or through other web-based applications or services, Defendants must provide a mechanism, accessible over the Internet or through such other web-based application or service that consumers can easily use to cancel the product or service and to immediately stop all further Charges.

B. For consumers who entered into the agreement to purchase a good or service including a Negative Option Feature through an oral offer and acceptance, Defendants must maintain a telephone number and a postal address that consumers can easily use to cancel the product or service and to immediately stop all further Charges. Defendants must assure that all calls to this telephone number shall be answered during normal business hours and that mail to the postal address is retrieved regularly.

VIII. REQUIRED DISCLOSURES RELATING TO FREE CREDIT REPORTS

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, in connection with offering Free Credit Reports, are permanently restrained and enjoined from failing to include disclosures that meet all of the following requirements:

A. General requirements for disclosures: The disclosures covered by Subsection B of this Section shall contain only the prescribed content and comply with the following requirements:

1. All disclosures shall be Clear and Conspicuous;

2. All visual disclosures must be parallel to the base of the advertisement or screen;

3. Program-length television, radio, or Internet-hosted multimedia advertisement disclosures shall be made at the beginning, near the middle, and at the end of the advertisement; and

4. If the locator address AnnualCreditReport.com or toll-free telephone number (877) 322-8228 authorized under federal law changes in the future, the new address or telephone number shall be

substituted in the disclosures required by this Section within a reasonable time.

B. Medium-specific disclosures: All offers of Free Credit Reports shall include the disclosures required by this Section:

1. Television advertisements: All advertisements for Free Credit Reports broadcast on television shall include the following disclosure in Close Proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law." The visual disclosure shall be at least four percent of the vertical picture height and appear for a minimum of four seconds.

2. Radio advertisements: All advertisements for Free Credit Reports broadcast on radio shall include the following disclosure in Close Proximity to the first mention of a free credit report: "This is not the free credit report provided for by Federal law."

3. Print advertisements: All advertisements for Free Credit Reports in print shall include the following disclosure in the form specified below and in Close Proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW." Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from AnnualCreditReport.com or (877) 322-8228, the ONLY authorized source under Federal law." Each letter of the disclosure text shall be, at minimum, one-half the size of the largest character used in the advertisement.

4. Websites: Any website offering Free Credit Reports must display the disclosure set forth in Subsections B.4.a, B.4.b, and B.4.e of this Section on each page that mentions a free credit report and on each page of the ordering process. This disclosure shall be visible across the top of each page where the disclosure is required to appear; shall appear inside a box; and shall appear in the form specified below:

a. The first element of the disclosure shall be a header that is centered and shall consist of the following text: "THIS NOTICE IS REQUIRED BY LAW. Read more at consumerfinance.gov/learnmore." Each letter of the header shall be one-half the size of the largest character of the disclosure text required by Subsection B.4.b of this Section. The reference to consumerfinance.gov/learnmore shall be an operational hyperlink, underlined, and in a color that is a high degree of contrast from the color of the other disclosure text and background color of the box.

b. The second element of the disclosure shall appear below the header required by Subsection B.4.a of this Section and shall consist of the following text: "You have the right to a free credit report from AnnualCreditReport.com or (877) 322-8228, the ONLY authorized source under Federal law." The reference to AnnualCreditReport.com shall be an operational hyperlink to the centralized source, underlined, and in the same color as the hyperlink to consumerfinance.gov/learnmore required in Subsection B.4.a of this Section;

c. The color of the text required by Subsections B.4.a and B.4.b of this Section shall be in a high degree of contrast with the background color of the box;

d. The background of the box shall be a solid color in a high degree of contrast from the background of the page and the color shall not appear elsewhere on the page;

e. The third element of the disclosure shall appear below the text required by Subsection B.4.b of this Section and shall be an operational hyperlink to AnnualCreditReport.com that appears as a centered button containing the following language: “Take me to the authorized source.” The background of this button shall be the same color as the hyperlinks required by Subsections B.4.a and B.4.b of this Section and the text shall be in a high degree of contrast to the background of the button;

f. Each character of the text required in Subsections B.4.b and B.4.e of this Section shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner;

g. Each character of the disclosure shall be displayed as plain text and in a sans serif font, such as Arial; and

h. The space between each element of the disclosure required in Subsections B.4.a, B.4.b, and B.4.e of this Section shall be, at minimum, the same size as the largest character on the page, including characters in an image or graphic banner. The space between the boundaries of the box and the text or button required in Subsections B.4.a, B.4.b, and B.4.e of this Section shall be, at minimum, twice the size of the vertical height of the largest character on the page, including characters in an image or graphic banner.

5. Mobile Applications: Any Mobile Application offering Free Credit Reports must comply with the requirements set forth in Subsection B.6 of this Section.

6. Internet-hosted multimedia advertising: All advertisements for Free Credit Reports disseminated through Internet-hosted multimedia in both audio and visual formats shall include the following disclosure in the form specified below and in Close Proximity to the first mention of a free credit report. The first line of the disclosure shall be centered and contain only the following language: "THIS NOTICE IS REQUIRED BY LAW." Immediately below the first line of the disclosure the following language shall appear: "You have the right to a free credit report from AnnualCreditReport.com or (877) 322-8228, the ONLY authorized source under Federal law." If the advertisement contains characters, the visual disclosure shall be, at minimum, the same size as the largest character on the advertisement.

7. Telephone requests: When consumers call any telephone number, other than the number of the centralized source, appearing in an advertisement that represents Free Credit Reports are available at the number, consumers must receive the following audio disclosure at the first mention of a free credit report: "The following notice is required by law. You have the right to a free credit report from

AnnualCreditReport.com or (877) 322-8228, the only authorized source under Federal law."

8. Telemarketing solicitations: When telemarketing sales calls are made that include offers of Free Credit Reports, the call must include at the first mention of a free credit report the following disclosure: "The following notice is required by law. You have the right to a free credit report from AnnualCreditReport.com or (877) 322-8228, the only authorized source under Federal law."

IX. MONETARY JUDGMENT

IT IS FURTHER ORDERED that:

A. Judgment in the amount of Five Million, Two Hundred Sixty Thousand, Six Hundred Seventy-One and Thirty-Six Cents ($5,260,671.36) is entered in favor of the Commission against Defendants, jointly and severally, as equitable monetary relief.

B. Defendants are ordered to pay to the Commission Five Million, Two Hundred Sixty Thousand, Six Hundred Seventy-One and Thirty-Six Cents ($5,260,671.36). Such payment must be made within 7 days of entry of this Order by electronic funds transfer in accordance with instructions provided by a representative of the Commission.

C. Within 7 days of entry of this Order:

1. Defendant Michael Brown is ordered to pay to the Commission all funds in the Bank of America, N.A. account ending "2356" held by Michael Brown;

2. Defendant Michael Brown is ordered to pay to the Commission all funds in the FirstBank Puerto Rico account ending "9599" held by Michael Brown; and

3. Defendant Michael Brown is ordered to liquidate and pay to the Commission the entire balance of Michael Brown's Merrill Lynch SEP IRA account ending "6422," less any fees owed to Merrill Lynch on that account or any amount Merrill Lynch is legally required to withhold.

To effect such payments, the Court directs that the entities holding the funds shall, immediately upon receiving notice of this Order, remit the funds to the Commission by electronic funds transfer or otherwise in accordance with directions provided by a representative of the Commission.

D. All money paid to the Commission pursuant to this Order may be deposited into a fund administered by the Commission or its designee to be used for equitable relief, including consumer redress and any attendant expenses for the administration of any redress fund. If a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable or money remains after redress is completed, with the Court's prior approval, the Commission may apply any remaining money for such other equitable relief (including consumer information remedies) as it determines to be reasonably related to Defendants' practices alleged in the Complaint. Any money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement. Defendants have no right to challenge any actions the Commission or its representatives may take pursuant to this Subsection.

X. PROHIBITION ON COLLECTING ON ACCOUNTS

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, whether acting directly or indirectly, are permanently restrained and enjoined from Charging or attempting to Charge consumers for any Credit Monitoring Services marketed or sold prior to entry of this Order, and from selling, assigning, or otherwise transferring any right to Charge for any Credit Monitoring Services marketed or sold prior to entry of this Order.

XI. CUSTOMER INFORMATION

IT IS FURTHER ORDERED that Defendants, their officers, agents, employees, and attorneys, and all other persons in active concert or participation with any of them, who receive actual notice of this Order, are permanently restrained and enjoined from directly or indirectly:

A. Failing to provide sufficient customer information to enable the Commission to efficiently administer consumer redress. Defendants represent that they have provided this redress information to the Commission. If a representative of the Commission requests in writing any information related to redress, Defendants must provide it, in the form prescribed by the Commission, within 14 days.

B. Disclosing, using, or benefitting from customer information, including the name, address, telephone number, email address, social security number, other identifying information, or any data that enables access to a customer's account (including a credit card, bank account, or other financial account), that any Defendant obtained prior to entry of this Order in connection with the advertising, marketing, promoting, offering for sale, or sale of Credit Monitoring Services; and

C. Failing to destroy such customer information in all forms in their possession, custody, or control within 30 days after receipt of written direction to do so from a representative of the Commission.

Provided, however, that customer information need not be disposed of, and may be disclosed, to the extent requested by a government agency or required by law, regulation, or court order.

XII. COMPLETION OF RECEIVERSHIP

IT IS FURTHER ORDERED that the appointment of the Receiver pursuant to the Preliminary Injunction is hereby continued in full force and effect as modified by this Section.

A. The Receiver is directed and authorized to accomplish the following within 90 days after entry of this Order, but any party or the Receiver may request that the Court extend the Receiver's term for good cause:

1. Take any and all steps that the Receiver concludes are appropriate to wind down the affairs of the Receivership Defendant;

2. Complete the process of taking custody, control and possession of all assets of the Receivership Defendant, including without limitation any funds in bank accounts or payment processing reserve accounts;

3. Complete, as necessary, the liquidation of all assets of the Receivership Defendant;

4. Prepare and submit a report describing the Receiver's activities pursuant to this Order, and a final application for compensation and expenses; and

5. Distribute to the Commission all remaining liquid assets at the conclusion of the Receiver's duties, in partial satisfaction of the monetary judgment set forth in this Order.

B. Upon completion of the above tasks, the duties of the Receiver shall terminate, and the Receiver shall be discharged.

XIII. ORDER ACKNOWLEDGEMENTS

IT IS FURTHER ORDERED that Defendants obtain acknowledgments of receipt of this Order:

A. Each Defendant, within 7 days of entry of this Order, must submit to the Commission an acknowledgment of receipt of this Order sworn under penalty of perjury.

B. For 5 years after entry of this Order, Individual Defendant for any business that such Defendant, individually or collectively with any other Defendant, is the majority owner or controls directly or indirectly, and Corporate Defendant, must deliver a copy of this Order to: (1) all principals, officers, directors, and LLC managers and members; (2) all employees having managerial responsibilities for conduct related to the subject matter of the Order, and all agents and representatives who participate in conduct related to the subject matter of the Order; and (3) any business entity resulting from any change in structure as set forth in the Section titled Compliance Reporting. Delivery must occur within 7 days of entry of this Order for current personnel. For all others, delivery must occur before they assume their responsibilities.

C. From each individual or entity to which a Defendant delivered a copy of this Order, that Defendant must obtain, within 30 days, a signed and dated acknowledgment of receipt of this Order.

XIV. COMPLIANCE REPORTING

IT IS FURTHER ORDERED that Defendants make timely submissions to the Commission:

A. One year after entry of this Order, each Defendant must submit a compliance report, sworn under penalty of perjury.

1. Each Defendant must: (a) identify the primary physical, postal, and email address and telephone number, as designated points of contact, which representatives of the Commission may use to communicate with Defendant; (b) identify all of that

Defendant's businesses by all of their names, telephone numbers, and physical, postal, email, and Internet addresses; (c) describe the activities of each business, including the goods and services offered, the means of advertising, marketing, and sales, and the involvement of any other Defendant (which Individual Defendant must describe if he knows or should know due to his own involvement); (d) describe in detail whether and how that Defendant is in compliance with each Section of this Order; and (e) provide a copy of each Order Acknowledgment obtained pursuant to this Order, unless previously submitted to the Commission.

2. Additionally, Individual Defendant must: (a) identify all telephone numbers and all physical, postal, email and Internet addresses, including all residences; (b) identify all business activities, including any business for which Individual Defendant performs services whether as an employee or otherwise and any entity in which Individual Defendant has any ownership interest; and (c) describe in detail Individual Defendant's involvement in each such business, including title, role, responsibilities, participation, authority, control, and any ownership;

B. For 20 years after entry of this Order, each Defendant must submit a compliance notice, sworn under penalty of perjury, within 14 days of any change in the following:

1. Each Defendant must report any change in: (a) any designated point of contact; or (b) the structure of Corporate Defendant or any entity that Defendant

has any ownership interest in or controls directly or indirectly that may affect compliance obligations arising under this Order, including: creation, merger, sale, or dissolution of the entity or any subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order.

2. Additionally, Individual Defendant must report any change in: (a) name, including aliases or fictitious name, or residence address; or (b) title or role in any business activity, including any business for which Individual Defendant performs services whether as an employee or otherwise and any entity in which Individual Defendant has any ownership interest, and identify the name, physical address, and any Internet address of the business or entity.

C. Each Defendant must submit to the Commission notice of the filing of any bankruptcy petition, insolvency proceeding, or similar proceeding by or against such Defendant within 14 days of its filing.

D. Any submission to the Commission required by this Order to be sworn under penalty of perjury must be true and accurate and comply with 28 U.S.C. § 1746, such as by concluding: "I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on: _____" and supplying the date, signatory's full name, title (if applicable), and signature.

E. Unless otherwise directed by a Commission representative in writing, all submissions to the Commission pursuant to this Order must be emailed to DEbrief@ftc.gov or sent by overnight courier (not the U.S. Postal Service) to: Associate Director for Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580. The subject line must begin: *FTC v. Credit Bureau Center, LLC*, et al., FTC Matter No. X170014.

XV. RECORDKEEPING

IT IS FURTHER ORDERED that Defendants must create certain records for 20 years after entry of the Order, and retain each such record for 5 years. Specifically, Corporate Defendant and Individual Defendant for any business that Individual Defendant, individually or collectively with any other Defendant, is a majority owner or controls directly or indirectly, must create and retain the following records:

A. Accounting records showing the revenues from all goods or services sold;

B. Personnel records showing, for each person providing services, whether as an employee or otherwise, that person's: name; addresses; telephone numbers; job title or position; dates of service; and (if applicable) the reason for termination;

C. Records relating to Affiliates or Affiliate Networks, including all names, addresses, and telephone numbers; dollar amounts paid or received; and information used in calculating such payments;

D. Records of all consumer complaints and refund requests, whether received directly or indirectly, such as through a third party, and any response;

E. All records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Commission;

F. Copies of all marketing materials, documents, and information received pursuant to Subsection III.C of this Order; and all written approvals or denials of marketing materials made pursuant to Subsection III.D of this Order; and

G. A copy of each unique advertisement or other marketing material.

XVI. COMPLIANCE MONITORING

IT IS FURTHER ORDERED that, for the purpose of monitoring Defendants' compliance with this Order, including any failure to transfer any assets as required by this Order:

A. Within 14 days of receipt of a written request from a representative of the Commission, each Defendant must: submit additional compliance reports or other requested information, which must be sworn under penalty of perjury; appear for depositions; and produce documents for inspection and copying. The Commission is also authorized to obtain discovery, without further leave of court, using any of the procedures prescribed by Federal Rules of Civil Procedure 29, 30 (including telephonic depositions), 31, 33, 34, 36, 45, and 69.

B. For matters concerning this Order, the Commission is authorized to communicate directly with each Defendant. Defendant must permit representatives of the Commission to interview any employee or other person affiliated with any Defendant who has agreed to such an interview. The person interviewed may have counsel present.

C. The Commission may use all other lawful means, including posing, through its representatives as consumers, suppliers, or other individuals or entities, to Defendants or any individual or entity affiliated with Defendants, without the necessity of identification or prior notice. Nothing in this Order limits the Commission's lawful use of compulsory process, pursuant to Sections 9 and 20 of the FTC Act, 15 U.S.C. §§ 49, 57b-1.

D. Upon written request from a representative of the Commission, any consumer reporting agency must furnish consumer reports concerning Individual Defendant, pursuant to Section 604(1) of the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(1).

XVII. RETENTION OF JURISDICTION

IT IS FURTHER ORDERED that this Court retains jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

SO ORDERED this 13th day of September, 2021.

/s/ Matthew F. Kennelly
Honorable Matthew F. Kennelly
United States District Judge

Filed September 13, 2021

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

FEDERAL TRADE COMMISSION, **Plaintiff,** **vs.** **CREDIT BUREAU CENTER, LLC, and MICHAEL BROWN,** **Defendants.**	**Case No. 17 C 194**

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

In 2018, the Federal Trade Commission sued Credit Bureau Center and Michael Brown (collectively, CBC) under section 13(b) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 53(b), section 5 of the Restore Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. § 8404, and section 621(a)(1) of the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681s(a)(1). *See* Compl. ¶ 1. The FTC alleged that CBC operated a deceptive marketing campaign that violated several consumer-protection statutes. This Court entered a permanent injunction and ordered CBC to pay more than $5 million in equitable monetary relief to the Commission—restitution, as the Seventh Circuit called it. *See FTC v. Credit Bureau Ctr., LLC*, 325 F. Supp. 3d 852 (N.D. Ill. 2018) (*Credit Bureau I*), *aff'd in part, vacated in part*, 937 F.3d 764 (7th Cir. 2019).

On appeal, the Seventh Circuit vacated the restitution reward after holding that section 13(b) does not authorize restitution. *See FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019) (C*redit Bureau II*), *cert. granted*, 141 S. Ct. 194 (2020), *vacated*, 141 S. Ct. 810 (2020), *cert. denied*, 141 S. Ct. 195 (2020), and *cert. denied*, 209 L. Ed. 2d 743 (May 3, 2021). The Seventh Circuit affirmed all other portions of the Court's opinion. After the Seventh Circuit issued its mandate, the FTC filed a motion to amend this Court's judgment. The FTC asks that the Court reimpose the prior judgment pursuant to section 19 of the FTC Act, 15 U.S.C. § 57(b). CBC opposes the FTC's motion and has filed a countermotion to "enforce" the Seventh Circuit's mandate, which it reads as precluding the relief the FTC seeks.

For the reasons stated below, the Court grants the FTC's motion to alter or amend the judgment and denies CBC's motion.

Background

CBC, along with affiliated marketers, schemed to bilk millions of dollars from consumers. Through a deceptive marketing campaign, consumers were directed to CBC websites where they believed they could receive a free credit report. Instead, the consumers were misled into enrolling in a monthly credit monitoring service in return for a monthly fee.

From 2014 to 2017, CBC defrauded over 150,000 consumers out of almost 7 million dollars.

In 2017, the FTC filed a complaint against CBC and its affiliated marketers in this court. Of the five counts, four are important for the consideration of the present motion: counts 1 and 2, which alleged the defendants violated section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and counts 3 and 4, which alleged CBC violated section 4 of ROSCA, 15 U.S.C. § 8403. Citing section 13(b) of the FTC Act and section 5(a) of ROSCA, the FTC requested injunctive relief and restitution.

After close of discovery, the FTC and CBC filed cross-motions for summary judgment. Citing section 13(b), the FTC asked for monetary relief totaling more than 5 million dollars—the amount consumers paid for CBC's credit monitoring service. CBC made numerous arguments for judgment in their favor, including that section 13(b) did not authorize monetary relief. The Court granted summary judgment on all five counts in favor of the FTC and denied summary judgment to CBC. *See Credit Bureau I*, 325 F. Supp. 3d at 870. Later, the Court entered a permanent injunction and awarded monetary relief consisting of restitution. *See generally* dkt. no. 239. The Court also retained jurisdiction "for purposes of construction, modification, and enforcement" of the judgment order. *Id.* at 33.

CBC appealed. In 2019, the Seventh Circuit affirmed much of the Court's opinion but vacated the restitution reward after holding that section 13(b) does not authorize restitution. *See Credit Bureau II*, 937 F.3d at 771–86. In doing so, the Seventh Circuit overruled its prior decision in *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989), which authorized awards of restitution under section 13(b). *See Credit Bureau II*, 937 F.3d at 782–786. The Seventh Circuit stayed its mandate pending appeal to the Supreme Court.

The Supreme Court denied CBC's petition for writ of certiorari but granted the FTC's petition. *See Credit Bureau Ctr., LLC v. FTC*, 141 S. Ct. 195 (2020); *FTC v. Credit Bureau Ctr., LLC*, 141 S. Ct. 194 (2020). The case was meant to be consolidated with *AMG Capital Management LLC v. FTC*, but the Supreme Court vacated its grant later that year. *FTC v. Credit Bureau Ctr., LLC*, 141 S. Ct. 810 (2020). In 2021, a unanimous Supreme Court held that section 13(b) of the FTC Act does not authorize the FTC to seek equitable monetary relief such as restitution or disgorgement. *AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1344 (2021). As such, courts across the country are no longer permitted to award monetary relief under section 13(b). *See id.*

Discussion

A party seeking to alter or amend judgment under Federal Rule of Civil Procedure 59(e) must "clearly establish a manifest error of law or an intervening change in the controlling law or present newly discovered evidence." *Romo v. Gulf Stream Coach, Inc.*, 250 F.3d 1119, 1122 n. 3 (7th Cir. 2001); *see also Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998). Rule 59(e) is not an appropriate vehicle for advancing arguments that could have been raised previously, introducing evidence that could have been introduced earlier, or rehashing old arguments. *Small v. Chao*, 377 F. Supp. 2d 665, 666 (C.D. Ill. 2003) (citing cases).

A. Overview of the parties' arguments

At bottom, the FTC asserts that it may seek monetary relief in this case pursuant to section 19 of the FTC Act (15 U.S.C. § 57(b))—a provision it did not cite in its complaint. To understand why the FTC makes this assertion, one must start with a provision the FTC did cite: section 5(a) of ROSCA. *See* Compl. at 22. Section 5(a) empowers the FTC to enforce ROSCA by treating violations of ROSCA as violations "of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices." 15 U.S.C. § 8404. Section 18 of the FTC Act is one of the "enforcement mechanisms" at the FTC's disposal. *Credit Bureau II*, 937 F.3d at 771. Section 18 empowers the FTC to "promulgate rules that 'define with specificity acts or practices which are unfair or deceptive.'" *Id.* (quoting 15 U.S.C. § 57(a)(1)(B)).

In short, section 5(a) of ROSCA treats a violation of ROSCA as a violation of a rule promulgated under section 18 of the FTC Act. Section 5(a) goes on to say that the FTC "shall enforce this chapter in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this chapter." 15 U.S.C. § 8404(a). In other words, a violation of

ROSCA—like a violation of a rule promulgated under section 18 of the FTC Act—may be enforced in the same manner, by the same means, and with the same powers enumerated in the FTC Act. If a rule promulgated under Section 18 is violated, the FTC "can seek legal and equitable remedies, including restitution, from violators," under section 19 of the FTC Act. *See Credit Bureau II*, 937 F.3d at 771 (citing 15 U.S.C. § 57b(a)(1), (b)).

With that statutory background in mind, the Court agrees with the FTC that section 5(a) of ROSCA plainly authorizes it to seek monetary relief for ROSCA violations via sections 18 and 19 of the FTC Act. This, however, is not the end of the FTC's contentions. The FTC also contends that because section 5(a) of ROSCA incorporates all of its enforcement authority under the FTC Act, by citing section 5(a) in its complaint, the FTC not only put CBC on notice about the factual basis for its ROSCA claim and the remedy sought (restitution), but also implicated an alternative avenue for seeking that remedy. In its view then, the FTC is entitled to the same redress as awarded in the prior judgment, but under ROSCA and section 19 of the FTC Act rather than section 13(b).

CBC asserts a number of counterarguments and urges the Court to deny the FTC's motion to alter the judgment. The Court addresses CBC's counterarguments in turn.

B. CBC's counterarguments

1. Mandate rule and the law of the case doctrine

In response to the FTC's motion, CBC argues that the Court cannot amend its prior judgment because the Seventh Circuit's mandate does not "permit any further proceedings or motions by the parties." CBC Resp. Br. at 1. It contends that because the Seventh Circuit did not remand this case, it must have "*conclusively* decided the issue of whether the FTC had authority to pursue monetary damages against" CBC—irrespective of the statutory basis for such an award. *Id.* at 7. CBC also asserts that the FTC may not pursue its relief under an alternative statute because the "law of the case doctrine" precludes it. *Id.* at 10.

The FTC responds that the mandate rule only requires the Court to comply with the Seventh Circuit's expressed or implied rulings. FTC Reply Br. at 8–9. It is clear, the FTC says, that Seventh Circuit's mandate changed only one part of the Court's decision: it vacated the restitution award under section 13(b) because monetary relief is not available under that provision. *Id.* at 9. Because the Seventh Circuit did not expressly or impliedly address relief under section 19, the FTC contends, the Court is not precluded from granting it the same relief under that statutory provision. *Id.*

The Court agrees with the FTC. "The mandate rule requires a lower court to adhere to the commands of a higher court on remand." *Carmody v. Bd. of Trs. of Univ. of Illinois*, 893 F.3d 397, 407 (7th Cir. 2018) (internal quotation marks omitted). Even still, the circuit's mandate only controls "matters within its compass." *Moore v. Anderson*, 222 F.3d 280, 283–84 (7th Cir. 2000) (internal quotation marks omitted). "On remand, the district court retains the authority to dispose of other issues not addressed." *Id.* Courts must consider "what issues were actually decided by the mandate," which requires a "careful reading of the reviewing court's opinion." *Id.* "The reach of the mandate is coextensive with the reach of [the appellate court's] holding, so observations or commentary touching upon issues not formally before the reviewing court do not constitute binding determinations." *Id.* (internal quotation marks omitted); *see Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 712 (7th Cir. 2015) (internal quotation marks omitted) (noting that the general rule is that "an appellate mandate governs only that which was actually decided").

The Seventh Circuit's opinion in this case plainly forecloses any further consideration of awarding restitution under section 13(b). But the Seventh Circuit did not address whether the FTC could pursue monetary relief under section 19 of the FTC Act, and thus it did not decide that issue. That issue was not before the Seventh Circuit. *See Moore*, 222 F.3d at 283–84. This Court's opinion did not consider the viability of restitution under section 19, and neither party raised arguments regarding restitution and that provision either here or before the Seventh Circuit.

CBC argues that monetary relief under the entirety of the FTC Act was "squarely before" the

Seventh Circuit and was addressed by that court. CBC Reply Br. at 4 (emphasis omitted). As evidence, CBC points out that section 19 was referenced in the Seventh Circuit's opinion and at oral argument.[1] But the fact that section 19 was discussed during the parties' oral argument or mentioned in the Court's opinion is not proof that the Seventh Circuit considered restitution under section 19 and precluded it. The Seventh Circuit's opinion mentions section 19, but those references are mostly limited to contrasting its language with that of section 13(b). *See, e.g., Credit Bureau II*, 937 F.3d at 774 (citation omitted) ("Moreover, Congress expressly approved restitution as a remedy under § 57b(b) two years after enacting section 13(b) …. If section 13(b) permitted restitution as a general matter, Congress would have had no reason to enact § 57b, which authorizes restitution under narrower circumstances."); *id.* at 775 ("As we've explained, the Commission's reading of section 13(b) effectively nullifies § 57b. We cannot read § 57b(e) to authorize that self-defeating effect.").

The same was true during the parties' oral argument before the Seventh Circuit—the discussion of section 19 was almost entirely limited to contrasting that provision with section 13(b). *See FTC v. Credit Bureau Ctr., LLC*, Oral Argument Audio, United States Court of Appeals for the Seventh Circuit, http://media.ca7.uscourts.gov/sound/2019/cm

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[1] The Court is well aware that questions and statements at oral argument have no precedential effect. Yet, at oral argument before this Court, when asked if the Seventh Circuit decided that restitution was not available under section 19, CBC answered affirmatively and pointed the Court to the appellate oral argument.

.18 2847.18-2847_04_17_2019.mp3 at 13:28–14:45; 26:13–29:06, 33:56–35:33, 35:34–36:19 (last visited Sept. 1, 2021). Given this context, CBC cannot viably maintain that by vacating the restitution, the Seventh Circuit decided not only that the FTC was not entitled to restitution under section 13(b) but also that it was not entitled to restitution under any other provision of the FTC Act or a related statute.

CBC's law of the case argument suffers the same fate as its mandate rule argument. "The law of the case doctrine is a corollary to the mandate rule and prohibits a lower court from reconsidering on remand an issue expressly or impliedly decided by a higher court absent certain circumstances." *Carmody*, 893 F.3d at 407 (internal quotation marks omitted). The Court need not consider the exceptions to the law of the case doctrine. Because the Seventh Circuit did not decide, expressly or impliedly, that the FTC could not pursue monetary relief under section 19 of the FTC Act, CBC cannot argue that the law of the case doctrine precludes consideration of that argument now. *See id.*

CBC makes much of the fact that the Seventh Circuit did not include "remand" in its decretal language. *See* Hon. Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 Brook. L. Rev. 727 (2005) ("'Decretal language'" is the portion of a court's judgment or order that officially states ('decrees') what the court is ordering.") Though it's true the word "remand" does not appear in the Seventh Circuit's opinion, that omission does not restrict the Court, post-appeal, from considering post-judgment motions. Indeed, "every appellate court judgment vests jurisdiction in the district court to carry out some further proceedings." *Exxon Chem. Pats., Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998) (cited favorably in *Big Ridge*, 808 F.3d at 712). "[A] judgment that does not specifically provide for a remand speaks only to the issues incorporated in the mandate." *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999); *see also Indianapolis Colts v. Mayor & City Council of Baltimore*, 775 F.2d 177, 180 (7th Cir. 1985) (citation omitted) ("[T]his court's failure to rule on Baltimore's fee request in Indianapolis Colts, 'left the matter open for consideration by the District Court.'"). Moreover, "'the nature of the district court's remaining tasks is discerned not simply from the language of the judgment, but from the judgment in combination with the accompanying opinion.'" T*y, Inc. v. Publications Int'l, Ltd.*, No. 99 C 5565, 2003 WL 21294667, at *3 (N.D. Ill. June 4, 2003) (quoting *Exxon*, 137 F.3d at 1483).

Here, reading the mandate in conjunction with the opinion leaves just one definite conclusion: the availability of restitution under section 13(b) of the FTC Act is precluded. Because the mandate rule binds a lower court to only "the resolution of any points that the higher court has addressed," the Seventh Circuit's mandate does not preclude the Court from considering the merits of the FTC's motion to amend the judgment based on section 19. *See Kovacs v. United States*, 739 F.3d 1020, 1024 (7th Cir. 2014).

2. Waiver, forfeiture, and Rule 54(c)

Next, CBC argues that the FTC has waived or forfeited the grounds for alternative relief under section 19 of the FTC Act. CBC contends that by pursuing relief under section 13(b) instead of section 19, the FTC waived monetary redress under the latter provision. CBC Reply Br. at 7.

The FTC responds with three arguments. *See generally* FTC Reply Br. at 11–13. First, it asserts that Federal Rule of Civil Procedure 54(c) prevents waiver or forfeiture of appropriate relief. *See Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990) ("Fed. R. Civ. P. 54(c) requires courts to award the relief to which the prevailing party is entitled, even if that party did not request the relief or relied on the wrong statute."). Second, the FTC argues the legal standards for waiver are not met here because it did not intentionally relinquish or abandon a known right. Third, it argues that it did not forfeit its alternative grounds for relief because it included section 5(a) of ROSCA (which incorporates section 19) in its complaint. And even if that isn't so, the FTC says, any forfeiture was excused.

Here too, the FTC has the better arguments. Waiver is the "intentional relinquishment or abandonment of a known right." *Bourgeois v. Watson*, 977 F.3d 620, 629 (7th Cir. 2020) (internal quotation marks omitted). The FTC did not waive its ability to pursue relief under section 19 before this Court because it did not intentionally relinquish or abandon its entitlement to monetary relief under section 5(a) of ROSCA. As already noted, the FTC's complaint included section 5 among the provisions that authorized the action against CBC, *see* Compl. ¶ 1, and among the provisions in its prayer for relief, *see id.* at 22–23. The FTC did not need to separately cite section 19 of the FTC Act because section 5(a) of ROSCA incorporates section 19.

The FTC did not waive its right to relief under section 19 on appeal either. The Seventh Circuit has said that "the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver." *Schering Corp. v. Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996). That is because the ability to make an alternative argument in defense of a district court's judgment "is a privilege, not an obligation." *Frank v. Walker*, 819 F.3d 384, 387 (7th Cir. 2016). "Forcing appellees to put forth every conceivable alternative ground for affirmance might increase the complexity and scope of appeals more than it would streamline the progress of the litigation." *Id.* ((alterations accepted and internal quotation marks omitted); s*ee also Okoro v. Callaghan*, 324 F.3d 488, 489–90 (7th Cir. 2003). Thus, a "theory left open in both the district court and the court of appeals remains open in the district court." *Frank*, 819 F.3d at 387. Though it cited section 5(a) of ROSCA in its complaint, the parties do not dispute that the FTC did not argue at summary judgment that it was also entitled to restitution under section 19 of the FTC Act. Nor did the FTC present that argument to the Seventh Circuit. Thus, that route for restitution "remains open."[2] *See id.*

CBC's forfeiture argument doesn't wash either. "Whereas waiver is the intentional relinquishment or abandonment of a known right, forfeiture is the mere failure to raise a timely argument, due to either inadvertence, neglect, or oversight." *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020) (internal quotation marks omitted). CBC says the FTC forfeited its ability to pursue damages under section 19 because it "put all its eggs" in the section 13(b) "basket." CBC Reply Br. at 7. But at the time the FTC drafted its complaint, it was the law in this circuit (and throughout much of the country) that section 13(b) was a permissible route to restitution. *See AMG Cap. Mgmt.*, 141 S. Ct. at 1351. So it can't be true that the FTC's decision not to raise an alternative ground for restitution was the result of "inadvertence, neglect, or oversight." *See Henry*, 969 F.3d at 786. The FTC was under no

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[2] The cases cited by CBC do not command a different result. *See, e.g.*, *Door Sys., Inc. v. Pro-Line Door Sys., Inc.*, 83 F.3d 169, 173 (7th Cir. 1996) (emphasis added) ("An appellee *can* defend the judgment appealed from on any nonwaived ground, even if the district court did not address it ... [but] [a]n appellee is not required to advance every possible ground for affirmance; and should the case be remanded it can advance the additional grounds in the district court, provided they have not been waived in that court."); *Cardoza v. CFTC*, 768 F.2d 1542, 1548 n.4 (7th Cir. 1985) (emphasis added) ("Contrary to plaintiff's assertion, the CFTC did not need to file a cross-appeal to raise the reviewability issue since as appellee the CFTC *may* defend a judgment on any ground."); *Massachusetts Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 481 (1976) (emphasis added) ("[I]t is likewise settled that the appellee *may*, without taking a cross-appeal, urge in support of a decree any matter appearing in the record.").

obligation to assert every conceivable ground for restitution.[3]

There's one additional ground that supports consideration of the FTC's motion: Rule 54(c). The Seventh Circuit has said that Rule 54(c) permits a court "to grant whatever relief is appropriate, including injunctive relief, even if the parties have not specifically requested it." *Old Republic Ins. Co. v. Employers Reins. Corp.*, 144 F.3d 1077, 1081 (7th Cir. 1998); *see also Medici v. City of Chicago*, 856 F.3d 530, 532 (7th Cir. 2017); *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 948 (7th Cir. 2006); *Travis*, 921 F.2d at 112. That reasoning applies here. Though at summary judgment the FTC did not specifically request restitution pursuant to section 19, that relief is still appropriate.

CBC attempts to distinguish *Travis* and *Old Republic*, but in doing so makes it clear those cases aren't that distinguishable. *See* CBC Reply Br. at 14–15. It is not "clear" that had the plaintiff in *Travis* not pled the alternative statute, she would not have been awarded damages. *See* CBC Resp. Br. at 17. The court in *Travis* did not say that. But even if it did, the FTC actually cited in its complaint section 5(a) of ROSCA, which incorporates section 19. *See* 15 U.S.C. § 8404. Thus, *Travis* would be on point regardless. CBC's citation to *In re Rivinius, Inc.*, 977 F.2d 1171, 1177 (7th Cir. 1992), is also unavailing. There, the court

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[3] And even if the FTC had forfeited the issue, that forfeiture would be forgiven due to exceptional circumstances, particularly in light of the change in the law. *See Bourgeois*, 977 F.3d at 631. As the FTC notes, forfeiture in this case would harm "innocent third parties," i.e., those defrauded by CBC. *See id.*

said that Rule 54(c) did not allow a defendant "to obtain relief based upon a contribution theory that was not properly raised at trial." *Id.* But even if the FTC hadn't included section 5(a) of ROSCA in its complaint, the failure to include an alternative statutory provision upon which the plaintiff could seek relief is not the same as a defendant's failure to serve a crossclaim for contribution. CBC also contends that Rule 54(c) does not allow the district court to award relief "to a party that has not prevailed." CBC Resp Br. at 15 (citing *Pearson v. Fair*, 935 F.2d 401, 414 (1st Cir. 1991)). Aside from the fact that the FTC was the party that prevailed in this Court, the plain words of Rule 54(c) are not limited to the prevailing party. *See* Fed. R. Civ. P. 54 ("Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.").

In sum, under the above-cited precedent, the FTC's failure at summary judgment or on appeal to proffer an alternative basis for the restitution award does not bar it from offering such a basis now before this Court.

3. Rule 59(e)

The FTC asserts that its motion is proper under Rule 59(e) because there was a change in the intervening law, specifically, the Seventh Circuit overturned its prior precedent and created a circuit split on this issue. *See Romo*, 250 F.3d at 1121 ("Rule 59(e) requires that the moving party clearly establish a manifest error of law or an intervening change in the controlling law or present newly discovered evidence.""); *Cosgrove*, 150 F.3d at 732.

CBC argues that Rule 59(e) does not apply here because there was no intervening change in the law outside of this case. In other words, CBC argues that though the Seventh Circuit overturned its precedent in *Credit Bureau II* (a sea-change in the interpretation of section 13(b) of the FTC Act), because that decision came in this case rather than in another, it is not an "intervening" change in the law. CBC Resp. Br. at 11–12 (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)).

CBC's argument is unpersuasive. As the Court has explained, the law of the case doctrine does not preclude the Court's consideration of section 5(a) of ROSCA (or section 19 of the FTC Act), because the Seventh Circuit did not expressly or impliedly consider the availability of restitution under those provisions. *Christianson* does not say anything that would change that conclusion. *See Christianson*, 486 U.S. at 817 ("[T]he law-of-the-case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'").

CBC also cites Wright & Miller's Federal Practice and Procedure, which is just as unconvincing here as its citation of *Christianson*. The portion CBC relies on is not nearly as supportive as it thinks. The treatise only says that "the most obvious justifications for departing from the law of the case arise when there has been an intervening change of law outside the confines of the particular case." Law of the Case, 18B Fed. Prac. & Proc. Juris. § 4478 (2d ed. 2021). Again, there is no "law of the case" to depart from here. But even if there was, saying that a particular situation presents the most obvious justification is not the same as saying it presents the only justification. And the treatise goes on to say that the "easiest cases occur when the law has been changed by a body with greater authority on the issue," i.e., the law has been changed by "a court higher in the hierarchy of a single court system." *Id.* That is exactly what happened here.

CBC's remaining arguments on this issue don't move the needle either. As discussed above, the FTC did not waive restitution under section 19 of the FTC Act because it cited section 5(a) of ROSCA in its complaint and an appellee need not supply the appellate court with "every conceivable alternative ground for affirmance." *See Frank*, 819 F.3d at 387.

Also unavailing are CBC's arguments regarding *JTH Tax, Inc. v. Aime*, 744 F. App'x 787, 794 (4th Cir. 2018) (*Aime I*) and *JTH Tax, Inc. v. Aime*, 984 F.3d 284 (4th Cir. 2021) (*Aime II*). In *Aime I*, the Fourth Circuit held that a district court erred when it determined that the parties agreed to a valid and enforceable extension of the deadline for a buyback provision in an agreement between the parties. *Aime I*, 744 F. App'x at 794. After concluding that the defendant's offer to extend lacked consideration and that the promise was therefore a gratuitous one, the court vacated the district court's judgment "to the extent it relied on the validity of the deadline extension." *Id.* at 793; *see also id.* at 794 ("But as we've explained, the court erred in finding that Liberty Tax and Aime validly extended the PSA's buyback option, and so Aime wasn't entitled to damages resulting from Liberty Tax's refusal to sell back his former franchises. On remand, the district court should enter appropriate damages consistent with those principles.")

After remand and the district court's issuance of its post-remand judgment, Aime filed a motion to reconsider and for the first-time sought disgorgement. *Aime II*, 984 F.3d at 290. Although the Fourth Circuit held that Aime was not entitled to damages based on the gratuitous extension of the buyback deadline, Aime argued that disgorgement was the proper remedy for the defendant's "breach." *See id* at 290–91. The district court concluded disgorgement damages were not available to Aime, and he appealed. *Id.* at 290.

In *Aime II*, the Fourth Circuit affirmed for two main reasons. Its initial reason was that Aime raised his disgorgement theory for the first time in his motion to reconsider—"after years of litigation, a bench trial, an appeal ... , and a damages proceeding upon remand." *Id.* Because Aime could have raised his disgorgement theory before the district court, during his first appeal, or during the damages proceeding upon remand, the court concluded that the motion to reconsider was properly denied. *Id.*

The other reason the Fourth Circuit affirmed the district court was that the mandate rule procedurally barred Aime from pursuing disgorgement. *Id.* at 291. The court first noted that it had already determined that the "buyback deadline was not validly extended, meaning that Aime wasn't entitled to damages resulting from Liberty Tax's refusal to sell back his former franchises." *Id.* (internal quotation marks omitted). Because Aime's basis for disgorgement was based on Liberty's refusal to sell back the franchises, that argument contradicted the court's prior mandate. *Id.* The court also explained that the mandate rule bars "any issue that could have been but was not raised on appeal." *Id.* (internal quotation marks omitted). Given that "Aime raised a new legal theory to obtain the same damages that the district court and [the Fourth Circuit had] denied him on his previous theory," his argument was barred by the mandate rule which does not permit new arguments or legal theories on remand. *Id.* at 291–92.

Returning to the case before the Court, more than a few points distinguish this case from the *Aime* cases. First, the plaintiff in *Aime* sought a new remedy for the damages the Fourth Circuit denied him under a previous theory, after the Fourth Circuit had conclusively determined that he was not entitled to damages on the defendant's refusal to sell back his former franchises. *See id.* at 290–92. Here, the FTC is pursuing restitution under section 19—the same remedy it sought under section 13(b)—after the Seventh Circuit determined only that it was not entitled to damages under section 13(b). The Seventh Circuit did not conclusively determine that the FTC could not pursue damages under any another portion of the FTC Act or ROSCA, and it did not determine that CBC had not violated ROSCA.

Second, unlike Aime, who failed to seek disgorgement in his pleadings and only sought disgorgement after post-remand judgment was entered, the FTC included section 5(a) of ROSCA in its complaint in this case, and it asserted its entitlement to relief under section 5(a) of ROSCA on remand. *See id.* at 291. Moreover, unlike in Aime where disgorgement would have been considered for the first time following remand, the FTC's entitlement to restitution was already litigated in this Court before the appeal. *See id.* In short, the Fourth Circuit's discussion of Rule 54(c) as it applied in Aime's case is not persuasive in the present context.

Third, there was no intervening change in controlling law in *Aime*. *See id.* at 289–90. Here, there has been. Thus, the Fourth Circuit's conclusions regarding Rule 59(e) and its application to Aime are not entirely on point. Even if they were, the FTC's entitlement to restitution under section 5(a) of ROSCA is not a new theory in the way disgorgement was in *Aime*, because section 5(a) was included in the FTC's complaint in this case. *See id.* at 291–92.

Finally, to the extent that CBC argues that *Aime* supports its waiver argument, it is incorrect. Part of the reason the Fourth Circuit affirmed was that "the district court properly concluded that Aime could have raised his disgorgement theory during the litigation, before [the Fourth Circuit] on appeal, or during the damages proceeding upon remand, but failed to do so." *Id.* at 290. Again, in this case the FTC asserted its entitlement to damages under section 19 of the FTC Act (via section 5(a) of ROSCA) on remand, not after the post-remand judgment had been entered. But even if Aime could support the proposition that failure to argue an alternative basis for restitution constitutes waiver, *Aime* would seemingly contradict the Seventh Circuit's holdings in *Schering, Okoro*, and *Frank*. *See, e.g.*, *Frank*, 819 F.3d at 387 ("A theory left open in both the district court and the court of appeals remains open in the district court.").

For these reasons, the Court determines that the *Aime* cases do not govern this one and concludes that Rule 59(e) permits the Court to grant the relief the FTC requests.

4. "Unclean hands" and unfair prejudice

CBC next contends that the doctrine of unclean hands bars consideration of the FTC's motion. "The doctrine of 'unclean hands' … nowadays just means that equitable relief will be refused if it would give the plaintiff a wrongful gain." *Scheiber v. Dolby Labs., Inc.*, 293 F.3d 1014, 1021 (7th Cir. 2002). According to CBC, the FTC has unclean hands because it knowingly and intentionally misused section 13(b) knowing that Congress did not intend it to be used to obtain monetary damages. CBC Resp. Br. at 3.

Not only is CBC's argument unpersuasive, it also ignores key facts. From the day the complaint was filed until the Seventh Circuit decided the appeal in this case, there was controlling circuit precedent permitting the FTC to seek restitution using section 13(b). *See Amy Travel*, 875 F.2d at 564; *Credit Bureau Ctr.*, 937 F.3d at 782–86. In fact, prior to *AMG Capital*, eight circuits permitted the FTC to seek monetary damages under section 13(b). *AMG Cap. Mgmt.*, 141 S. Ct. at 1351. It cannot be true that a party who proffers arguments based on overwhelming and longstanding precedent has unclean hands once that precedent is overturned after over 30 years. The fact that other parties had been arguing against the prior interpretation of section 13(b) might be proof that wisdom comes late—even to courts—but it is not proof that the FTC is an abusive litigant.

CBC's unfair prejudice argument is similarly unpersuasive. As the FTC notes, CBC admits it "knew early in these proceedings (in 2017) that consumer redress was available under Section 19, and that the FTC was seeking to recover the full amount consumers lost to their scheme." FTC Reply Br. at 7 (citing CBC Resp. Br. at 13). What exactly would be changed by seeking relief under section 19 (via section 5(a) of ROSCA) instead of section 13(b) of FTC Act? CBC had an opportunity to oppose, and did oppose, the requested award of restitution. The same relief is being requested for the same misconduct. CBC does not explain how it would have presented its case differently. Its bare proclamation that it would have done so does not hold water.

The out-of-circuit cases CBC cites do not change anything. *See* CBC Resp Br. at 18–19. If it's true that Rule 54(c) is inapplicable where a party fails to plead a certain relief, that is not an issue here. The FTC's complaint included monetary damages among the relief requested.

In short, the FTC does not have unclean hands, and CBC will not suffer unfair prejudice if the FTC's Rule 59(e) motion is granted.

5. The (non-) effect of recent caselaw

CBC contends that the Supreme Court's recent decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), limits the availability of damages in this case to "net profits derived from the underlying fraud." CBC Reply Br. at

9. That conclusion can be drawn only by extrapolating. The Supreme Court in *Liu* held that courts were not permitted to enter "disgorgement awards that exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into the account.'" *Liu*, 140 S. Ct. at 1950.

The present motion does not involve the remedy of disgorgement, nor does this case involve 15 U.S.C. § 78u(5), the Securities Exchange Act, or the Securities Exchange Commission and thus *Liu* is not applicable here. Other district courts have reached this same conclusion. *See, e.g.*, *FTC v. On Point Glob. LLC*, No. 19-25046-CIV, 2020 WL 5819809, at *4 (S.D. Fla. Sept. 30, 2020) (internal quotation marks omitted) ("While the Defendants argue that *Liu* may impact this proceeding, this Court cannot extrapolate that fact when the Supreme Court's holding in *Liu* dealt with the wrong agency, the wrong statute, and the wrong remedy."); *FTC v. Noland*, No. CV-20-00047-PHX-DWL, 2020 WL 4530459, at *4 (D. Ariz. Aug. 6, 2020) ("Additionally, *Liu* addressed the disgorgement remedy the SEC may seek under its governing statute and didn't once discuss the FTC, which is governed by an entirely different statute. Given the presence of textual differences between the two statutes, it would be improper to read *Liu* as necessarily curtailing the scope of the FTC's authority.").

To the extent CBC argues that the FTC must trace particular funds, that same argument was rejected in this Court's prior opinion. *See Credit Bureau I*, 325 F. Supp. 3d at 869 ("The FTCA authorizes legal restitution, which does not impose the same tracing requirements."). Neither *Liu* (in which tracing is discussed only in the dissent) nor *AMG Capital* (in which the word "tracing" does not even appear) undermine the Court's earlier conclusion. Finally, the Court rejects, for the same reasons, CBC's re-asserted argument that the restitution amount has been improperly calculated. *See Credit Bureau I*, 325 F. Supp. 3d at 869 (rejecting each of CBC's calculation-related challenges).

6. Statutory interpretation

CBC makes a few statutory interpretation arguments that are only a little more than cursory. First, it argues that the FTC lacks authority to seek consumer redress in this case because it did not commence an action under 15 U.S.C. § 56(a)(2)(B) or section 19 "as required." *See* CBC Reply Br. at 7. Assuming this argument isn't forfeited because CBC did not make it until its reply brief, *see O'Neal v. Reilly*, 961 F.3d 973, 974 (7th Cir. 2020), it is forfeited and lacking in merit given the cursory way in which CBC makes the point. *See Batson v. Live Nation Ent., Inc.*, 746 F.3d 827, 833 (7th Cir. 2014) (determining an argument was forfeited because it was "perfunctory and underdeveloped"); *Gonzales v. Madigan*, 403 F. Supp. 3d 670, 679 (N.D. Ill. 2019) (Kennelly, J.), *aff'd*, 990 F.3d 561 (7th Cir. 2021). Title 15, section 56(a)(2)(B) of the United States Code gives the FTC, in any civil action under section 19, "exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose." 15 U.S.C.

§ 56(a)(2)(B). The provision requires the FTC to "inform the Attorney General of the exercise of such authority." 15 U.S.C. § 56(a)(2). CBC does not explain how the FTC erred in exercising its exclusive authority under section 19, nor does it contend that the FTC failed to inform the Attorney General that it intended to exercise its authority.

Moreover, contrary to CBC's argument, neither section 19 nor 15 U.S.C. § 56(a)(2)(B) "condition[ ] relief ... on commencing a civil action" under section 56(a)(2)(B). *See* CBC Reply Br. at 7. Nothing in either cited provision even hints at such a requirement. Section 56 is not even referenced in section 19. *See* 15 U.S.C. § 57b. And, as previously discussed, the FTC cited section 5(a) of ROSCA in its complaint, along with section 13(b), which incorporates section 19. In short, the FTC did allege its basis for enforcement.

Second, CBC also argues for the first time in its reply brief that section 18 of the FTC Act, 15 U.S.C. § 57a, does not incorporate the remedies in section 19. CBC Reply Br. 10–11 ("The FTC asks the Court to *imply* that Section 18 actually alleges a cause of action brought under Section 19 allowing the recovery of monetary damages and injunctive relief."). In CBC's view, section 18 of the FTC Act is not an enforcement statute and thus the FTC cannot use it to pursue restitution. Even assuming this argument is not forfeited, *see O'Neal*, 961 F.3d at 974, it is hobbled by a few misunderstandings. At the outset, section 18 *is* an enforcement statute. The Seventh Circuit has already said as much. *Credit Bureau II*, 937 F.3d at 771 (referring to section 18 as one of the FTC's "enforcement mechanisms" because under section 18 the FTC may promulgate rules that "preemptively resolv[e] whether certain conduct violates the FTCA" and "pursue 'quick enforcement' actions against violators.").

That aside, the FTC is not attempting to use section 18 to seek monetary relief. Again, section 5(a) of ROSCA "plainly authorizes the FTC to seek equitable monetary relief to redress consumer injury resulting from ROSCA violations." *FTC v. Cardiff*, No. ED CV 18-2104-DMG (PLA), 2021 WL 3616071, at *2 (C.D. Cal. June 29, 2021). Section 5(a) treats a violation of ROSCA the same as "a violation of a rule under section 18 of the FTCA." 15 U.S.C. § 8404(a). In enforcing section 5(a), the FTC is authorized to use "the same manner ... the same means ... the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this chapter." *Id.* Section 19 of the FTC Act gives the FTC license to pursue equitable monetary damages, and that section is incorporated by reference in Section 5(a) of ROSCA.

7. Notice pleading

CBC also makes a few arguments about the nature and sufficiency of the FTC's complaint. First, it contends the FTC did not adequately plead its request for monetary relief under section 5(a) of ROSCA. Specifically, CBC contends that because the FTC failed to explicitly invoke section 19 in its complaint, it cannot use that provision now. CBC argues that it lacked "notice" and was prevented from making "a realistic appraisal of the case," so that its "settlement and litigation strategy could be based on knowledge and not speculation." CBC Resp. Br. at 19 (alterations accepted and internal quotation marks omitted). The FTC argues that by citing section 5(a) in its complaint, it put CBC on notice about the factual basis for its ROSCA claim, the remedy sought (restitution), and one avenue for seeking that restitution.

The FTC has the better of this dispute. In the complaint, the prayer for relief includes section 5 of ROSCA among the provisions that entitled the Court to grant the various forms of relief the FTC requested. Compl. at 22–23. In the complaint, the FTC specifically asked the Court to award relief "necessary to redress injury to consumers resulting from Defendants' violations of ... ROSCA ... including but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies." *Id.* at 22. That seems more than sufficient to meet the notice pleading requirements in Federal Rule of Civil Procedure 8(a)(2), which "requires only that a complaint plead 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *See Bilek v. Fed. Ins. Co.*, 8 F.4th 581 (7th Cir. 2021). "[T]here is no rule requiring parties to plead legal theories or elements of a case." *Auto Driveaway Franchise Sys., LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 675 (7th Cir. 2019).

As discussed earlier, the Court is unmoved by CBC's claims of unfair prejudice. Aside from the particular route to an award of restitution, nothing will materially change. The FTC seeks the same remedy, for the same reasons, and for the same victims under section 5(a) via section 19 as it did under section 13(b). And though CBC says it would have presented its case differently, as discussed earlier it does not explain how this is so.

Next, CBC argues that the FTC did not establish subject matter jurisdiction. In cursory fashion, CBC contends that the FTC's failure to allege its authority under section 19 is a "matter of subject matter jurisdiction." *See* CBC Reply Br. at 11 n.6. But, in the complaint, the FTC cited section 5(a) among others when alleging that it was "authorized to initiate federal district court proceedings, by its own attorneys, to enjoin violations of the FTC Act [and] ROSCA … and to secure such equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill gotten monies." *See* Compl. ¶ 5. The FTC also cited section 5(a) in the portion of the complaint where it alleged this Court had subject matter jurisdiction. *See id.* ¶ 2; *see also id.* ¶ 1. In short, it's not true that the FTC failed to allege its authority.

In sum, because the complaint sufficiently tied the FTC's factual allegations and claims for relief to the ROSCA violation, the invocation of section 5(a) of ROSCA was enough to put CBC on notice about "the methods of enforcement and nature of relief available under Section 19." *See Cardiff*, 2021 WL 3616071, at *2.

B. FTC's motion to alter or amend judgment

With CBC's counterarguments dispatched, the Court moves on to consider the FTC's motion. The

Court is persuaded that it has the authority to amend the prior judgment under Rule 59(e) due to the intervening change in the law. *See Romo*, 250 F.3d at 1121; *Cosgrove*, 150 F.3d at 732. Specifically, *Amy Travel*, which recognized section 13(b) of the FTC Act as an appropriate ground on which to grant monetary relief, was overturned after judgment was entered in this case. *See Credit Bureau II*, 937 F.3d at 771–86. The Court will amend its prior judgment and award the same consumer redress, this time under ROSCA and section 19 of the FTC Act.

Conclusion

For the foregoing reasons, the Court grants the FTC's motion to alter or amend its judgment [dkt no. 275] and denies CBC's countermotion [dkt. no. 277]. The Court will separately enter the FTC's proposed final judgment and order while reserving the right to make appropriate modifications.

Date: September 13, 2021

/s/Matthew F. Kennelly
Honorable Matthew F. Kennelly
United States District Judge

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

November 3, 2023

Before

DIANE S. SYKES, *Chief Judge*

JOEL M. FLAUM, *Circuit Judge*

MICHAEL B. BRENNAN, *Circuit Judge*

No. 21-2945

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

CREDIT BUREAU CENTER, LLC, ET AL.
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 17-cv-194

Matthew F. Kennelly,
Judge.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service requested a vote on the petition for rehearing en banc, and all judges on the original panel voted to deny rehearing. It is therefore ordered that the petition for rehearing en banc is DENIED.

United States Code Annotated

Title 15. Commerce and Trade

Chapter 2. Federal Trade Commission; Promotion of Export Trade and Prevention of Unfair Methods of Competition

Subchapter I. Federal Trade Commission (Refs & Annos)

15 U.S.C.A. § 57b

§ 57b. Civil actions for violations of rules and cease and desist orders respecting unfair or deceptive acts or practices

(a) Suits by Commission against persons, partnerships, or corporations; jurisdiction; relief for dishonest or fraudulent acts

(1) If any person, partnership, or corporation violates any rule under this subchapter respecting unfair or deceptive acts or practices (other than an interpretive rule, or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of section 45(a) of this title), then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State.

(2) If any person, partnership, or corporation engages in any unfair or deceptive act or practice (within the meaning of section 45(a)(1) of this title) with respect to which the Commission has issued a final cease and desist order which is applicable to such person, partnership, or corporation, then the Commission may commence a civil action against such person, partnership, or corporation in a United States district court or in any court of competent jurisdiction of a State. If the Commission satisfies the court that the act or practice to which the cease and desist order relates is one which a reasonable man would have known under the circumstances was dishonest or fraudulent, the court may grant relief under subsection (b).

(b) Nature of relief available

The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

(c) Conclusiveness of findings of Commission in cease and desist proceedings; notice of judicial proceedings to injured persons, etc.

(1) If (A) a cease and desist order issued under section 45(b) of this title has become final under section 45(g) of this title with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice, and (B) an action under this section is brought with respect to such person's, partnership's, or corporation's rule violation or act or practice, then the findings of the Commission as to the material facts in the proceeding under section 45(b) of this title with respect to such person's, partnership's, or corporation's rule violation or act or practice, shall be conclusive unless (i) the terms of such cease and desist order expressly provide that the Commission's findings shall not be conclusive, or (ii) the order became final by reason of section 45(g)(1) of this title, in which case such finding shall be conclusive if supported by evidence.

(2) The court shall cause notice of an action under this section to be given in a manner which is reasonably calculated, under all of the circumstances, to apprise the persons, partnerships, and corporations allegedly injured by the defendant's rule violation or act or practice of the pendency of such action. Such notice may, in the discretion of the court, be given by publication.

(d) Time for bringing of actions

No action may be brought by the Commission under this section more than 3 years after the rule violation to which an action under subsection (a)(1) relates, or the unfair or deceptive act or practice to which an action under subsection (a)(2) relates; except that if a cease and desist order with respect to any person's, partnership's, or corporation's rule violation or unfair or deceptive act or practice has become final and such order was issued in a proceeding under section 45(b) of this title which was commenced not later than 3 years after the rule violation or act or practice occurred, a civil action may be commenced under this section against such person, partnership, or corporation at any time before the expiration of one year after such order becomes final.

(e) Availability of additional Federal or State remedies; other authority of Commission unaffected

Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law. Nothing in this section shall be construed to affect any authority of the Commission under any other provision of law.