No. 21-2945

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Federal Trade Commission v. Credit Bureau Center, LLC et al.,
Petitioner.

Appeal from the
United States District Court for the Northern District of Illinois
Case No. 17-cv-00194
The Honorable Judge Matthew F. Kennelly

APPELLANTS' OPENING BRIEF

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DISCLOSURE STATEMENT

Appellate Court No: 21-2945

Short Caption: FTC v. Credit Bureau Center and Michael Brown

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Stephen R Cochell represents both Credit Bureau Center, LLC and Michael Brown

Caleb Kruckenberg and John F. Kerkhoff represent both Credit Bureau Center, LLC and Michael Brown.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Currently Representing Credit Bureau Center, LLC and Michael Brown is

the Cochell Law Firm by Stephen R. Cochell. Associate Jonathan L. Slotter also appeared in the District Court proceedings.

Lawrence Charles Rubin of Taft Stettinius & Hollister LLP was local counsel for Mr. Cochell and Slotter at the District Court level.

Gregory Zini of Barclay Damon LLP and Parker Roy MacKay of MacKay Law Office represented Mr. Brown at the District Court level but were replaced by the Cochell Law Firm.

Caleb Kruckenberg and John F. Kerkhoff of Pacific Legal Foundation have made an appearance and represent Credit Bureau Center, LLC and Michael Brown on this appeal.

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None.

Attorney's Signature: */s/ Stephen R. Cochell*

Date: February 2, 2022

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Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No __

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction pursuant to 28 U.S.C. §1291. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 45(a), 53(b), 1681s(a)(1), and 8404(a).

Appellants seek review from the District Court's Judgment, and its Memorandum and Order Granting FTC's Motion to Amend the Judgment, and the following Amended Judgment. Dkt. 288 and 289. Notice of Appeal was filed on October 22, 2021. Dkt. 290. Because appeal is taken from the final judgment adjudicating all of the claims with respect to all of the parties no information pursuant to Circuit Rule 28(a)(3) is necessary.

Credit Bureau Center ("CBC") and Michael Brown (collectively "Petitioners") respectfully request the Court to reverse the trial court's order and to enforce the mandate in its prior decision, *Federal Trade Commission* v. *Credit Bureau Center*, 937 F.3d 764 (7th Cir. 2019) (also referred to as "*CBC I*") and to grant other appropriate relief.

Because this appeal relates to matters remanded by a panel of this Court, Petitioners respectfully suggest that this case be referred to that panel, consisting of Circuit Judge Sykes, Circuit Judge Manion and Circuit Judge Brennan.

PROCEDURAL HISTORY

On August 21, 2019, this Court reversed the District Court's Decision holding Credit Bureau Center and Michael Brown liable for monetary relief under section 13(b) of the FTC Act. The FTC appealed. The Supreme Court granted certiorari and consolidated it with *AMG Capital Management, Inc. v. FTC*, 141 S. Ct. 11341 (2021). The Court ultimately held oral argument in *AMG* and held this case for decision.

In *AMG*, the Supreme Court unanimously agreed with this Court. It then denied certiorari and remanded the matter back to this Court. On May 6, 2021, this Court issued its Notice of Issuance of Mandate stating: "We VACATE the restitution award. In all other respects, we AFFIRM the judgment…The above is in accordance with the decision of this court entered on this date."

The same day, the FTC filed a Motion to Amend or Alter Judgment. Dkt. 275.The District Court immediately issued a Briefing Schedule. On May 28, 2021, Petitioner filed a Response in Opposition to FTC's Motion to Amend and Counter-Motion to Enforce Mandate. Dkt. 277. On September 13, 2021, the District Court denied Petitioner's Motion to Enforce and granted the FTC's Motion to Amend Judgment. Dkt. 288. A Modified Final Judgment and Permanent Injunction was entered on September 13, 2021. Dkt. 289.

OVERVIEW OF ARGUMENT

This Court has seen this case before. It appeared that, the first time, the Court spoke in no uncertain terms: The Federal Trade Commission could not obtain millions of dollars in a monetary judgment against Credit Bureau Center and Michael Brown under the FTC Act. So the Court vacated the monetary judgment.

But now—two-and-a-half-years-later—the FTC is back, holding nearly the same judgment and asking this Court to, *this time*, approve the same amount, with the same conditions, against the same defendants.

What happened? Was Brown or CBC charged again? No. Did the FTC file a new action? No. Did Congress pass a new statute expanding the FTC's power? No. In fact, all that has happened since this Court's prior opinion is that the Supreme Court clarified that the FTC has *less* power than it claimed when this case started.

But not content with the limits of its power after *AMG*, the FTC went back to the district court in this case, circumventing this Court's mandate, and filed a motion to amend the judgment. The FTC claimed it found a new source of authority to justify the judgment—even though it had never been raised, argued, or cited before: Section 19 of the FTC Act. Dkt. 275 at 6 and 9; Dkt. 277 at 7. The district court accepted the FTC's argument, and simply cut out all references to Section *13* (which this Court and the Supreme Court said did not justify the judgment) and inserted Section 19. Dkt. 288; 289.

But federal agencies cannot ignore the rulings of this Court. The FTC chose to litigate this case as a Section 13 case, and that ultimately failed. It must live with that choice. It cannot now, turn back the clock, and cite a new source of authority. And even if FTC could do so, Section 19 doesn't provide the power that FTC claims. For those reasons, this Court must vacate the judgment.

** ** ** **

After extensive, time consuming, and expensive proceedings before this Court and the Supreme Court analyzing the elaborate enforcement scheme adopted by Congress, this Court concluded that the FTC's use of Section 13(b) circumvented the monetary redress provisions of the FTC Act. "Because the Commission brought this case under section 13(b), we vacate the restitution award." *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764, 767 (7th Cir. 2019). The vacated award included

the FTC's ROSCA allegations under 15 U.S.C. § 8404. This Court did not remand the case for further proceedings. Instead, this Court ordered that the award be vacated. However, the trial court entered a modified judgment that nullifies this Court's ruling. That judgment rests on alleged power under Section 19 of the FTC Act, 15 U.S.C. § 57b, which grants courts "jurisdiction" to "grant relief" that "redress[es] injury to consumers or other persons." *Id.* § 57b(b). The statute allows the FTC to seek and obtain remedies like "the refund of money or return of property," or "the payment of damages." *Id.* But "nothing" in the statute authorizes "exemplary or punitive damages." *Id.* Nor does Section 19 authorize disgorgement.

Yet, that's precisely what the FTC did here. The judgment does not redress injury to consumers because it can be kept by the FTC and disgorged to the U.S. Treasury. It also amounts to a penal sanction—in violation of Section 19—because the FTC received gross receipts (as opposed to net profits), something that has long distinguished penal and non-penal equitable awards. Thus, Section 19 cannot support the FTC's judgment.

What's more, the district court failed to comply with this Court's mandate. The Mandate Rule requires the district court on remand to follow directions in the remand order and bars the trial court from revisiting issues already resolved by the appellate court. *See* 28 U.S.C. § 2106; *United States v. White*, 406 F.3d 827, 831 (7th Cir. 2005); *Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000).

Even *assuming* that the trial court's actions were not barred by the Mandate Rule, the FTC adopted a policy and practice of seeking monetary remedies under Section 13(b) instead of the redress provisions adopted by Congress in Section 19. The FTC's choice waived its Section 19 argument.

From the day it filed the Complaint, the FTC argued that Section 13(b) allowed the agency to seek monetary relief in Section 5 cases. Dkt. 1 at 22; 193 at 31-32. *See FTC v. H. N. Singer, Inc*., 668 F.2d 1107 (9th Cir. 1982); *Credit Bureau Center*, 937 F.3d at 772. Yet even the FTC *acknowledged* Congress rejected granting the Agency such authority.[1] Ultimately, the Supreme Court agreed and unanimously ruled that Congress could have never intended the FTC to ignore the procedures under Sections 19 and 5. *AMG Capital Management, Inc. v. FTC*, 141 S.Ct. 1941 (2021).

The trial court, however, allowed the FTC to bootstrap Section 19 to its ROSCA claims. Because ROSCA, 15 U.S.C. § 18 and 15 USC § 8404, references the FTC Act, and the FTC Act includes Section 19, the district court ruled that the

[1] A former FTC Commissioner (Timothy Muris) and FTC Director (S. Howard Beales) wrote "Primarily because the FTC Act's basic prohibitions against unfair and deceptive acts or practices were both broad and often ill defined, Congress *rejected open-ended monetary relief*. Instead, it enacted two provisions that provided for monetary relief, but only under carefully circumscribed conditions. Neither provision, however, was deemed adequate to combat fraud." S Howard Beales & Timothy Muris, Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act, 79 Antitrust L.J. 1, 2 (2013) (emphasis supplied).

FTC brought a Section 19 case all along. And that, it said, justified the exact same judgment.

But this approach strains credulity, prejudices defendants, and gives the FTC an unjust second bite at the apple. Section 8404 simply commands the FTC to pursue enforcement in the same way that it pursues enforcement actions for rules violations under Section 18. Congress adopted Section 19 to enforce violations of rules. Section 19(a)(1) authorizes the FTC to "commence" a civil action for a rule violation. 15 U.S.C. § 57b(a)(1). Section 19(b) further grants jurisdiction to district courts to grant redress to consumers in that same action. The plain meaning of the term "commence" is to "begin", to "start" and follow a process. https://www.dictionary.com/browse/commence. Entry of a judgment is an end. The Court simply entered a judgment based on Rule 54(c) without any process; that is, no discovery or opportunity to challenge the allegations whatsoever. Dkt. 288 at 13. Since no Section 19(a) action was "commenced", and 19(b) doesn't authorize redress *to the FTC*, the district court lacked jurisdiction to award Section 19(b) relief and the FTC was not entitled to any relief.

Even *assuming* Sections 18 and 8404 did authorize filing of lawsuits to enforce a rules violation (which they do not), Section 56(a)(1)(A) builds in a safeguard requiring the FTC to give written notification and consult with the Attorney General before commencing an action under Section 18, or 8404 even

assuming these were enforcement statutes (which they are not). The FTC must follow the Act and comply fully with Section 56(a)(1)(A) *before* it commences or intervenes in a civil action. Because the FTC failed to comply with the statute, it lacked subject matter jurisdiction and authority under Section 18, and ROSCA.

Moreover, as in *CBC I*, the FTC once again seeks to imply authority into Section 18 and Section 8404 where none exists. Dkt. 277 at 7 and 10. The FTC failed to allege authority to seek monetary relief under Section 19—the FTC's statute for enforcing violations of rules adopted by the FTC. Dkt. 1 at 22; 193 at 31-32. Instead of pursuing Section 19, the FTC unilaterally adopted its own implied remedial scheme through 13(b) which effectively nullified and circumvented Section 19. Now the FTC seeks to invoke the very statute it deliberately disregarded.

ISSUES PRESENTED

1. Whether the District Court had jurisdiction for a Section 19 judgment and if so, whether the judgment here "redress[es] injury to consumers" or amounts to "exemplary or punitive damages" under Section 19?

2. Whether the Mandate Rule Precluded Further Proceedings under Section 19 where the FTC failed to plead Section 19 in the first instance?

3. Whether this Court's Mandate in this case created an "intervening change in the law" allowing the District Court to reinstate the restitution award via rule 59(e).

4. Whether the trial court had jurisdiction and authority under ROSCA to impose the Modified Final Judgment under Rule 54(c).

ARGUMENT

I. THE JUDGMENT MUST BE VACATED BECAUSE IT EXCEEDS THE FTC'S AUTHORITY UNDER SECTION 19

After the district court first entered its judgment in this case, a unanimous Supreme Court spoke clearly: Section 13 of the FTC Act, 15 U.S.C. § 53(b), does not "authorize the Commission to seek, [or] a court to award, equitable monetary relief such as restitution or disgorgement." *AMG*, 141 S. Ct. at 1344. That left the FTC, and ultimately the district court, scrambling to justify the award that had already been entered. *See* Chair Lina M. Khan, *Memorandum to Commission Staff and Commissioners*, *Vision and Priorities for the FTC*, 1 (Sept. 22, 2021) *available at* https://www.ftc.gov/system/files/documents/public_statements/1596664/agency_priorities_memo_from_chair_lina_m_khan_9-22-21.pdf ("Using our full set of tools and authorities—including rulemaking and research in addition to adjudication—will be critical, especially post-*AMG*."); Former Commissioner Rohit Chopra, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 13 n. 37 *available at* https://www.ftc.gov/public-statements/2020/10/case-resurrecting-ftc-acts-penalty-offense-authority (Oct. 29, 2020) ("As the FTC faces threats to its authority to seek equitable relief [from the grant of *certiorari* in *AMG*], the agency should consider pursuing this alternative form of relief in more cases.").

Enter Section 19. 15 U.S.C. § 57b.

Never mind that the FTC failed to even *mention* Section 19 during the years of litigation in this case. Dkt. 1 at 22; 193 at 31-32. Now, with its Section 13 arrow removed from its quiver, the Commission says Section 19 gives it the power it previously used (illegally, it turns out) under Section 13.

The FTC is wrong. And plainly so. True, Section 19 gives courts *some* power to seek monetary judgments. But the statute falls well short of what FTC seeks here. In fact, two of the four sitting Commissioners have recognized that Section 19 is not a substitute for Section 13. *See Resident Home, LLC; Analysis of Proposed Consent Order To Aid Public Comment*, 86 Fed. Reg, 58279, 58283 (Oct. 21, 2021) (Dissenting Statement of Commissioners Phillips and Wilson) ("Soon after the Supreme Court unanimously rebuked the Federal Trade Commission for seeking monetary remedies not permitted by Section 13(b) of the FTC Act—remedies that, in fairness to the agency, were blessed by appellate courts for decades—the Commission now votes to accept monetary remedies not permitted by Section 19.") And they predicted that if it "continue[s] to flout the limits of [its] authority, the Commission should fully expect additional rebukes from the courts." *Id.* They were surely right on that score.

Section 19's text answers all of the relevant questions: "The court [in a 19(a) action] shall have jurisdiction to grant such relief as the court finds necessary to

redress injury to consumers …. 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." 15 U.S.C. § 57b(b).

For starters, the statute authorizes only relief that will "redress injury to consumers." 15 U.S.C. § 57b(b). What is "redress?" The text sheds light on that question: the "refund of money" or "return of property" or "payment of damages." *Id.* Remedies, in other words, that *make consumers whole*. That's a far cry from how the FTC used Section 13. Under that statute, the FTC often obtained blanket equitable monetary relief disconnected from any "redress."

What's more, Section 19 prohibits any "exemplary or punitive damages." 15 U.S.C. § 57b(b). That fits Section 19's general purpose—to make consumers whole, not punish wrongdoers. So a Section 19 award can't serve as general punishment or deterrence. This fact, too, distinguishes in kind Commission remedies long sought under Section 13. *E.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 373 (2d Cir. 2011) (noting that FTC need not return money to consumers under Section 13 although FTC could do so as a "matter of grace.").

The district court ignored Section 19's text and assumed it gives the FTC the same power as Section 13. In doing so, the court below entered a judgment designed to punish Credit Bureau. Section 19 grants FTC no such power. It gives courts no such "jurisdiction." And it plainly cannot support the judgment entered below.

A. The Judgment Fails to Provide Redress as Required by Section 19

As in any case involving statutory interpretation, the text must guide the court. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). (the "cardinal canon before all others" is the plain text). Statutory language must be read "not in a vacuum, but with reference to the statutory context, 'structure, history, and purpose.'" *Abramski v. United States*, 573 U.S. 169, 178 (2014) (quoting *Maracich v. Spears*, 570 U.S. 48, 76 (2013)).

And here, the text is clear: Courts have "jurisdiction" to enter relief only to "redress injury to consumers." 15 U.S.C. § 57b(b). Section 19 does not grant courts sweeping equitable power. Nor does it allow courts to order defendants to disgorge profits or send checks to the U.S. Treasury. It requires "redress" to "consumers." In reading that language, this court must "presume Congress says what it means and means what it says." *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016).

The term "redress" is well-known to the law. It has two forms, "penal" and "restitutionary," with the latter being defined as "[m]oney paid to one who has been injured, the amount being the pecuniary value of the benefit to the wrongdoer."

Black's Law Dictionary, *Redress* (11th ed. 2019). *Penal* redress, on the other hand, requires "full compensation … for the full value of the loss (an amount that may far exceed the wrongdoer's benefit)" "as an instrument for *punishing* the offender." *Id.* (emphasis added). Because Section 19 is limited to "redress" without "the imposition of any exemplary or punitive damages," it unmistakably permits only restitutionary redress "to make consumers whole." *Resident Home, LLC*, 86 Fed. Reg, at 58283 (Dissenting Statement of Commissioners Phillips and Wilson).

Full equitable jurisdiction would go beyond this purpose because certain equitable remedies do not focus on consumer redress. *See Bronson*, 654 F.3d at 373 (explaining that FTC need not return money to customers in Section 13 action pre-*AMG*). Had Congress intended for the FTC to have a full range of equitable tools, it "could just have said so." *Kloeckner v. Solis*, 568 U.S. 41, 52 (2012); *Liu v. SEC*, 140 S.Ct. 1936 (2020). Congress did not.

And so the statute limits the FTC's reach to something short of the outer bounds of equitable relief. A court may order things like "the refund of money," or the "return of property," or "the payment of damages." 15 U.S.C. § 57b(b). But whatever the remedy, it must "redress" the "*injury to consumers*."

The Supreme Court's treatment of statutes granting even *broader* equitable powers confirms the point. In *Liu*, the law allowed the SEC to obtain "any equitable relief that may be appropriate or necessary for the benefit of investors"—power far

beyond Section 19's "redress" standard here. 140 S.Ct. at 1940. Yet even that language prohibited the SEC from going beyond ill-gotten gains. *Id.* at 1943. Nor did "equitable relief" justify SEC disgorgement practices. Courts had "test[ed]" the statute's reach by "ordering the proceeds of fraud to be deposited in Treasury funds instead of disbursing them to victims." *Id.* at 1946.

The same SEC statute required that relief be "for the benefit of investors." But the Supreme Court highlighted a problem: The SEC did "not always return the entirety of disgorgement proceeds to investors" and instead "deposit[ed] a portion of its collections in a fund in the Treasury." *Id.* at 1947. That was "in considerable tension with equity practices." *Id.* at 1946. It was unclear what would constitute "benefit" for investors because the statute "provide[d] limited guidance as to whether the practice of depositing a defendant's gains with the Treasury satisfies the statute's command." *Id.* at 1947-48. In general, though, the Court said the law "requires the SEC to *return a defendant's gains* to wronged investors," because "no analogous common-law remedy permitting a wrongdoer's profits to be withheld from a victim indefinitely without being distributed to known victims." *Id.* at 1948 (emphasis added).

So what *would* satisfy the requirement that the SEC provide "benefit to investors?" Depositing relief into the Treasury wouldn't do so. The award "must do *more* than simply benefit the public at large by virtue of depriving a wrongdoer of

ill gotten gains." *Id.* at 1948 (emphasis added). If funds sat in the Treasury, the court "would render meaningless the latter part" of the statute requiring investor benefit. *Id.* That phrase "must mean something more than depriving a wrongdoer of his net profile alone," or the court "would violate the 'cardinal principle of interpretation that courts must give effect . . . to every clause and word of a statute.'" *Id.* at 1948 (quoting *Parker Drilling Mgt. Servs., Ltd. v. Newton*, 139 S.Ct. 1881, 1890 (2019)). Thus, not even full "equitable relief" could reach the scope of *penal* redress. *See* Black's Law Dictionary, *Redress* (11th ed. 2019).

Just so here. Or *more so* here. Section 19 imposes limits beyond those in Section 78u(d)(5). *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) (noting that Section 19 "expressly limits a court's equitable jurisdiction."). Instead of giving full "equitable relief" that be "for the benefit of investors," the FTC Act says the relief must "redress injury to consumers." Full stop. So while the SEC Act might allow relief that "benefits" investors, even if it is not direct payment—such as using money pay whistleblowers, *see Liu*, 140 S.Ct. at 1947—Section 19 does no such thing. It is clear: Only *redress* is permitted.

And redress "must mean something more than depriving a wrongdoer of his net profit," or it would be "meaningless." *Liu*, 140 S.Ct. at 1948. No wonder, then, courts interpreting Section 19 have already determined as much: "there may be no redress without proof of injury caused" by defendant's practices. *FTC v. Figgie Int'l,*

Inc., 994 F.2d 595, 605 (9th Cir. 1993). *Figgie*, a seminal Section 19 case, held that through Section 19, Congress sought "only to authorize redress *to consumers* and others for 'injury resulting' from the trade practice." *Id.* at 607 (emphasis added). The FTC could *not* use "[u]nclaimed money from the redress fund" for "'indirect redress' in the form of . . . donations to non-profit" organizations, because there is "no basis for allowing the Commission to keep money in excess of what it reasonably spends to find purchasers of the [product], advertise to them the availability of the money . . . and process their claims and reimburse them." *Id.* at 607. There, as here, the FTC argued that it should be permitted "to keep the money because it is in the nature of disgorgement." *Id.* And there, as here, the argument ran afoul of Section 19 because "requiring Figgie to pay the Commission the excess would . . . not mak[e] redress to the consumers who bought" the product. *Id.*

Figgie decides this case. Payments to anyone other than consumers or others who experienced injury amount to "extraordinary provision[s]" that "cannot be characterized as 'redress'" because the "word connotes *making amends to someone who has been wronged.*" *Id.* (emphasis added). If the Commission keeps the money, or the cash goes to the Treasury, no redress occurs—just as *Figgie* explains. Simply [c]alling a fine 'indirect redress' does not make it redress" because that would "exceed the statutory limitation on the remedy." *Id.*

No doubt, pre-*AMG*, run-of-the-mill Section 13 cases (including *this* case) involved precisely what the FTC attempts here: keep as much of the award as it wants, without limits, and without any obligation to return anything. *See Bronson Partners, LLC*, 654 F.3d at 373 (explaining, in Section 13 case, that the FTC may "as a matter of grace, attempt to return as much of the disgorgement proceeds as possible," but "the remedy is not, strictly speaking restitutionary at all, in that the award runs in favor of the Treasury, not the victims."). In those cases, the FTC could—if it wanted—give the money to consumers, but it didn't have to do so. *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997).

But Section 19 doesn't give the FTC a choice. It *requires* redress. *See Figgie*, 994 F.2d at 606-07. And other courts echo *Figgie's* core insight: if the FTC seeks "disgorgement under Section 19(b), the Court might have found . . . defendants' objections to disgorgement to be persuasive." *FTC v. Silueta Distributors Inc.*, 1995 WL 215313, at *6 (N.D. Cal. Feb. 24, 1995); *see also FTC v. Washington Data Resources*, 856 F.Supp.2d 1247, 1280 (M.D. Fla. 2012) ("Concerned solely with the plaintiff's injury, Section 19(b) confers no authority to award monetary relief that exceeds redress to consumers."); *id.* at 1281 ("Section 19(b) prohibits disgorgement in excess of consumer redress."); *FTC v. Cap. Choice Consumer Credit, Inc.*, 2004 WL 5149998, at *45 (S.D. Fla. Feb. 20, 2004) ("under Section 19(b), a court may not order disgorgement in excess of redress."). No authority points the other way—

even in its briefing to the district court the FTC did not cite a *single* authority allowing Section 19 to serve as a substitute for Section 13. *See* Dkt. 275 at 10-11. That's not surprising because no court of appeals has *ever* allowed Section 19 to be used as a substitute for disgorgement, and this case surely should not be the first.[2]

The district court, however, read Section 19's language ("redress injury to consumers") to *extend* the common-law's range of relief beyond the limits of even traditional equity. *See Liu*, 140 S.Ct. at1948; *Figgie*, 994 F.2d at 605-07. It was explicit that it was authorizing the "FTC [to] seek[] 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)." Dkt. 288, at 25. Its subsequent judgment allows "[a]ll money paid to the Commission" to be "used for equitable relief, *including* consumer relief." Dkt. 289 at 25 (emphasis added). But a Section 19 judgment cannot merely "includ[e]"

[2] This Court's passing statement in the original appeal that Section 19 empowers the Commission to "seek legal and equitable remedies, including restitution," in no way undermines this conclusion. *See CBC I*, 937 F.3d at 771 . Section 19 *does* allow "restitution," at least to the extent that it is payable to an identifiable harmed entity and does not exceed the applicable loss. *See Figgie*, 994 F.2d at 605-07. But in any event, the prior opinion dealt only with Section 13, of course, and did not, and indeed could not, rule on the propriety of any hypothetical award under Section 19. Even the district court agreed it had not resolved any questions about Section 19's scope, saying, "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." Dkt 288 at 9.

consumer relief—consumer relief is *all the court can possibly* award. 15 U.S.C. § 57b(b).

The judgment gets worse, stating that "[i]f a representative of the Commission decides that direct redress to consumers is wholly or partially impracticable"—note that nothing guides the representative's decision—"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." Dkt. 289 at 25 (emphasis added). Again, though, Section 19 does not allow "other equitable relief" when "redress to consumers" is "wholly or partially impracticable." The statute's language allows *only* "redress." 15 U.S.C. § 57b(b).

To top it off, the judgment states that [a]ny money not used for such equitable relief is to be deposited to the U.S. Treasury as disgorgement." Dkt. No. 289 at 25. So the FTC can decide that "redress" is impracticable and disgorge the award to the Treasury. That is not what Section 19 allows. *Figgie*, 994 F.2d at 605-07; *see also Liu*, 140 S.Ct. at 1947-48. The Commission *must* use *any* money to pay "redress" to consumers; anything else must be refunded to Credit Bureau.

FTC's haphazard attempt to keep its disgorgement power intact—despite *AMG*, statutory text, precedent, common-law principles, and common sense—

requires that the judgment be vacated. Nothing in the judgment comports with Section 19 or the law.

B. The Judgment Violates Section 19's Ban on Punitive Damages

While the statute's authorization of redress decides this case, the district court's judgment also violates the statute's prohibition on "exemplary or punitive damages." *See* 15 U.S.C. § 57b(b). Those limits fit with the statute's purpose to make consumers whole—not punish wrongdoers. The award here imposes a penalty—in violation of the statute.

The Supreme Court has already told us that similar disgorgement-type remedies amount to penalties. *Kokesh v. SEC*, 137 S.Ct. 1635, 1644 (2017). When the disgorgement goes beyond "return[ing] the defendant to the place he would have occupied had he not broken the law," then the fine has punitive features. *Id.* Indeed, "[d]enial of" a deduction of costs "by making the defendant liable in excess of net gains, results in a punitive sanction." *Id.* at 1644-45 (quoting Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment *h,* at 216); *see Liu*, 140 S.Ct. at 1941 (disgorgement and equity "never 'lends its aid to enforce a forfeiture or penalty.'" (quoting *Marshall v. Vicksburg*, 15 Wal. 146, 149 (1873))).

True, keeping money as disgorgement does not *alone* turn the award into a penalty. *Febre*, 128 F.3d at 537; *see also Liu*, 140 S.Ct. at 1940 (allowing disgorgement where SEC could obtain "equitable relief" even though that power

"historically excludes punitive sanctions."). But keeping *gross receipts*—as opposed to merely net profits or ill-gotten gains—makes all the difference. *See Liu*, 140 S.Ct. at 1940 (explaining that disgorgement is not punitive where the award "does not exceed a wrongdoer's net profits."); *id.* at 1942 ("disgorgement beyond . . . net profits from wrongdoing" would be punitive). "[T]o avoid transforming an equitable remedy into a *punitive* sanction, courts" historically "restricted the remedy to an individual wrongdoer's net profits to be awarded for victims." *Id.* at 1942. Anything beyond that would run afoul of the rule that the "wrongdoer should not be punished." *Id.* at 1943.

And *Liu* is not limited to the SEC. The case "set[s] forth a rule applicable to *all categories of equitable relief*." *CFPB v. Consumer First Legal Group, LLC.*, 6 F.4th 694, 710 (7th Cir. 2021) (emphasis added). So when the CFPB sought to collect a defendant's "gross receipts" under a statute that allows a court to grant "any appropriate legal or equitable relief," this Court vacated the more than $21 million award. *Id.* (analyzing 12 U.S.C. § 5565(a)). The reason was simple: *Liu* did not allow equitable relief based on gross receipts. *Id.* Instead the court must calculate "based on net profits." *Id.* Equitable principles do not reach gross receipts, as the court ordered here. *Id.*

As in *Consumer First*, here the FTC has done precisely what the Supreme Court said would clash with equitable non-penal requirements: It disgorged all *gross*

receipts—not merely net profits. Indeed, the district court outlined its math in its original, vacated, opinion: "The FTC began its calculation with the amount of revenue obtained through traffic that Pierce directed to CBC: $6,832,435.81. The FTC subtracted the *amount of refunds* CBC paid to customers ($414,860.77), *chargebacks* that customers successfully obtained ($394,903.68), and the amount already paid by Pierce and Lloyd in settlement of their claims ($762,000), for a net of $5,260,671.36." *FTC v. CBC I*, 325 F. Supp. 3d 852, 869 (N.D. Ill. 2018) (emphasis added). The FTC provided no proof of loss from the customers—instead it simply calculated the full amount that customers spent and the court imposed that same amount. *See* Dkt. 289 at 24 (ordering judgment of $5,260,671.36 as "equitable monetary relief").

That award is a repeat of the punitive disgorgement in *Kokesh*. As there, the relief here was "imposed by the courts as a consequence for violation . . .[of] public laws." 137 S.Ct. at 1643. It was "ordered without consideration of a defendant's expenses that reduced the amount of illegal profit," which means it "does not simply restore the state quo [but] leaves the defendant worse off." *Id.* at 1644-45. And it is "not compensatory" since "funds are dispersed to the United States Treasury." *Id.* at 1644; *see also Liu*, 140 S.Ct. at 1949-50 (disgorgement cannot exceed the gains made by a business "when *both* the receipts and payments are taken into account."

(internal quote omitted)). That is, as the *Kokesh* court explained, punitive. And Section 19 doesn't allow it.

That is, indeed, the very definition of "penal." *See* Black's Law Dictionary, *Penal Redress* (11th ed. 2019) ("full compensation of the injured person as an instrument for punishing the offender," and the amount "may far exceed the wrongdoer's benefit."). And because Section 19 *prohibits* "exemplary or punitive damages," the judgment cannot stand.

C. The Court Below Failed to Adequately Calculate Consumer Redress

At an even more basic level, the district court's judgment must be vacated because it omits any calculation of consumer redress. Instead of analyzing the amount of loss that would redress consumer injury—as the statute requires—the district court simply signed off on a near-identical judgment that previously allowed disgorgement. Compare Dkt. 239 at 26 *with* Dkt. 289 at 15 . Disgorgement is what the FTC sought from the get-go. Dkt. 1 at 1, 2, 22 (seeking disgorgement as a remedy). And when the FTC moved to amend the judgment, the court rubber stamped the prior judgment—disgorgement language and all. *Compare* Dkt. 239 *with* Dkt. 289.

But the Court needed to analyze *redress*—both how much and to whom. It did neither. Rather, the court approved the exact same disgorgement order, allowing the FTC to keep *all sales*—without calculating actual losses or requiring the FTC to

send all money back to customers. *See CBC I*, 325 F. Supp. 3d at 869 (court's calculation). This calculation even recognizes that the disgorgement award was wholly separate from any notion of consumer redress, such as a refund. *See id.* Moreover, in its written opinion reimposing the identical award of $5,260,671.36, the district court was defiant—rejecting any argument "that the FTC must trace particular funds," or that "the restitution amount has been improperly calculated" for the same reasons in its original Section 13 opinion. Dkt. 288 at 21; *accord CBC I*, 325 F. Supp. 3d at 869 ("The Court concludes that, even if the funds at issue were commingled with other CBC funds, the FTC is not barred from obtaining restitution.").

At no point did the FTC even attempt to explain or show the number of customers sent to the at-issue websites, or how those alleged actions violated ROSCA. Indeed, while Fed. R. Civ. P. 26(a)(1)(A)(iii) required the FTC to produce "a computation of each category of damages claimed," as a part of their initial disclosures, the FTC *never* produced calculations concerning which actions caused direct harm to consumers.[3] The FTC has never proven, or even pled, which websites

[3] Instead of providing calculations specific to ROSCA, as mandated by Rule 26, the FTC based its calculations on all revenue derived by Revable. Dkt. 277 at 161-162. The FTC was well aware of the standard for calculating damages under *FTC v Figgie International*. Any request by the FTC for remand on damages must be denied where, as here, the FTC deliberately placed all its eggs in the Section 13(b) basket and never intended to seek damages under Section 19. Rule 37(c)(1) makes exclusion of "any information" the presumed remedy, except where the failure to

or landing pages violated ROSCA and whether any website violated the statute before December 1, 2015, and instead just produced calculations based on all revenue derived through Revable from whatever time or source. *See* Dkt. 277 at 25-26; Dkt. 277-1 at 158; Dkt. 211 at 7 and Dkt. 205 at 26.. That's why the FTC claimed that losses amounted to $6.8 million. *CBC I*, 325 F. Supp. 3d at 869. But that amount reflected *gross sales*, and it did not refer to a specific time period or specific customers. *Id.*

Because Section 19 requires *redress*—and not punishment—refunds should be given only "to those buyers who make a valid claim for such redress." *Figgie*, 994 F.2d at 606 (internal quotation marks omitted). Customers, ultimately, can decide whether they want a refund for products, or whether they felt they paid for what they got. *Id.* ("consumers who decide, after advertising which corrects the deceptions by which Figgie sold them the heat detectors, that nevertheless the heat detectors serve their needs, may then make the Informed choice to keep their heat detectors instead of returning them for refunds."). But that didn't even enter the discussion at the district court because it (and the FTC) believed Section 19 allows wide-ranging disgorgement awards to *punish* Credit Bureau. It, in fact, *deducted*

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disclose is "substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *Finley v. Marathon Oil Co.*,75 F.3d 1225, 1230 (7th Cir. 1996). There is no record support that satisfies this standard.

customer redress from the so-called "restitution" award. *CBC I*, 325 F. Supp. 3d at 869. The statute allows no such punishment, and the judgment must be vacated.

D. CBC Properly Raised Its Challenge to Section 19

CBC properly raises this Section 19 argument. In the proceedings below, it clearly argued that any award under Section 19 would need to be traced to consumer redress and could not exceed the *net* proceeds proven from rule violations. *See* Dkt. 277 at 20-22. The district court, moreover, ruled on these questions, rejecting them for the reasons it set out in its original, vacated, opinion. *See* Dkt. 288 at 21.

To the extent that the amended judgment goes beyond those objections, CBC could hardly have anticipated that it would do so. For starters, the district court's judgment orders more what defendants and *even the district court* said it could do. In its opinion, the district court said that "[t]he present motion does not involve the remedy of disgorgement," yet in its judgment the court specifically allowed disgorgement. *See* Dkt. 288 at 21; 289 at 25.

What's more, the district court merely rubber stamped the previous judgment that had been entered without addressing consumer redress. Brown, of course, argued in district court (and repeats here) his claim that FTC had itself forfeited the Section 19 argument *altogether*. That encompasses the scope of the remedy provided here.

More still, the argument at the district court—what the FTC claimed in its motion—was that the award could be *in the same amount*. That's different from *how* the money would be used. Nowhere in its motion to amend did FTC seek disgorgement or equitable relief with penalty features. It would make no sense for Credit Bureau to have argued against something never raised. The FTC asked *only* that the district court "modify the judgment and ensure that consumers get back as much as possible of the money." Dkt. 275 at 9. Nowhere in that motion—and nowhere in the lower court's opinion—did the Commission claim authority to keep the money as disgorgement. Instead, FTC argued that it could "obtain refunds for consumers," *id.* at 10, and "an award of consumer redress," *id.* at 11. The Commission asked the Court to grant relief "so that consumers can receive their redress." *Id.* Thus, "the FTC respectfully requests that the Court amend its judgment to include consumer redress under Section 19 of the FTC Act." *Id.*; *see id.* at 12(same). Its reply brief said more of the same. *See* Dkt. 278 at 1 ("The FTC brought this motion to get relief for . . . victims."); *id.* ("*consumers* are entitled to *get their money back*." (emphasis added)); *id.* ("[t]he remaining funds should go back to the injured customers."); *id.* at 2 ("Section 19 . . . provide[s] an independent statutory basis *for refunding consumers*." (emphasis added)); *id.* (court "should amend its judgment to *grant consumers the relief*." (emphasis added)); *Id.* at 6 ("Section 19 authorizes consumer redress.").

No wonder, then, that Credit Bureau did not argue that FTC couldn't seek "disgorgement" or other payments deposited to the Treasury. The FTC never argued that it could obtain such relief under Section 19. To the contrary, Credit Bureau argued that FTC failed to properly calculate the award amount—something directly relevant to the FTC's motion. Indeed, why would Credit Bureau argue that Section 19 requires specific redress to consumers and prohibits disgorgement? No one suggested otherwise. Even the court claimed—although it did not follow—that disgorgement did not apply. Dkt. 288 at 21 (the "present motion does not involve the remedy of disgorgement.").

So this court can review Brown's argument. Otherwise, "injustice might . . . result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). After all, courts rule "are devised to promote the ends of justice, not to defeat them," and a "rigid and undeviating judicially declared practice" to never "consider all questions which had not been previously and specifically urged would be out of harmony with this policy." *Id.* at 557-58. Forfeiture here would result in "a plain miscarriage of justice." *Hormel*, 312 U.S. at 558; *see also Hicks v. Avery Drei, LLC*, 654 F.3d 739, 744 (7th Cir. 2011) (noting courts review arguments where there are "exceptional circumstances or one where a miscarriage of justice could occur."). Thus, there was no forfeiture. If this court held otherwise, Credit Bureau would be held accountable for an argument that no one ever made—and even the court's opinion below rejected.

On top of that, this case implicated the court's *jurisdiction*, and jurisdictional issues are not forfeited. *Stern v. U.S. Gypsum, Inc.*, 547 F.2d 1329, 1333 (7th Cir. 1977) (no forfeiture "where jurisdictional questions are presented."). When a "jurisdictional question" is raised, forfeiture is excused. *Scalise v. Thornburgh*, 891 F.2d 640, 643-44 n.3 (7th Cir. 1989). Here, the statute grants "jurisdiction" to courts only to "redress" consumer injury, and is further limited to an action "commenced" under Section 19(a). *See* 15 U.S.C. § 57b(b) and 15 U.S.C. § 57b(a)(1). There is no power to grant anything else. And so there is no "jurisdiction" to do what the court below did.

II. THE TRIAL COURT EXCEEDED THE SCOPE OF THE MANDATE AND LACKED JURISDICTION TO AWARD ANY 19(B) RELIEF

The mandate informs the district court of what it must do to implement the appellate decision on remand and limits further proceedings to the scope of the mandate. *Kovacs v. United States*, 739 F.3d 1020, 1024 (7th Cir. 2014), citing *United States v. Husband*, 312 F.3d 247, 250 (7th Cir. 2002) ("[T]his court does not remand issues ... when those issues have been waived or decided.").

This obligation to follow the judgment of a reviewing court, the so-called mandate rule, is a relative of the law of the case. *Id*. In *Moore v. Anderson*, 222 F.3d 280, 283 (7th Cir. 2000) the Court held that: "when a court of appeals has reversed

a final judgment and remanded the case, the district court is required to comply with the express or implied rulings of the appellate court." Said another way, the court must follow "the spirit as well as the letter of the mandate." *Matter of Cont'l Ill. Securities Litigation*, 985 F.2d 867, 869 (7th Cir. 1993). "The court may believe and even express its belief that our reasoning was flawed, yet it must execute our mandate nevertheless." *Donohoe v. Consol. Operating & Prod. Corp*., 30 F.3d 907, 910–11 (7th Cir. 1994).

The Mandate commands that the monetary award be vacated: *"[b]ecause the Commission brought this case under Section 13(b)*." *CBC I*, 937 F.3d at 767 (emphasis supplied). In other words, the FTC filed suit under Section 13, and this Court vacated the judgment. During the first round at this Court the FTC never claimed that it could have gotten the same judgment under Section 19.

The district court cannot ignore that. The FTC did not even seek to amend its Complaint—instead simply asking for the same judgment based on another statutory section. Dkt. 275 at 6, 9. But if Section 19 *always* was a part of this case, then FTC should have made the argument in round one. It did not. That's because FTC was committed to Section 13. And by vacating the monetary award, this Court decided the FTC could not obtain monetary awards against Credit Bureau Center and Michael Brown. The trial court may not circumvent the mandate to now add Section 19 and reinstate the vacated award. Section 19(b) provides a limited grant of

jurisdiction to award restitution only in cases "commenced" under Section 19(a)[4]. Not only did the trial court exceed the scope of the mandate but it is without jurisdiction since the FTC failed to commence an action under 19(a). "Federal courts are courts of limited jurisdiction: 'It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction.'" *Hart v. FedEx Ground Package System, Inc.*, 457 F.3d 675, 679 (7th Cir. 2006), quoting *Kokkonen v. Guardian Life Ins. Co.,* 511 U.S. 375, 377 (1994).

In *Credit Bureau Center I*, this Court made it clear that the FTC must follow the procedures set by Congress and cannot circumvent Congressionally mandated processes. "Reading an implied restitution remedy into section 13(b) makes these other provisions largely pointless." *CBC I,* 737 F.3d. at 774. This Court held that "[W]here Congress has provided elaborate enforcement provisions for remedying the violation of a federal statute, ... it cannot be assumed that Congress intended to authorize by implication additional judicial remedies ... ." *Meghrig v KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996) (emphasis added).

[4] Section 57b(a)(1) provides that the Agency "may commence" a civil action for a rules violation "for relief under subsection (b)". The statute further provides that in an action commenced under Section 57b(b), "The court in an action under subsection (a) shall have jurisdiction to grant…relief…." 15 U.S.C. §§ 57b(a)(1), 57b(b)).

This Court held the authority to grant injunctive relief under Section 13(b) was part of an "elaborate enforcement scheme" that authorized the FTC to seek restitution under Section 19 and Section 45 of the FTC Act. However, Congress did not implicitly authorize restitution under Section 13(b). *CBC I* 937 F.3d. at 767(citing *Meghrig*, 516 U.S. at 487-88). This Court extensively analyzed the statutory framework and history of the FTC's elaborate enforcement scheme. "Most notably, the FTCA has two detailed remedial provisions [including Section 19] that expressly authorize restitution if the Commission follows certain procedures." *Id*. In *AMG*, the Supreme Court found that Congress never intended to authorize monetary relief through Section 13(b) of the Act. *AMG*, 141 S. Ct. at 1349. As in *CBC I*, this Court should not allow the FTC to bypass and render Congressional statutes "pointless." The FTC's failure to comply with Section 56 and commence under 57(a) precludes recovery of monetary redress under Section 19.

A. The FTC's Policy of Using 13(b) to Circumvent the Congressional Enforcement Scheme Underscores the Fact That the FTC Deliberately Waived Section 19 as a Basis for Monetary Relief.

Section 13(b) long served as the FTC's primary enforcement tool (the "Section 13(b) Program"). That choice—a product of a long and deliberate process—applied across cases, including here. And the FTC must be held responsible for those decisions. The Commission waived any reliance on Section 19.

Indeed, this Court recognized that the FTC used Section 13(b) to circumvent the provisions of Section 19 and 5. *CBC I*, 937 F.3d at 784. When the FTC initially sought to create precedent that enabled the agency to seek monetary relief under Section 13(b), the FTC knew there was no legislative history or statutory support for actions taken under Section 13(b) but nevertheless represented that the seizures were warranted. D. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act 1-2, Paper at FTC 90th Anniversary Symposium*, Sept. 23, 2004 (hereby "FitzGerald"); Dkt. 156-6. The central thesis of Fitzgerald's article was that the administrative complaint process for Section 5 cases was protracted and took several years to obtain a cease and desist order. Dkt. 156-6 at 1. The Commission asked Congress to grant the Agency the power to order restitution. *Id.* at 6. Congress refused a broad grant of authority but: (1) added Section 19 authorizing the FTC to seek monetary redress for rules violations; or (2) for acts or practices as to which the Commission issued a cease-and-desist order. *Id.* at 6-7. "Neither the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief." *Id.* at 15.

Frustrated with Congress, the FTC then set out to persuade courts to grant and create the very powers that Congress refused to grant the FTC. Clearly, in *Singer*, and in other circuit court proceedings, the FTC did *not* fully disclose to the circuit courts that Congress refused to grant the FTC authority to seek full restitution under

the Act. If the FTC had disclosed the fact that the Agency knew that Congress rejected the Agency's request for broad powers to seek restitution, circuit judges would have told the FTC to go back to Congress if it wanted to change the law. Of course, this is precisely what the Supreme Court told the FTC in *AMG*.

Once this sort of statutory interpretation was adopted by an appellate court, the FTC sought similar relief in other circuits which adopted the *Singer* decision. As this Court found, circuit courts uncritically accepted the Ninth Circuit's precedent in *Singer*. *CBC I*, 937 F.3d at 785.

While the FTC may prefer the courts ignore its manipulation of the system, a failure to hold the agency accountable for misconduct encourages the FTC and other agencies to file frivolous appeals, take procedural short-cuts whenever possible and ask courts to grant implied remedies that were never created or intended by Congress. In the instant case, the Agency adopted and followed its policy to deliberately misuse Section 13(b) and circumvent the procedural requirements of Section 19 and Section 5. The Court should hold the FTC's feet to the fire like any other litigant. *See Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 670 (1944); *Precision Co. v. Automotive Co.,* 324 U.S. 806 (1945).[5]

[5] To simply allow the FTC to ignore its laws ultimately corrodes public confidence and encourages the FTC and other agencies to play fast and loose with the courts.

Based on this Court's decision in *CBC I,* an administrative agency must strictly adhere to its statutory authority and steps necessary to pursue enforcement under the FTCA. *CBC I*, 937 F.3d at 780. The presumption in favor of relief doesn't apply "under a statute that expressly enumerated the remedies available to plaintiffs." *Id. citing Karahalios v.Nat'l Fed'n of Fed. Emps*., 489 U.S. 527 533 (1989) ("It is … an elemental canon of statutory construction that where a statute expressly provided a remedy, courts must be especially reluctant to provide additional remedies.") Stated differently, "[t]he FTC must be charged with knowledge of its own enforcement authority." *Id.* The FTC's deliberate decision to proceed under Section 13(b) constitutes waiver.

B. Authority to Seek Consumer Redress Under ROSCA Depends on Complying With the Statute, Jurisdiction, and Standing.

The trial court pointed to the FTC's complaint where the Agency alleged subject matter jurisdiction under ROSCA Section 8404(a) and Section 13(b). Dkt. 288 at 4-5. Importantly the FTC's complaint section entitled: "THIS COURT'S POWER TO GRANT RELIEF" pointed exclusively to Section 13(b) as empowering the "Court, in the exercise of its equitable jurisdiction, [to] award ancillary relief." The Agency further alleged: "Once the FTC invokes the Court's equitable powers, the full breadth of the Court's equitable authority is available." The FTC's complaint explicitly sought only equitable remedies such as injunctive relief and restitution.

Dkt. 1. (requesting that Court exercise its "*own equitable powers*" to grant "restitution, the refund of monies paid, disgorgement of ill-gotten monies, and other equitable relief")." But, of course, this Court held that the FTC cannot use Section 13(b) to enforce ROSCA and must comply with the statute. *CBC I*, 937 F.3d at 784.

Congress defined and limited the FTC's authority to represent itself in a ROSCA 8404(a) action. Section 56(a) of the FTC Act is entitled: "**Commencement, defense, intervention and supervision of litigation and appeal by Commission or Attorney General.**" (original in bold). The FTC is required to consult with the attorney general "*before* commencing, defending, or intervening in, any civil action." 15 USC § 56 (a)(1)(A)(emphasis added). Congress adopted these provisions to assure that the Attorney General was able to oversee and supervise the FTC's activities. To avoid the reporting requirement, the FTC specifically invoked *only* its authority for injunctive relief "(A) under section 53 [13(b)] of this title (relating to injunctive relief)".

Congress imposed the condition of notifying and consulting with the Attorney General before the FTC is authorized to commence or intervene in litigation. Failure to satisfy this jurisdictional condition cannot be excused.

Defendants timely objected to the FTC's standing to pursue monetary relief on behalf of consumers in this lawsuit. Dkt. 182 at 8. In its summary judgment motion, the FTC responded as follows: "Defendants 5th defense claims the FTC

lacks standing to represent consumers, but the FTC is an independent agency that represents itself, not individual consumers *15 USC §§ 53, 56(a)(2)(A) [relating to injunctive relief]*." Dkt. 193 at 34. (emphasis supplied). Thus, the FTC deliberately claimed standing under Section 13(b) & 15 USC § 56(a)(2)(A) *instead* of satisfying the requirement of 15 USC § 56(a)(1)(A) and § 56(a)(2)(B). When challenged on whether it had standing to seek monetary relief, the FTC must be presumed to know that it had to establish standing under separately under ROSCA. The FTC's failure to establish standing to pursue monetary relief in this action was a deliberate decision to invoke only Section 13(b), and constitutes waiver of monetary relief.

When the FTC filed its complaint and throughout trial proceedings, the FTC was well aware that it could have invoked Section 19, but failed to do so. Nor did the FTC, on appeal, ask this court to uphold the verdict under Section 19 as an alternate ground for relief. The FTC's attempt to seek damages under Section 54(c) must fail because it deliberately, or through inaction, waived any right to proceed under Section 19. "We may affirm on any ground fairly supported by the record but only if the appellee has preserved the argument in the district court. *Burns v. Orthotek, Inc. Emps.' Pension Plan & Tr.*, 657 F.3d 571, 575 (7th Cir. 2011). Indeed, "[o]nly if a party raises an argument both here and in the district court may we use it as an alternate means to affirm." *Tully v. Barada*, 599 F.3d 591, 594 (7th Cir.

2010); *Duncan Place Owners Ass'n v. Danze, Inc*., 927 F.3d 970, 973 (7th Cir. 2019)("Arguments not raised in the district court are waived … .").

C. The Trial Court Misinterpreted ROSCA

After the Court's decision in *AMG*, the FTC argued, and the trial court found that Section 8404(a) treats a violation of ROSCA as a violation of a Section 19 of the Act. Dkt. 288 at 5. The plain language of the Section 8404 does not support the trial court's conclusion. In pertinent part, 15 U.S.C. § 8404 provides:

> (a)IN GENERAL
> Violation of this chapter or any regulation prescribed under this *chapter* shall be treated as a violation of a rule under section 18 of [Chapter 110] the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices. 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 (15 U.S.C. 41 et seq.) were incorporated into and made a part of this *chapter*. (emphasis added)

The term "as though" does not grant authority to simply file an action but reference to other parts of the FTC statute "as though all applicable terms were incorporated into and made a part of this ***chapter***." In other words, ***Section 8404*** itself does not include Section 19 but merely instructs the FTC "shall" seek enforcement of a rules violation under either under Section 19, Section 5, or Section 13(b).

As to bringing an enforcement action directly under ROSCA under Section 8404, *assuming* this was possible, the FTC must first comply fully with Section

56(a)(1)(A). Stated differently, Section 8404 does not authorize the FTC to disregard the statutory requirements for bringing an action under ROSCA.Similarly, Section 18 of the Act simply authorizes the FTC to adopt rules "which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce… ." 15 U.S.C.§ 57a(a)(1)(B).As set out by this Court in *CBC I*, an action to seek restitution under a rule adopted pursuant to Section 18 of the FTC Act must be filed under Section 19. Section 18 provides general authority to adopt rules but is not an independent authority to enforce under Section 18. The FTC successfully enforced the FTC Act through Section 13 and Section 19 for rule violations. Congress did not adopt Section 8404 to expand the authority of the FTC where, as here, Section 19 already provided enforcement authority for rules violations. While Section 8404 certainly permits the FTC to enforce ROSCA by [using] the "same manner, by [using] the same means," in the FTC Act, that does *not* relieve the FTC of the same obligations to plead a specific enforcement provision in its complaint.

The FTC's position also makes no logical sense. If the FTC truly believed its own assertions, it would have been unnecessary to include references in their complaint to Section 5 and Section 13(b). Section 8404(a) merely says the FTC "shall" seek enforcement of a rules violation under either under Section 19, Section 5, or Section 13(b). The trial court's holding that a mere reference to 15 U.S.C. § 8404 implies a Section 19 remedy is simply wrong and would, in effect, relieve the

FTC of pleading and establishing its jurisdiction and authority to enforce ROSCA, and establishing the courts' jurisdiction to award relief—a result that is neither expressly nor implicitly authorized expressly by the FTCA or ROSCA. Indeed, this Court, and the Supreme Court's decision in *AMG* make it clear that: (1) the text of a statute controls a dispute over authority; and (2) courts cannot imply *enforcement* authority where it does not exist by statute. *AMG*, 141 S.Ct. at 1349-50; *CBC I*, 937 F.3d at 773.Thus, the district court misapplied ROSCA § 8404, and effectively granted the FTC implied authority to commence an action without complying fully with Section 19(a) or Section 56(a).

III. THIS COURT'S DECISION WAS NOT AN INTERVENING CHANGE IN THE LAW.

The Court need not reach this issue because the trial court's order exceeds the scope of the Mandate and seeks to impose monetary relief that was waived by the FTC's through its enforcement policy.

The FTC argued to the district court that this Court's decision in *CBC I* constituted an "intervening change in the law" justifying amendment of the judgment under Rule 59(e). The district court agreed and determined it had authority to reinstate the same consumer redress under Rule 59(e)[6]. The trial court rejected

[6] "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*." … "The Court will amend its prior judgment and award the same consumer redress." Dkt. 288 at 26 (emphasis supplied).

Appellant's contention that this Court's decision in this case constituted the law of the case, and was not an intervening change in the law under Rule 59(e). Dkt. 288 at 14. This argument ignores the fact that there was no change in the statutory language of the FTC Act—only this Court's *correction* to a *misapplication* of Section 13(b) of the Act. *CBC I*, 937 F.3d. at 767 ("Stare decisis cannot justify adherence to an approach that Supreme Court precedent forecloses."). Moreover, this Court's decision was not an "intervening" change where, as here, this Court's decision was part of an appeal from a district court in this, the *same* case. Thus, as a matter of logic and common sense, this Court's decision in this case did not "intervene" in anything. This Court's decision did not, as a matter of law, constitute an "intervening" change in this case.

In *Christianson v. Colt Indus. Operating Corp.*, 486 U.S.800, 815-16 (1988), the Court held that: "The law of the case posits that when a courtdecides upon a rule of law, that decision should continue to govern the same issues in *subsequent stages in the same case*." citing 18B Charles Alan Wright, Arthur R.Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478 (emphasis supplied). With respect to law of the case, "[p]erhaps the most obvious justifications for departing . . . arise when there has been an intervening change of law *outside* the confines of the particular case.") *Id.* (emphasis supplied). In other words, there can be no "intervening change in the law" because there was no

intervening case "outside" this case. Because this Court and the Supreme Court *reaffirmed* the Seventh Circuit's decision in *this* case, the mandate must be enforced.

A "Rule 59(e) motion may not be used to . . . raise arguments or present evidence that could have been raised prior to the entry of judgment." *GSS Group Ltd. v. Nat'l Port Authority*, 680 F.3d 805, 812 (D.C. Cir. 2012) (holding arguments raised for the first time in a Rule 59(e) motion "are waived", *citing* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2810.1, at 127-28 (2d ed. 1995). A Rule 59(e) motion is not "a chance for a party to correct poor strategic choices," *SEC v. Bilzerian*, 729 F. Supp.2d 9, 15 (D.D.C. 2010), nor are Rule 59(e) motions allowed for litigants "to cry over spilled milk, " *Bond v. Dep't of Justice*, 286 F.R.D. 16, 17 (D.D. C. 2012). *See also Silk v. Sandoval*, 435 F.2d 1266, 1268 (1st Cir. 1971) (acknowledging "the complementary interest in speedy disposition and finality, clearly intended by Rule 59").

IV. THE FTC IS NOT ENTITLED TO DAMAGES UNDER RULE 54(C)

The Court need not reach the FTC's arguments on Rule 54(c) because that provision only allows an award based on some *other* source of authority. But Section 19 did not authorize the judgment here. Plus, the FTC waived damages under Section 19. Moreover, this Court's Mandate and holding on the FTC's authority to seek monetary relief in an elaborate enforcement scheme was clear, unequivocal and should be enforced. Simply stated, the FTC had no authority to seek the judgment, and thus, Rule 54(c) doesn't apply.

In addition, the FTC is not entitled to damages under 54(c) because it has failed to establish a basis for any such relief. Rule 54(c) requires that a party must be *entitled* to relief in order to grant a Rule 54(c) motion. *Travis v. Gary Community Mental Health Ctr., Inc.,* 921 F.2d 108, 112 (7th Cir. 1990) (reasoning that Rule 54(c) "requires courts to award the relief to which the prevailing party is *entitled*"). But this Court already held the FTC was not entitled to monetary relief because it did not request it properly under its own statute. Even *assuming* the FTC correctly "commenced" a Section 19(a) action, as the text of the statute requires for 19(b) *redress,* the FTC is still not "entitled" to redress to *consumers* because third party consumers are not entitled to a judgment in a case brought by the FTC "[T]he FTC is an independent agency that represents itself, *not individual consumers*" FTC Statement Dkt. 193 at 33. (emphasis supplied).

Moreover, the FTC seeks class action damages for thousands of unnamed third parties without complying with the requirements and protections of Rule 23. The FTC's failure to plead under Rule 23 requires reversal. This basic issue was raised but not addressed by the trial court. Dkt, 277 at 21.

This Court also focused on the importance of a regulatory agency following its own statutes. *CBC I*, 937 F.3d at 780 (citing *California v. Sierra Club*, 451 U.S. 287, 297 (1981) ("The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide."). Courts cannot imply or engraft remedies, remedies into statutes, or otherwise assure an agency's recovery where, as here, the FTC blatantly ignored its own enforcement statute. Thus, the FTC cannot pursue class actions without following Rule 23 or otherwise exceed its authority.

Because Congress articulated specific forms of relief, the FTC was required to follow and plead its own statutes. *CBC I,* 937 F.3d at 780 (citing *Franklin v. Gwinnett Cty. Pub. Sch*., 503 U.S. 60, 69 n.6, (1992) (noting that the presumption in favor of relief doesn't apply "under a statute that expressly enumerated the remedies available to plaintiffs"*); see also Karahalios v. Nat'l Fed'n of Fed. Emps*., 489 U.S. 527, 533 (1989) ("It is ... an elemental canon of statutory construction that where a statute expressly provides a remedy, courts must be especially reluctant to provide additional remedies.")(quotation marks omitted)). Because Congress expressly

identified the FTC's authority to seek monetary relief under Section 5 and 19, the Court should not reward the FTC for subverting Congressional intent.

V. IN THE EVENT OF A REMAND, THE TRIAL COURT MUST TRACE THE ASSETS.

After this Court's ruling in *CBC I*, the Supreme Court decided *SEC v. Liu,* and held that agencies may not seize assets unrelated to the fraud. *Liu*, at 1943-1944. This necessarily requires tracing of assets to determine what assets are related to the fraud and what assets are unrelated to the underlying fraud alleged. The trial court held that: "The FTCA authorizes legal restitution, which does not require the same tracing requirements required for equitable restitution." In its second order granting judgment, the trial court also held that *Liu* did not apply to FTC proceedings. Dkt. 288 at 21.

Here, the district court not only seized funds related to the activities undertaken by Pierce and Lloyd but also seized all of Credit Bureau Center's funds and assets as well as Brown's individual assets. Dkt 59 at 8. Appellant's Brief, 18-3310, Dkt. 12 at 40. Brown raised this issue on appeal in *CBC I*, 937 F.3d at 768, and before the trial court on mandamus.

Brown previously raised this same issue before the Court contending that the damages allegedly suffered should have been limited only to amounts that unjustly enriched Defendants. Similarly, Brown further challenged the award of past damages as legal, instead of equitable relief. *Great West Life & Annuity Ins. Co. v.*

Knudson, 534 U.S. 204, 210 (2002) (Money damages are the "classic form of legal relief."). In *Montanile v. Board of Trustees*, 136 S. Ct. 6511 (2016), the Court held that an ERISA Plan fiduciary could not bring suit against a plan participant who dissipated assets from a third party settlement on non-traceable items. *Id.* at 557-562. It is undisputed that the funds received from consumers were commingled in CBC's accounts and then paid to vendors, employees and contractors. Dkt. 206-1 ¶ 54. Equitable restitution cannot be used to seize legally obtained funds unrelated to the alleged fraud. *See Liu*, 140 S.Ct. at 1941-42; *Kokesh* 137 S.Ct. at 1643.

The websites developed for Pierce and Lloyd (the "Subject Websites") were not activated until December 1, 2015, and operated for fourteen months until February 2017. Dkt. 211 at 13-14. The FTC did not dispute that 52% of Brown's business was legitimate and unrelated to the underlying fraud. *Id*. Thus, any award or redress should have been limited to, and could not be more than 48% of the assets seized. Redress should be limited to consumers who ordered on the ROSCA-defective websites during the 14 month period of their opeation. Once these consumers are identified, as in *Figgie*, they should be notified about the refund process to claim a refund check.

Finally, as mentioned above, the FTC was well aware of *Figgie*, and the requirements for establishing damages under Section 19. In its Rule 26 Disclosure, the FTC simply regurgitated its gross revenues number $6,832,435.81 and

deliberately ignored the standard for proof of damages under *Figgie*. The FTC's game plan was to avoid the necessity to prove damages under *Figgie* and secure a $ 6,832,435.81 judgment. Under this court's precedent and Rule 37, the FTC cannot show that its conduct was substantially justified or harmless error. The Court should not remand this case based on the FTC's Rule 26 violations, lack of jurisdiction, and the other reasons cited in this brief.

VI. CONCLUSION

The stakes here are both stark and simple—Must the FTC adhere to the directives of both the Supreme Court and this Court? Or, as the district court concluded, can the agency do whatever it wants, statutory limits be damned?

The first time this Court heard this case, it vacated the judgment because the agency's use of Section 13(b) was an abuse of the FTC's statutory authority, and did none of the things equitable remedies are supposed to do, such as pay back identified victims of misconduct. The Supreme Court agreed.

No one, least of the all the FTC, thought Section 19 had been waiting in secret to authorize the same type of abusive award. If this Court's prior decision in CBC1 means anything, the judgment below must be vacated.

CERTIFICATE OF COMPLIANCE WITH FRAP RULES 32(a)(7), FRAP RULE 32(g) AND CR 32(c)

The undersigned, counsel of record for the Defendant-Appellant, Credit Bureau Center, LLC and Michael Brown, furnished the following in compliance with FRAP Rule 32(a)(7);

I hereby certify that this brief conforms to the rules contained in FRAP Rule 32(a)(7) for a brief produced with a proportionally spaced font.

The length of this brief is _____ words.

Dated: February 2, 2022.

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PROOF OF SERVICE

Pursuant to FRAP 25(d) and Circuit Rule 25, the undersigned, counsel for the Defendant-Appellant, Credit Bureau Center, LLC and Michael Brown, hereby certifies that on February 2, 2022, the Brief and Required Short Appendix of Appellant as well as a digital version containing the brief, were delivered to counsel for the Plaintiff-Appellee, Federal Trade Commission.

Dated: February 2, 2022

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

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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.

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.

Honorable Matthew F. Kennelly
United States District Judge

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

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

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) (*Credit 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

[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

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.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

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Circuit decided that restitution was not available under section 19, CBC answered affirmatively and pointed the Court to the appellate oral argument.

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.'" *Ty, 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); *see 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 obligation to assert every conceivable ground for

[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.").

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 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

[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.*

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.

MATTHEW F. KENNELLY
United States District Judge

Date: September 13, 2021

Kiren Mathews

From: Caleb Kruckenberg
Sent: Wednesday, February 02, 2022 2:52 PM
To: Kiren Mathews; Incoming Lit
Subject: FW: Appellant's Brief
Attachments: Dkt. 11-Appellants' Brief.pdf

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Filed as Dkt. 11. Is attached.

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