No. 22-2078

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

KRISTY ROSS,
Defendant-Appellant.

On Appeal from the United States District Court
for the District of Maryland
1:08-cv-03233-RDB (Hon. Richard D. Bennett)

SUPPLEMENTAL BRIEF OF THE FEDERAL TRADE COMMISSION

ANISHA S. DASGUPTA
General Counsel

JOEL MARCUS
Deputy General Counsel

MATTHEW M. HOFFMAN
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3097
mhoffman@ftc.gov

Of Counsel:
MIRIAM R. LEDERER
Attorney

FEDERAL TRADE COMMISSION
Washington, D.C., 20850

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INTRODUCTION

The Federal Trade Commission submits this supplemental brief in response to the Court's order of April 17, 2023, which asked the parties to address what impact, if any, *FTC v. Pukke*, 53 F.4th 80 (4th Cir. 2022), has on this appeal. The answer is that *Pukke* has no impact on this appeal.

Pukke involved a direct appeal from a judgment holding defendants liable under Section 13(b) of the FTC Act. Because the case was still open on direct review, this Court applied the Supreme Court's intervening decision in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (2021), and vacated monetary awards resting on Section 13(b).

This case, by contrast, is not open on direct review. Instead, Appellant Kristy Ross is seeking to reopen an eleven-year-old judgment that was fully litigated on direct appeal all the way up to the Supreme Court and closed long ago. Under well-settled principles of retroactivity established by the Supreme Court, new decisions like *AMG* do not justify reopening long-closed cases like this one.

ARGUMENT

As discussed in the FTC's response brief (at 10), the Supreme Court has established a straightforward rule for determining when a change in decisional law is given retroactive effect. A new decision is given "full retroactive effect in all cases still open on direct review." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97

(1993). But "[n]ew legal principles … do not apply to cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). That is the difference between *Pukke* and this case: *Pukke* was still open on direct review when this Court reviewed the judgments, while this case became final at least nine years ago, when the Supreme Court denied Ross's petition for a writ of certiorari. *AMG* therefore does not provide a basis for reopening the judgment here.

Pukke involved both direct appeals from district court judgments and an appeal from the denial of post-judgment relief under Rule 60(b)(5). In the direct appeals, several defendants sought review of a judgment that imposed an injunction and monetary relief under Section 13(b). Because the case was open on direct appeal, the Court applied *AMG* and vacated the monetary award under Section 13(b), although this did not change the bottom line because the court had properly awarded the same monetary relief as a contempt sanction based on the violation of a prior injunction. *Pukke*, 53 F.4th at 105-06. The court otherwise affirmed the judgments. *Id.*at 106. The Rule 60(b)(5) appeal involved a group of defendants who failed to appear, as to whom the district court had entered default judgments. This Court affirmed the district court's denial of Rule 60(b)(5) relief, finding the matter "a clear-cut case for default judgment." *Id.* at 107.

Nothing in *Pukke* suggests that the district court here abused its discretion in denying relief to Ross under Rules 60(b)(4) and 60(b)(6), which were not even at

issue in *Pukke*. To the contrary, *Pukke* clearly and expressly affirmed the denial of Rule 60(b)(5) relief. The Court also stated: "As noted, *AMG* requires vacating the $120.2 million equitable monetary judgment, but the default judgments are upheld because the district court did not abuse its discretion and *AMG* does not affect the injunctive relief granted in each default judgment." *Pukke*, 53 F.4th at 107. On remand in *Pukke*, the parties have disputed the effect of this sentence.[1] But however that dispute is ultimately resolved in *Pukke,* it does not make a difference in this case. If the *Pukke* Court intended to vacate the monetary relief part of the default judgment under *AMG*, it could have reached that result only by applying the principles set forth in *Harper* and *Reynoldsville Casket* and holding that *AMG* should apply because the case was still "open on direct review" as a result of the direct appeals. *Harper*, 509 U.S. at 97.

By contrast, in this case, nothing is still open on direct review. The judgment has been final since 2012, and the direct appellate process has been closed for nearly nine years, since the Supreme Court denied certiorari in 2014. Under the

[1] Defendants contend that the Court vacated the monetary relief portion of the default judgment based on *AMG*. The FTC contends that because the Court affirmed the denial of Rule 60(b)(5) relief, which was the only basis sought for relief from the judgment, the default judgment in *Pukke* must stand as entered. The FTC sought clarification from this Court as to its intended meaning, but the motion was denied.

principles of *Harper* and *Reynoldsville Casket*, there is no basis for vacating the monetary award here.

As discussed in our brief (at 28), this Court has consistently held that "a change in decisional law subsequent to a final judgment provides no basis for relief under Rule 60(b)(6)." *Moses v. Joyner*, 815 F.3d 163, 168 (4th Cir. 2016) (quoting *Dowell v. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993)).[2] Nothing in *Pukke* undermines these precedents; indeed, *Pukke* did not address Rule 60(b)(4) or (b)(5) at all. Thus, under the well-established law of this circuit, *AMG* does not provide a basis for Rule 60(b) relief here.

If anything, *Pukke* supports the conclusion that Rule 60(b) relief is not proper here. In *Pukke*, one of the appellants' claims included a challenged to a monetary judgment stemming from a 2006 order. *Pukke*, 53 F.4th at 102. The Court refused to consider the 2006 order, including its monetary provisions, holding that *AMG* could not be used "to drag us into relitigating the merits of a case made final nearly twenty years ago." *Id.* The same reasoning applies here.

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[2] Ross did not seek relief under Rule 60(b)(5), but in any event the Court has likewise held that a change in decisional law "does not provide a sufficient basis for vacating the judgment under Rule 60(b)(5)." *Dowell*, 993 F.2d at 48. Nothing in *Pukke* contradicts that earlier holding, but if there were some conflict between *Pukke* and *Dowell* the earlier opinion would control. *McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004).

AMG does not provide a basis for relitigating the merits of a case that became final nearly a decade ago.

CONCLUSION

For the foregoing reasons, nothing in *Pukke* suggests that the district court abused its discretion in denying relief under Rule 60(b)(4) and Rule 60(b)(6). The judgment should be affirmed.

Respectfully submitted,

ANISHA S. DASGUPTA
General Counsel

JOEL MARCUS
Deputy General Counsel

May 1, 2023

/s/ Matthew M. Hoffman
MATTHEW M. HOFFMAN
Attorney

FEDERAL TRADE COMMISSION
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-3097
mhoffman@ftc.gov

Of Counsel:
MIRIAM R. LEDERER
Attorney

FEDERAL TRADE COMMISSION
Washington, D.C. 20580

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using Microsoft Word for Microsoft 365 MSO in 14-point Times New Roman type. The Court's order directing supplemental briefing did not specify a word limit, but the brief contains 1065 words.

May 1, 2023

/s/ Matthew M. Hoffman
Matthew M. Hoffman