No. 12-12811-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION, *Plaintiff/Appellee*,

v.

RANDALL L. LESHIN, et. al., *Defendants/Appellants*.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF OF PLAINTIFF/APPELLEE FEDERAL TRADE COMMISSION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. Rule 26.1-1, Appellee the Federal Trade Commission certifies that the list of persons and entities with an interest in this case supplied in the Appellants' initial brief, filed on August 3, 2012, appears to be complete to the best of our knowledge.

STATEMENT REGARDING ORAL ARGUMENT

Appellee the Federal Trade Commission respectfully submits that an oral argument is not necessary for the Court to resolve the issues presented in this case. The facts and legal issues are adequately presented in the briefs and the record, the issues are straightforward, and the decisional process would not be significantly aided by oral argument. Fed. R. App. P. 34(a)(2)(C).

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JURISDICTIONAL STATEMENT

The district court's jurisdiction derives from 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 53(b) and 6105(b). The district court entered its final order on April 24, 2012, and the notice of appeal was filed on May 22, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly exercised its discretion to enter a money judgment, in the amount of the unpaid balance of the monetary civil contempt sanction, that can be enforced using traditional legal remedies.

2. Whether the contempt defendants are entitled to relitigate issues that the district court and this Court have already resolved, such as the proper measure of relief to compensate consumers harmed by their contumacious conduct, or their lack of entitlement to a jury trial.

STATEMENT OF THE CASE

This appeal emerges from the same civil law enforcement action as the district court orders that this Court reviewed in *FTC v. Leshin*, 618 F.3d 1221 (11th Cir. 2010) ("*Leshin I*"). This Court affirmed the district court's ruling that the appellants (referred to as the "contempt defendants") had violated a Stipulated Injunction. This Court also affirmed the district court's imposition of a

compensatory civil contempt sanction, requiring the contempt defendants to disgorge the amount of funds that they wrongly collected from consumers by means of their violations of the injunction.

The contempt defendants failed to make any payment toward the $594,987.90 that the district court had required them to disgorge in the orders that this Court affirmed in *Leshin I*. After the FTC discovered that the contempt defendants indeed had assets to turn over, the district court entered a coercive contempt order, commanding that they be taken into custody and incarcerated unless they turned over specific assets. To avoid incarceration, they remitted $92,761.00 – less than 16 percent of the total they owed – in March 2011. On February 16, 2012, the district court issued an order – referred to as the "Money Judgment Order" [D.E. 602] – entering a money judgment against the contempt defendants in the amount of the unpaid balance of the civil contempt sanction ($502,316.90, plus interest) for violating the Stipulated Injunction. The contempt defendants seek review of the Money Judgment Order, as well as the district court's subsequent order denying their motion to amend the judgment, in the present appeal.

STATEMENT OF FACTS

1. In 2006, the Federal Trade Commission ("FTC" or "Commission") brought a civil law enforcement action charging that attorney Randall L. Leshin, Charles Ferdon, and two corporate entities owned by Leshin, had engaged in unfair and deceptive practices, in violation of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 41 *et seq.*, and abusive telemarketing, in violation of the FTC's Telemarketing Sales Rule, 16 C.F.R. Part 310, in the course of their "debt consolidation" business. The Commission's complaint alleged that the defendants had blasted out millions of unlawful pre-recorded phone calls to solicit debt consolidation contracts; had secured tens of thousands of contracts based on misleading and deceptive representations about their fees, terms and conditions; and had falsely held themselves out as complying with applicable state consumer protection requirements. *See Leshin I*, 618 F.3d at 1227-28.

The FTC and the defendants agreed to resolve the litigation through a consent decree. The district court entered this agreed-upon order on May 5, 2008 [D.E. 320] ("Stipulated Injunction"), requiring the defendants – as well as an additional affiliated entity known as the Debt Management Counseling Center, Inc. ("DMCCI") – to stop making false representations, charging excessive fees, and engaging in other unlawful practices; to pay for a court-appointed monitor to

oversee their finances and notify consumers of their rights to cancel their debt management contracts or transfer them to alternative providers; to cease collecting fees from consumers who opted to cancel; to cease servicing contracts in states where they were not qualified to do business; and to pay over $40 million for redress to consumers harmed by their illegal practices. The district court subsequently conducted evidentiary hearings, and issued an order resolving certain disputed issues that had arisen concerning the scope of the Stipulated Injunction on August 5, 2008 [D.E. 339] ("Omnibus Order"). *See Leshin I*, 618 F.3d at 1228-30.

Despite their own agreement to the terms of the Stipulated Injunction, and the clarifications provided by the court below in the Omnibus Order, the defendants and DMCCI continued to engage in the very practices prohibited by those orders, including collecting fees from consumers who had asked to terminate their contracts, and servicing contracts in states where they failed to comply with applicable licensing and consumer protection laws. In January 2009, the Commission moved to have them held in contempt. Following additional evidentiary hearings, the district court concluded that they had violated the Stipulated Injunction, and held them in contempt. *See* Corrected Findings of Fact & Conclusions of Law [D.E. 395] (April 7, 2009) ("Contempt Ruling") at 15-38 (¶¶ 43-101). The district court adopted a monetary civil contempt sanction as a

compensatory remedy, requiring the contempt defendants to pay the amounts needed to redress the financial harm that they had caused to consumers by violating the injunction – *i.e.*, the fees that they had improperly collected. *Id.* at 38-42 (¶¶ 102-21); *see Leshin I*, 618 F.3d at 1230-31. The district court emphasized that "[t]his order is to remedy contempt via disgorgement, not a money judgment[,]" and warned that if the contempt defendants failed to comply, they could be subjected to further contempt sanctions, potentially including "incarceration as [a] coercive remedy to secure compliance with [the] disgorgement order." Contempt Ruling at 42 (¶ 122).

After further fact-gathering, the district court entered a final judgment determining the amount of the required consumer redress payment to be $594,987.90, and ordered the contempt defendants to disgorge this amount (plus interest and costs) to the FTC within 30 days. *See* Corrected Final Judgment of Disgorgement and Consumer Redress [D.E. 489] (December 29, 2010) ("Disgorgement Order") at 2 (¶ 1); *see Leshin I*, 618 F.3d at 1231. The district court ordered the FTC "to use the disgorged funds to pay consumer redress to each affected consumer in the amount listed for each consumer in the 'Totals' column in the attachments to the Monitor's Ninth Report." *Id.* (¶ 3) (citing Court-Appointed Monitor's Ninth Report to the Court [D.E. 483] (Jan. 15, 2010) (listing names and

addresses of 2,912 individual consumers entitled to refunds in nine states and specifying the amount due to each one). The district court reiterated its admonition that the contempt defendants' failure to make the required payment in a timely manner could lead to coercive contempt sanctions. *See* Disgorgement Order at 2 (¶ 1). "After disgorgement and any attendant contempt enforcement are complete," the court stated, "the FTC may apply to the Court to convert any unpaid balance of this civil contempt remedy to a money judgment." *Id.* at 4 (¶ 8).

2. On appeal, this Court affirmed the district court's orders, holding that the district court did not abuse its discretion in (*i*) determining that the contempt defendants were in contempt of the Stipulated Injunction, *Leshin I*, 618 F.3d at 1232-35; and (*ii*) holding them jointly and severally liable to pay a monetary civil contempt sanction in the amount of the total fees collected from consumers in violation of the Stipulated Injunction. *Id.* at 1235-40. The contempt defendants had argued that the district court's monetary sanction should be overturned because, according to them, "no consumers were injured by their contumacious activity;" there was "'no causal relationship between disgorged fees and any wrongdoing' because their noncompliance [with the stipulated injunction] was 'purely technical;'" and "the consumer[s] received some value from the . . . service" they provided. *Id.* at 1237. This Court "address[ed] each of these

arguments in turn and reject[ed] them all." In particular, this Court concluded that the consumers did, indeed, suffer financial injuries that were properly assessed based on the total amount of fees they paid, and that "the district court did not abuse its discretion by requiring the contempt defendants to disgorge all fees collected on contracts procured in violation of the injunction." *Id.* The Court reasoned as follows:

> Despite the contempt defendants' contention that no consumers were injured by their contumacious activity, consumers entered into contracts based on the misrepresentation that the defendants had the legal authority to conduct business. As a part of these contracts, consumers paid fees that they would not otherwise have paid . . . Ordering disgorgement of all fees collected serves to restore the consumer who would not otherwise have paid the fees or contracted for these services if the consumer had known the contempt defendants were not in compliance with state law. But for the contempt defendants' violation of the injunction, they would not have collected fees from the consumers[.]

Id. at 1237-38.

The Court further rejected the contempt defendants' characterization of the sanction imposed by the district court as "punitive or criminal contempt sanctions" and their assertion that "the district court violated their right to due process[.]" *Id.* at 1238. Rather, the Court held, the requirement that the contempt defendants pay out all fees they collected "is remedial in nature" because it "attempts to restore the status quo before the contempt defendants, in violation of the injunction, represented to consumers that they could lawfully enter into contracts in certain

states. Moreover, the contempt sanctions are civil in nature because the sanctions were imposed to compensate consumers for the losses they sustained." *Id.* at 1239. The Court concluded that the contempt defendants thus received all the due process protections to which they were entitled: "notice and an opportunity to be heard." *Id.*

Finally, the Court declined to address the contempt defendants' challenge to the district court's statement concerning the possible conversion of the contempt defendants' monetary obligations to a money judgment, finding that the issue was not ripe for review. *Id.*

3. The contempt defendants failed to pay any portion of the judgment by the date specified in the Disgorgement Order. The Commission conducted asset discovery and identified specific amounts that the contempt defendants held in various banks and other financial institutions. It moved for a coercive contempt order compelling them to turn over those assets promptly. The district court assessed the evidence and determined that the contempt defendants – already in contempt of the 2008 Stipulated Injunction – were in contempt again, this time violating the 2010 Disgorgement Order. *See* Report and Recommendations at 25-26 [D.E. 557] (February 15, 2011); Order Affirming Magistrate Judge's Report at 2 [D.E. 563] (March 8, 2011) ("Coercive Contempt Order") (adopting findings

and conclusions recommended by magistrate judge). The court found that the contempt defendants had not made a good-faith effort to comply with the Disgorgement Order, *see* Report and Recommendations at 26-38, and that they had failed to demonstrate that they were unable to make the required payments. *Id.* at 39-47.

By contrast with its 2009 Contempt Ruling and 2010 Disgorgement Order – in which the district court established a *compensatory* or *remedial* civil contempt sanction requiring a specific monetary payment for consumer redress – in 2011, the court decided to impose a *coercive* civil contempt sanction to address the contempt defendants' violations of the Disgorgement Order, and as a means to induce them to comply with that order by making payment. Specifically, the court decided that "incarceration is a proper sanction for the individual Defendants' contempt of this Court's order." *Id.* at 47. The district court concluded that, in light of their prior contempt of court, incarceration is "the least coercive sanction necessary to encourage the Defendants' compliance with this Court's order." *Id.* at 48. "[R]ather than imposing this sanction immediately," however, the district court decided to issue "a conditional order, permitting the individual Defendants to avoid [coercive] sanctions by purging themselves of this contempt through prompt compliance" – "specifically[,] [by] relinquishing the above-identified assets." *Id.*

Thus, the district court ordered that, unless the contempt defendants turned over $92,761.00 held in specific accounts identified by the FTC within 10 days, they would be taken into custody and incarcerated – and would remain incarcerated until turning over those assets. Coercive Contempt Order at 4-5.

The contempt defendants turned over $92,761.00 – less than 16 percent of the total amount they owed – to the FTC within the 10-day period set forth in the Coercive Contempt Order.[1] The district court found that, by doing so, the "Contempt Defendants complied with the Court's March 8, 2011 [Coercive Contempt] Order and have purged themselves of the finding of civil contempt set forth therein." Order on Motion for Order Determining Compliance at 3 [D.E. 587] (April 26, 2011) ("Coercive Contempt Compliance Order").

The district court, however, never vacated, amended, or modified the original Contempt Ruling and Disgorgement Order that this Court affirmed in *Leshin I*. Nor did the court state that the contempt defendants were purged or relieved of their remaining monetary obligations. To the contrary, the district court made it clear that the contempt defendants were still obligated to pay the remaining balance of the compensatory contempt sanction, reiterating that "the FTC may

[1] The Commission used these funds to distribute partial redress payments to customers identified in the Monitor's report.

apply to convert to a money judgment any unpaid balances of the disgorgement amount of $594,987.90, plus interest[.]" Coercive Contempt Order at 5.

The contempt defendants made no further payments, and on September 7, 2011, the Commission moved to convert the unpaid balance of the compensatory civil contempt sanction ($502,316.90, plus interest) into a money judgment. The district court granted the motion. *See* Order on Magistrate Report (February 15, 2012) [D.E. 602] ("Money Judgment Order") (adopting magistrate judge's Report and Recommendation on FTC's Motion for Money Judgment [D.E. 599] (November 15, 2011)). The district court denied the contempt defendants' motion to alter or amend the judgment on April 24, 2012 [D.E. 611]. This appeal followed.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion when it entered a money judgment in the amount of the unpaid balance of the compensatory civil contempt sanction, for which the contempt defendants remain liable. The contempt defendants' challenges to the Money Judgment Order rest on the false premise that, by entering a "money judgment," the district court imposed an additional, new remedy that is entirely different from the original civil contempt sanction. But the district court made no substantive changes to the contempt defendants' obligation

to pay the amount necessary to redress the financial harms that they caused to consumers; they owed precisely the same amount before and after the district court adopted the Money Judgment Order. That order merely changed the mechanism by which the FTC could obtain satisfaction of the contempt defendants' preexisting financial obligation. (*See infra*, Part I.A.)

Indeed, the district court could have characterized the fixed monetary relief it ordered in this case as a "money judgment" all along, since the award was not contingent or conditioned on any further actions. The Federal Rules provide that a "money judgment is enforced by a writ of execution, unless the court directs otherwise." Fed. R. Civ. P. 69(a)(1). Thus, courts may rely on the exception to "direct[] otherwise," such as by adopting coercive contempt sanctions to induce compliance by recalcitrant defendants in appropriate circumstances. Here, after the district court's Coercive Contempt Order failed to compel the contempt defendants to pay the total amount they owed, the court can hardly be faulted for applying the general default enforcement process under Rule 69(a)(1). The court's decision to deem the compensatory remedy to be a "money judgment" properly strengthens the FTC's ability to collect on behalf of consumers, using mechanisms such as writs of execution, garnishment, levies or attachment of specific assets, and the like. (*See infra*, Part I.B.)

The contempt defendants wrongly argue that, by showing their inability to pay the full amount of the civil contempt sanction, they "purged" themselves of any further obligations under the district court's original contempt orders. But the district court specifically rejected their claim of inability to pay, and made clear that they are still required to satisfy the remaining unpaid balance. Moreover, inability to pay is a defense to *coercive* civil contempt sanctions, but not to *compensatory* sanctions. The contempt defendants can purge their contempt of the Stipulated Injunction only by making a full payment to satisfy the original judgment, and thereby remedy the injuries they caused to consumers. (*See infra*, Part I.C.)

Principles of *res judicata* and the "law of the case" doctrine foreclose the contempt defendants' attempt to relitigate issues that they have already argued and lost before both the district court and this Court. Thus, the contempt defendants cannot be heard to challenge the FTC's proof of damages to consumers, that their violations of the Stipulated Order were mere "technicalities" that should have been overlooked, or that the "value" of the services that they supposedly provided to consumers should have been offset against the amount of the sanction. They certainly cannot resuscitate their baseless claim of entitlement to a jury trial, given the incontrovertible precedents establishing that compensatory civil contempt

sanctions may be imposed upon notice and an opportunity to be heard, with no jury trial – and given this Court's ruling in *Leshin I* that the district court accorded them ample due process before imposing the redress payment obligation that, in substance, is identical to the "money judgment" at issue here. (*See infra*, Part II.)

STANDARD OF REVIEW

"District courts are afforded wide discretion in fashioning . . . remed[ies] for civil contempt" – which may include (1) *coercive* sanctions designed to "coerce the contemnor to comply with a court order," and (2) *compensatory* sanctions designed to "compensate a party for losses suffered as a result of the contemnor's act." *McGregor v. Chierico*, 206 F.3d 1378, 1385 n.5 (11th Cir. 2000). Both types of civil contempt sanctions are reviewed for an abuse of discretion. *Id.* at 1388; *Leshin I*, 618 F.3d at 1231. This Court "review[s] findings of fact arising out of contempt proceedings under the clearly erroneous standard," *Doe v. Bush*, 261 F.3d 1037, 1047 (11th Cir. 2001), while conclusions of law are subject to *de novo* review. *In re Younger*, 986 F.2d 1376, 1377 (11th Cir. 1993) (*per curiam*). "In the civil contempt context[,] the district court's discretion in imposing non-coercive sanctions is particularly broad and only limited by the requirement that they be compensatory." *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1521 (11th Cir. 1990).

ARGUMENT

I. The District Court Properly Exercised its Discretion to Enter a Money Judgment in the Amount of the Unpaid Portion of the Compensatory Civil Contempt Sanction.

A. The Money Judgment Order Did Not Change the Contempt Defendants' Financial Obligations, and is Not a "New" Remedy or "Different" from the Original Compensatory Sanction.

The contempt defendants' challenge to the Money Judgment Order rests on the premise that, by entering a "money judgment," the district court improperly adopted a "further and additional contempt remedy," Br. at 12 – *i.e.*, a "brand-spanking new money judgment," *id.* at 36 – that is "something else that is totally new and different" from the original remedy, *id.* at 14, resulting in "two sequential, *separate* remedies for the same civil contempt." *Id.* at 15 (emphasis in original). This premise is wrong; the district court made no substantive changes to the contempt defendants' financial obligation when it "converted" the "order of disgorgement" into a "money judgment." No "new" or "additional" sanction was imposed. Before issuance of the Money Judgment Order, the contempt defendants were obligated to pay the Commission $502,316.90 (plus interest) – the amount of their "gross receipts collected or obtained from consumers in violation of the Stipulated Injunction," Disgorgement Order at 2 (¶ 1), less the amount they had

paid to date. After issuance of the Money Judgment Order they are still obligated to pay precisely the same amount.[2]

In determining whether contempt orders are "correct as a matter of federal law[,] . . . . the labels affixed either to the proceeding or to the relief imposed . . . are not controlling . . . . Instead, the critical features are the substance of the proceeding and the character of the relief that the proceeding will afford." *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). In the Money Judgment Order, the district court merely changed the "label affixed" to the contempt defendants' payment obligation, but did not change the "character of the relief" – *i.e.*, the duty to pay the amount "necessary to effect complete compensation to those aggrieved by the contempt" so as to achieve "full remedial relief." Contempt Ruling at 39 (¶ 103) (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1947)).

The same financial obligation – whether labeled as a money judgment or otherwise – remains an entirely proper remedy for civil contempt, when the goal is "to compensate the complainant for losses sustained." *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947) (citing *Gompers v. Buck's Stove and Range Co.*, 221 U.S. 418, 448-49 (1911)); *Leshin I*, 618 F.3d at 1237.

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[2] *See* Money Judgment Order at 6-7 ("The amount has not changed, and there is no assertion that the amount is incorrect or should change."); Report and Recommendation on FTC's Motion for Money Judgment at 12 [D.E. 599] ("No cumulative recovery will thus result from enforcement of the judgment[.]").

B. Entry of a Money Judgment and Issuance of a Writ of Execution Are Lawful and Well-Precedented Means for Enforcing Recalcitrant Defendants' Duty to Pay a Compensatory Remedy.

Not only was it proper for the district court to recharacterize the sanction as a "money judgment" rather than an "order of disgorgement;" the nature of the relief in this case could have been "properly characterized as a money judgment" all along. *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 980 (11th Cir. 1986). The district court's original Disgorgement Order "made an award of money" that the contempt defendants were to pay to the FTC; "[t]he amount owed was not contingent, nor was the obligation to pay conditioned on whether [defendants] purged themselves of contempt." *Id.* This Circuit has long held that, when defendants "fail[] to fulfill the obligations of the consent decree" requiring payment of a fixed sum, the district court's proper course is to "simply enter[] a final civil judgment determining the current obligations of the [defendants] to the [plaintiff]" and "ordering payment in full of the amount due under the decree[.]" *Id* at 976, 980. This is precisely what the district court did in the Money Judgment Order. *Accord, SEC v. Brennan*, 230 F.3d 65, 71, 73 (2d Cir. 2000) (in a disgorgement order in which defendant's monetary "liability [was] definitively fixed by entry of judgment," a "money judgment has been entered," and the SEC's

subsequent motion for coercive contempt sanctions to compel defendant's compliance was "part of an effort by the SEC to enforce a money judgment").

The Federal Rules provide that a "money judgment is enforced by a writ of execution, unless the court directs otherwise." Fed. R. Civ. P. 69(a)(1). The exception allowing enforcement through means other than a writ of execution, such as "through the imposition of a contempt sanction," is typically invoked "only [in] cases in which established principles warrant [such forms of] relief, such as when execution would be an inadequate remedy" or other "exceptional circumstances." 13 *Moore's Federal Practice – Civil* § 69.02 (3d ed. 2012); *accord*, *Combs*, 785 F.2d at 980; *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1147-48 (9th Cir. 1983). Such "exceptional circumstances" often justify the use of coercive civil contempt sanctions to induce defendants to comply with earlier orders imposing monetary penalties for violations of statutory obligations.[3] Courts also may use coercive contempt sanctions to compel recalcitrant defendants to comply with preexisting orders imposing *compensatory* civil contempt sanctions, as the district court attempted to do earlier in the present case. *See* Coercive

[3] *See, e.g., McComb v. Jacksonville Paper Co.*, *supra* (Fair Labor Standards Act); *Pierce v. Vision Investments, Inc.*, 779 F.2d 302 (5th Cir. 1986) (Interstate Land Sales Full Disclosure Act); *McGregor v. Chierico*, *supra* (FTC Act); *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525 (11th Cir. 1992) (Commodities Exchange Act); *SEC v. Yun*, 208 F. Supp. 2d 1279, 1285-88 (M.D. Fla. 2002) (Securities Exchange Act of 1934).

Contempt Order [D.E. 563]; *see also, e.g., SEC v. Solow*, 682 F. Supp. 2d 1312, 1325-26 (S.D. Fla. 2010). However, the fact that courts *may* enforce payment obligations using coercive contempt sanctions in "exceptional circumstances" does not mean that courts are *limited* to relying on such enforcement mechanisms. *See Hodgson v. Hotard*, 436 F.2d 1110, 1116 (5th Cir. 1971) ("the District Court may grant whatever sanction is necessary to enforce compliance") (citation and emendations omitted).

The Coercive Contempt Order resulted in the contempt defendants' paying just under 16 percent of the total amount they owed, but as the district court concluded, it "failed to effect full remedial relief, and further measures are necessary to bring Plaintiff as close as possible to full compensation" to the consumers whom the contempt defendants had harmed. Money Judgment Order at 4. Given the limited success of the coercive contempt remedy, adopted pursuant to the exception permitted under Rule 69(a)(1) ("unless the court directs otherwise"), the district court can hardly be faulted for making use of Rule 69(a)(1)'s general default process for enforcement of "money judgments," rather than continuing to rely on potentially prolonged and repetitive contempt proceedings.

The completion of the district court's coercive contempt proceeding without achieving full payment of the original compensatory sanction does not relieve the contempt defendants of their preexisting liability to pay. "The contempt proceeding . . . does not settle or compromise the beneficiary of this sanction from pursuing execution of the award by civil process." *Piambino v. Bestline Products, Inc.*, 645 F. Supp. 1210, 1217 (S.D. Fla. 1986). In *Piambino*, the two contempt defendants were liable to make payments totaling $1 million, pursuant to a previous decision of the Court of Appeals; but they dissipated the assets that might have been available to satisfy that judgment, so that by the time the district court held contempt proceedings on remand, they were adjudged to have the ability to pay only $125,000 and $15,000, respectively. *Id.* at 1215-16. The court held that their payment of these amounts would "discharge them of contempt and end these [coercive] contempt proceedings," but would not extinguish their liability for the preexisting award. *Id.* at 1217. To the contrary, the court recognized that, in the event the contempt defendants might "later [be] found able to provide additional reimbursement," further contempt proceedings would not be held, but "[o]f course, the Plaintiff-Intervenor may attempt to execute a valid judgment entered by this

Court for the remainder due."[4] *Id.* The same is true here, as the district court recognized in the Money Judgment Order.

By recharacterizing the contempt defendants' financial obligation as a "money judgment," the district court did not alter the substance of the sanction in any way, but it properly strengthened the Commission's ability to collect the judgment on behalf of injured consumers.[5] Some courts have held that traditional

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[4] *Piambino* thus stands for precisely the opposite of the proposition for which the contempt defendants cite it. Br. at 16. To be sure, "contempt [proceedings] must come to an end;" but this has no bearing on the defendants' liability to pay the underlying judgment, or on the availability of alternative means to enforce it, such as "a money judgment through ordinary civil process." *Id.* The appellants here stress the difference between how they incurred liability and how the contempt defendants in *Piambino* incurred liability. Br. at 17-18. But the fact that the *Piambino* contempt defendants (former lead counsel in a putative class action case) incurred liability for violating their fiduciary and legal-ethics obligations toward the minority members of the class (*see Piambino v. Bailey*, 757 F.2d 1112 (11th Cir. 1985)), while the contempt defendants here incurred liability for violating the Stipulated Injunction, is a distinction without a difference.

[5] The contempt defendants' assertion that the district court erred by "enter[ing] that money judgment in favor of the FTC and not the supposedly injured consumers," is entirely unfounded. Br. at 53; *see generally id.* Part IV. As discussed above, nothing in the Money Judgment Order modifies or supersedes the Disgorgement Order, other than changing the "label affixed" to the monetary award to facilitate collection. The Commission remains bound by the Disgorgement Order's specific provisions ordering it "to use the disgorged funds to pay consumer redress to each affected consumer[.]" *See* Disgorgement Order at 2 (¶ 3); *see also id.* at 3 (¶ 4(c)). Accordingly, there is no basis for the contempt defendants' assertion that the district court erred in failing to "outline how any funds received by the FTC will be returned to 'injured' consumers." Br. at 54. The court established a detailed scheme governing how the FTC must return funds

legal remedies such as writs of execution, garnishment, levies or attachment of specific assets, and the like (*see* Fed. R. Civ. P. 64(b)) are inapplicable in the context of enforcing equitable "orders of disgorgement" in cases involving statutory violations. *See, e.g., SEC v. Huffman*, 996 F.2d 800, 802-03 (5th Cir. 1993) ("disgorgement orders in the context of a securities violation" are not "debts" that are subject to conventional collection mechanisms under the Federal Debt Collection Procedure Act, 28 U.S.C. §§ 3001 *et seq.*); *Pierce v. Vision Investments, Inc.*, 779 F.2d at 307. But such collection mechanisms unmistakably *can* be used to enforce payment obligations that explicitly have been entered as "money judgments." *See, e.g., Ziino v. Baker*, 613 F.3d 1326, 1328-29 (11th Cir. 2010) ("In order to execute on a judgment [against an estate in bankruptcy] under Rule 69, Ziino must have obtained a money judgment.").

C. The Contempt Defendants Have Not "Purged" Their Liability to Pay the FTC the Amount Necessary to Remedy the Harms They Inflicted on Consumers, and Cannot Evade this Obligation by Claiming an Inability to Pay

The contempt defendants falsely contend that they already "have purged the contempt by disgorging everything they had the ability to pay," and that "[t]his is the limit of their ability to comply with the Court's order, so nothing further can be

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to injured consumers. *See* Disgorgement Order at 2-3 (¶¶ 3, 4(c)); Monitor's Ninth Report [D.E. 483].

required[.]" Br. at 25. They attempt to buttress this assertion by mischaracterizing the district court's ruling in the Coercive Contempt Compliance Order [D.E. 587] as having "purged all contempt." *Id.* at 26. Not so. The contempt defendants violated *two* orders: first, they violated the Stipulated Injunction; and later, they violated the Disgorgement Order. In the Coercive Contempt Compliance Order, the district court addressed only the second of these contempt rulings, and found that the contempt defendants had purged only their potential liability for coercive contempt sanctions by turning over $92,761.00 in specified assets within 10 days of the entry of the Coercive Contempt Order [D.E. 563], thus averting the threat of incarceration. The district court never ruled that they purged their obligation under the original contempt ruling to pay the remaining balance of the compensatory sanction for their violations of the Stipulated Injunction. To the contrary, the district court explicitly confirmed the contempt defendants' continuing obligation to make the full payment adopted in the Disgorgement Order, by ruling, "it is further… ORDERED AND ADJUDGED that the FTC may apply to convert to a money judgment any unpaid balances of the disgorgement amount." Coercive Contempt Order at 5.

The contempt defendants misleadingly attempt to conflate the *compensatory* civil contempt sanction imposed in 2010 with the *coercive* civil contempt sanction imposed in 2011. But the two remedies are fundamentally different:

> Civil contempt divides into two general classes: coercive and compensatory. Both classes benefit the injured litigant, but in different ways. Coercive civil contempt is intended to make the recalcitrant party comply. Compensatory civil contempt reimburses the injured party for the losses and expenses incurred because of his adversary's non-compliance.

Norman Bridge Drug Co. v. Banner, 529 F.2d 822, 827 (5th Cir. 1976). "A party held only in civil contempt by way of compensation to his adversary will be absolved of liability [only] if the court order was invalid or erroneous," *id.* at 828; and where the order was "validly entered," the injured parties "were entitled to the benefit of the order . . . . [and the] compensatory fine cannot be reversed." *Id.*

Thus, the contempt defendants are not entitled to an opportunity to "purge" the monetary obligation at issue here. Where "civil contemnor[s] [are] required to pay a specific sum, not as a sanction to assure further compliance, but as compensation to or offset of damages of the adversary because of a past dereliction[,]" the only way they can "purge themselves of contempt [is by] pay[ing] the damages caused by their violations of the decree." *Clark v. Boynton*, 362 F.2d 992, 998 (5th Cir. 1966) (quoting *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193-94 (1947)). *See also Int'l Union, United Mine Workers of*

Am. v. Bagwell, 512 U.S. 821, 829 (1994) ("contemnor [must be] afforded an opportunity to purge" *only* "where [the] fine is not compensatory" but is intended to "coerce[] the defendant into compliance with the court's order").

The contempt defendants further assert that the district court's entry of the Money Judgment Order effectively "deprives [them] of their legal right to assert their ability to pay defense." Br. at 7-8; *see also id.* at 31-34. But they have no such defense to a *compensatory* civil contempt sanction. Inability to comply is a recognized defense to the imposition of *coercive* contempt sanctions. *Maggio v. Zeitz*, 333 U.S. 56, 71-75 (1948); *Newman v. Graddick*, 740 F.2d 1513, 1524-25 (11th Cir. 1984) (where a "civil contempt . . . . sanction [is] designed to compel a person to do what the court has ordered him to do[,] . . . . the person in civil contempt must be given the opportunity to bring himself into compliance[,] and inability to comply is a complete defense[.]"). By contrast, here, the contempt defendants' payment obligation "is remedial in nature[;]" it is designed "to compensate consumers for the losses they sustained." *Leshin I*, 618 F.3d at 1239. There is no precedent that requires district courts to accord a contemnor's "inability to pay" any significant weight in its decisions on imposing *compensatory* or remedial civil contempt sanctions.

Even if their ability to pay were relevant, the contempt defendants are wrong in contending that they have already demonstrated their inability to pay. Br. at 25. To the contrary, the district court specifically determined that the contempt defendants *failed* to satisfy their burden of demonstrating that that they were unable to comply with the Disgorgement Order. *See* Report and Recommendation [D.E. 557] at 40; Coercive Contempt Order at 2 (confirming magistrate judge's findings). The district court's decision in the Coercive Contempt Order to apply a coercive sanction only to compel the contempt defendants to turn over $92,761.00 (substantially less than the total amount they owed) was an exercise of its discretion to deal with a portion of defendants' liability – to be satisfied from specifically identified assets – while leaving the remainder of the liability to be dealt with later. Other courts have taken similarly measured steps in like circumstances. *See, e.g., CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525 (11th Cir. 1992) (affirming district court civil contempt order maintaining defendant's conditional incarceration unless he paid $144,155.35 – just five percent of the total $2.8 million due under the earlier disgorgement order – but reconfirming his continuing obligation to pay the total amount). The district court's restraint on that occasion certainly does not mean that the court released the contempt defendants of their obligation to pay the remaining sum.

Moreover, even if the contempt defendants had demonstrated an inability to pay in 2011, during the period of time when the FTC moved for, and the court granted, the Coercive Contempt Order, that would not permanently free them from their continuing obligation to pay the compensatory sanction. "[T]the law is clear that this [inability to pay] defense is to be measured at the time of the contempt proceedings." *Piambino v. Bestline Products*, 645 F. Supp. at 1215 (citing *United States v. Rylander,* 460 U.S. 752, 757 (1983)). If the contempt defendants subsequently obtain the ability to comply with the original judgment, there is nothing to preclude the Commission from seeking to enforce it. *Id.* at 1217; *cf. SEC v. Yun*, 208 F. Supp. 2d 1279, 1284 (M.D. Fla. 2002) ("it is clear from Yun's zealous efforts to exhaust her assets… that, while Yun has a present financial inability to pay the judgment against her, that inability might not last long").[6]

Indeed, it would have been unfair if the court had excused the contempt defendants from their obligation to pay consumer redress on the basis of their

[6] Contempt defendants colorfully argue that "everything Defendants had the ability to pay, as determined by the Court, has already been paid. A money judgment would just be kicking a dead horse, punishing the Defendants for decades to come, based on future income, particularly since the Court already knows Defendants have been rendered insolvent by virtue of the original settlement and subsequent disgorgement in this case." Br. at 21-22. But as discussed above, the sanction in this case is intended not to punish the contempt defendants, but to compensate their victims. The contempt defendants are obviously capable and intelligent people, and nothing in the court's orders precludes them from making an honest living.

inability to pay at a particular point in time. "If complainant [here, the Commission, on consumers' behalf] makes a showing that respondent has disobeyed a decree in complainant's favor and that damages have resulted to complainant thereby, complainant is *entitled as of right* to an order in civil contempt imposing a compensatory fine. . . . An order imposing a compensatory fine in a civil contempt proceeding is thus somewhat analogous to a tort judgment for damages caused by wrongful conduct." *Parker v. United States*, 153 F.2d 66, 70 (1st Cir. 1946) (emphasis added) (citing *Union Tool Co. v. Wilson*, 259 U.S. 107, 112 (1922)); *accord*, *McComb v. Jacksonville Paper Co.*, 336 U.S. at 191. To the extent an injured party seeks "remedial, as distinguished from punitive action, the District Court [would] not [be] justified in purging the [defendant] of contempt arising from" defendant's violations of an injunction. *Union Tool Co.*, 259 U.S. at 114.

Thus, in a recent case closely analogous to this one, involving civil contempt sanctions for violating a consent decree with the FTC, the Seventh Circuit held that the district court did not err in imposing remedial civil contempt sanctions, measured by consumer loss, "to compensate the complainant for losses sustained," without any consideration of the contempt defendant's ability to pay. *See FTC v.*

Trudeau, 662 F.3d 947, 950 (7th Cir. 2011), *pet. for cert. pending* (quoting *United States v. United Mine Workers of Am.,* 330 U.S. at 303-04.

II. The Contempt Defendants Are Not Entitled to *De Novo* Adjudication, by Jury Trial or Otherwise, of Issues that the District Court Has Already Resolved

The contempt defendants assert that, "[b]y now converting the equitable contempt sanction to a new, legal remedy of a money judgment,"[7] the district court has opened the way for them to raise a plethora of arguments that they have already argued and lost – such as that they are entitled to "a jury trial for money damages" and that they are entitled to "account for the value of the services received by consumers" as an offset against their liability. Br. at 34. This contention, like all the arguments in their brief, relies on the incorrect premise that

[7] The contempt defendants attempt to distinguish what they characterize as "legal" money judgments from "equitable" remedies such as compensatory "orders of disgorgement." *See, e.g.,* Br. at 21, 30, 34. But Supreme Court precedents extending over the past century make clear make clear that this distinction is simply "not material" to decisions on civil contempt remedies, in which a court may "lay to one side the question whether the [agency], when suing to restrain violations of [a statute], is entitled to" any particular monetary remedy. *McComb v. Jacksonville Paper Co.*, 336 U.S. at 193. "In a proceeding for civil contempt[,] the relief [may] be based upon the pecuniary injury or loss which the act of disobedience caused the complaining party…. to ensure full compensation to the party injured[,]" or, in the alternative, may be based upon the ill-gotten gains that the defendant "had made through the… sales in violation of the injunction." *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 455-56 (1932). *See also Gompers*, 221 U.S. at 444, 451 (in "proceeding in equity for civil contempt," proper relief would be "to impose a fine for the use of complainant, measured in some degree by the pecuniary injury caused by [defendants'] act of disobedience").

the contempt defendants have already "purged" their obligation to satisfy the preexisting monetary contempt sanction affirmed by this Court in *Leshin I*, and that the "money judgment" is something entirely "new and different." Br. at 12. As discussed above (*see supra* Part I.A), this premise is fundamentally wrong.

This Court cannot allow the contempt defendants to reopen arguments that the district court rejected in the Contempt Ruling and the Disgorgement Order, and that this Court rejected in *Leshin I*. This Court has made it clear that, in a proceeding to enforce a prior judgment obligating a party to make a payment, "the underlying order is not at issue. The court will not reconsider the legal or factual basis of the order alleged to have been disobeyed. Direct appeals are available to test such conclusions." *CFTC v. Wellington Metals, Inc.*, 950 F.2d at 1528-29. Here, the contempt defendants had the opportunity to take such a direct appeal – they did so, in *Leshin I* – and lost. They cannot now collaterally attack the district court's and this Court's decisions on the basis of the money judgment "label" that the district court has applied for purposes of facilitating enforcement. *See also Maggio v. Zeitz,* 333 U.S. at 69 ("It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy."); *United States v.*

Rylander, 460 U.S. at 756-57 (same). *Cf. Citronelle-Mobile Gathering, Inc. v. Watkins*, 934 F.2d 1180, 1185 (11th Cir. 1991) (ruling, in a different context, that "appellants' liability… has already been fully litigated, and their appeal of the district court decision assessing the amount of restitution appellants must pay has already been decided…. There remains no question of liability based on those… violations: all the issues on this appeal concern the post-judgment enforcement of the [court's] decision.").

Principles of *res judicata*, claim preclusion, and the "law of the case" doctrine preclude the contempt defendants from raising the same arguments that the district court and this Court have already resolved. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) ("final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action."); *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1289, 1290 (11th Cir. 2005) (*per curiam*) ("Under the law-of-the-case doctrine, the resolution of an issue decided at one stage of a case is binding at later stages of the same case."). The contempt defendants cannot be heard to challenge the judgment on grounds that the district court, as well as this Court, explicitly considered and rejected – such as that there was no "actual proof of money

damages to the consumers," Br. at 22, 36-43,[8] that the "value" of the services purportedly provided to consumers should have been taken into account, *id.* at 23,[9] that they were improperly held in contempt for "technical violations" of the "lengthy, confusing, detailed and complicated" Stipulated Injunction, *id.* at 2, 14, 23, 45, 50,[10] that their failures to satisfy the licensing requirements needed to operate in a number of states were immaterial to consumers and should be overlooked, *id.* at 39,[11] or most egregiously, that they are entitled to a jury trial. *Id.* at 22, 46-49; *see infra*, pp. 32-33.

The contempt defendants wrongly assert that, before adopting a final money judgment order for enforcement of a compensatory civil contempt sanction, a district court must employ different types of procedures than those applicable to

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[8] *See Leshin I*, 618 F.3d at 1238 ("Despite the contempt defendants' contention that no consumers were injured by their contumacious activity, . . . consumers paid fees that they would not otherwise have paid" but for their violations of the injunction).

[9] 618 F.3d at 1237 ("The district court did not abuse its discretion in ordering disgorgement of gross receipts . . . . even though the consumer received some value from the product or service.") (citing *McGregor*, 206 F.3d at 1388).

[10] 618 F.3d at 1232 ("The contempt defendants argue . . . . that no consumers were 'harmed or prejudiced by their technical, if at all, noncompliance[.]' . . . We disagree.")

[11] 618 F.3d at 1238 ("Ordering disgorgement of all fees collected serves to restore the consumer who would not otherwise have paid the fees or contracted for these services if the consumer had known the contempt defendants were not in compliance with state law. But for the contempt defendants' violation of the injunction, they would not have collected fees from the consumers[.]")

orders of disgorgement or other types of compensatory civil contempt sanctions. Again, this constitutes an improper collateral attack on *Leshin I*, in which this Court affirmed the procedures that the district court employed in requiring the contempt defendants to make the very same consumer redress payment that now has been entered as a money judgment. 618 F.3d at 1238-39. As discussed above, the Money Judgment Order had no effect at all on their substantive liability to pay the consumer redress award.

Similarly, in *Leshin I*, this Court squarely rejected the same contention that the contempt defendants now attempt to resuscitate – that by ordering them "to disgorge all fees collected in violation of the [Stipulated] [I]njunction," the "district court imposed punitive or criminal contempt sanctions [that] violated their constitutional right to due process." *Id.* at 1238. Rather, this Court held that the consumer redress payment obligation adopted in the Disgorgement Order – which, in substance, is one and the same as the money judgment at issue here – is a "valid civil sanction[] for violation of the original terms of the injunction," because "it is remedial in nature," it "attempts to restore the *status quo* before the contempt defendants… violat[ed]… the injunction," and it was "imposed to compensate consumers for the losses they sustained." *Id.* at 1238-39. Accordingly, the Court held, the district court gave the contempt defendants adequate "notice and an

opportunity to be heard," and "did not deprive contempt defendants of due process." The contempt defendants' contrary argument has no more merit now than it had the first time around.

The contempt defendants' assertion that they are entitled to a jury trial to reexamine these issues (Br. at 22, 46-49) verges on the frivolous. The Supreme Court has made it clear that "civil contempt sanctions… may be imposed in an ordinary civil proceeding upon notice and an opportunity to be heard. Neither a jury trial nor proof beyond a reasonable doubt is required." *Bagwell*, 512 U.S. at 827. *See also Piambino v. Bestline Products*, 645 F. Supp. at 1213 ("A defendant in a civil contempt proceeding of course is not entitled to a jury trial.") (citing *Shillitani v. United States,* 384 U.S. 364, 371 (1966)).

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's Money Judgment Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 7,048 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R 32-4, and it was prepared using Microsoft Word in 14-point Times New Roman font (a proportionally spaced typeface).

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CERTIFICATE OF SERVICE

I certify that, on September 27, 2012, a copy of the foregoing brief was served by first-class U.S. mail upon Randall L. Leshin, *pro se* counsel and attorney for the other Appellants (Express Consolidation, Inc.; Randall L. Leshin, P.A.; Charles Ferdon; and Debt Management Counseling Center, Inc.), at 712 E. McNab Rd., Pompano Beach, FL 33060, in addition to service via the CM/ECF system.

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