No. 21-2945

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

CREDIT BUREAU CENTER, LLC, *et al*.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 1:17-cv-00194
Hon. Matthew F. Kennelly, District Court Judge

BRIEF OF THE FEDERAL TRADE COMMISSION

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JURISDICTION

The appellants' jurisdictional statement is not complete and correct. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1337(a), and 1345. The appeal is from the district court's Memorandum Opinion and Order (Doc.288) and Modified Final Judgment and Order (Doc.289), both entered on September 13, 2021. The Modified Final Judgment and Order adjudicates all the claims with respect to all parties. Defendants timely filed their notice of appeal (Doc.290) on October 22, 2021. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED

1. Whether the district court correctly held appellants liable for consumer redress under Section 19(a)(1) and 19(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 57b(a)(1) & 57b(b) and Section 5(a) of the Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8404(a);

2. Whether the district court correctly held that the FTC did not waive pursuit of monetary relief under Section 19;

3. Whether the district court correctly modified its judgment under Fed. R. Civ. P. 59(e) based on an "intervening change in controlling law";

4. Whether the district court correctly held that this Court's mandate in an earlier appeal or the law of the case doctrine did not prohibit modification of the original judgment to order monetary relief under a different statute;

5. Whether the district court correctly calculated the amount of relief necessary to redress consumer injury;

6. Whether the district court correctly held that tracing of assets was not required;

7. Whether appellants waived their argument that the district court's modified judgment permitted relief beyond that authorized under Section 19; and

8. Whether it would be premature for the Court to address whether the modified judgment permitted relief beyond that authorized under Section 19.

STATEMENT OF THE CASE[1]

The underlying facts of this case were not disputed initially and are no longer subject to dispute. The FTC proved that Michael Brown and his company Credit Bureau Center (collectively, Brown) ran a scheme in which fake apartment rental ads were posted on Craigslist to lure consumers to sign up for an allegedly free credit report on Brown's websites. In fact, without telling consumers, Brown enrolled them in an ongoing credit monitoring service that charged them $30 every month. Brown bilked 150,000 consumers out of $6.8 million. *FTC v. Credit*

[1] Doc.xxx" refers to entries in the district court's docket; page cites are to ECF-generated page numbers; "Br." refers to the Appellants' February 2, 2022 Brief (7th Cir. Doc. 18); "A[#]" refers to pages in the Appellants' Short Appendix; "SA[#] refers to pages in the FTC's Supplemental Appendix; "Op." refers to the district court's Sept. 13, 2021 Memorandum Opinion and Order (Doc.288); and "Mod. Judg." refers to the district court's September 13, 2021 Modified Final Judgment (Doc.289).

Bureau Ctr., LLC, 325 F. Supp. 3d 852, 857, 860-62 (N.D. Ill. 2018), *aff'd in part*, *vacated in part*, 937 F.3d 764 (7th Cir. 2019).

The FTC sued Brown for violating, *inter alia*, (1) Section 5 of the Federal Trade Commission Act, which prohibits "deceptive conduct," 15 U.S.C. § 45; and (2) Section 4 of the Restore Online Shoppers' Confidence Act (ROSCA), 15 U.S.C. § 8403, which restricts the use of a "negative option" feature to sell goods or services on the internet. *See* Doc.1 ¶¶1, 44-52 [SA01, 016-18]. The complaint sought an injunction against further unlawful conduct and "relief . . . necessary to redress injury to consumers resulting from [Brown's] violations of the FTC Act, ROSCA," and other federal laws, including "restitution [and] the refund of monies paid." *Id*. at 22 [SA022].

The district court entered summary judgment in favor of the FTC, finding Brown liable for violating the FTC Act, ROSCA, and other federal laws. The court permanently enjoined Brown from engaging in a credit monitoring service with a negative option feature or deceptive sales like the fake landlord/apartment scheme here and imposed extensive requirements on Brown's continued involvement in the credit monitoring business or sales using a negative option feature or an affiliate program. The court ordered him to pay $5.2 million in monetary relief, basing that judgment on the authority of Section 13(b) of the FTC Act, which under the then-binding Seventh Circuit precedent allowed monetary remedies.

Credit Bureau Ctr., 325 F. Supp. 3d at 858-70. The Court retained jurisdiction "for purposes of construction, modification, and enforcement of [its] Order." Doc.239 at 33.

On appeal, this Court affirmed the grant of summary judgment and the injunction but vacated the monetary remedy. The Court overturned its earlier decisions, which had been on the books for 30 years, holding instead that Section 13(b) does not permit monetary remedies. *FTC v. Credit Bureau Ctr., LLC*, 937 F.3d 764 (7th Cir. 2019) ("*Credit Bureau I*") (subsequent history omitted). The Supreme Court later ratified that judgment in *AMG Capital Mgmt. v. FTC*, 141 S. Ct. 1341, 1344, 1352 (2021) ("*AMG Capital*"). In all other respects, the Court upheld the district court's judgment. Specifically, the Court held that ROSCA requires the disclosure of "all material terms" of a transaction before the consumer pays, but Brown "did not tell consumers that they were enrolling in a credit-monitoring service." *Credit Bureau I*, 937 F.3d at 769, 770.

After issuance of the mandate, the FTC moved under Fed. R. Civ. P. 59(e) to amend the district court's judgment to reimpose the monetary remedy under provisions other than Section 13(b). Modification of the judgment was appropriate, the FTC argued, because the judicial decisions regarding Section 13(b) were an "intervening change of controlling law" under the Rule.

The FTC showed that the court could reimpose a monetary remedy under Section 19 of the FTC Act, 15 U.S.C. § 57b, which empowers the Commission to sue any person who violates a rule promulgated under Section 18 of the FTC Act "respecting unfair or deceptive acts or practices," *id*. § 57b(a)(1). In such suits, the court may "grant such relief as the court finds necessary to redress injury to consumers," including "the refund of money or return of property." *Id*. § 57b(b). Both this Court and the Supreme Court had recognized that Section 19 of the FTC Act permits monetary remedies. *Credit Bureau I*, 937 F.3d at 773 ("[W]hen someone engages in conduct prohibited by a rule, the FTCA authorizes 'such relief as the court finds necessary . . . , [including] *the refund of money or return of property*.' § 57b(b)."); *AMG Capital Mgmt*., 141 S. Ct. at 1352 ("Nothing we say today … prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers.").

Monetary relief under Section 19 was appropriate for ROSCA violations because ROSCA specifies that violations of it or its implementing rules are to be "treated as . . . violation[s] 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(a). ROSCA also directs the Commission to enforce the statute (and its implementing rules) "in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions

of the Federal Trade Commission Act were incorporated into and made part of this Act," 15 U.S.C. § 8404(a), which clearly includes Section 19 and its specified remedies.

In the order on review, the district court granted the FTC's motion and denied a countermotion to deny modification of the judgment and '"enforce' the Seventh Circuit's mandate." Doc.288 ("Op.") 2 [A034]. The court first held that the mandate did not preclude monetary relief under Section 19 because the Court's earlier decision barred only "awarding restitution under section 13(b)," and did "not preclude the [district court] from considering" monetary relief under Section 19. Op. 7, 10 [A039, A042]. For the same reason, the court rejected Brown's claim that the law of the case precluded any monetary remedy. Op. 9 [A041].

The court held next that the FTC did not waive a claim for relief under Section 19 when it sought summary judgment only under Section 13(b). The agency "did not intentionally relinquish or abandon its entitlement to monetary relief under section 5(a) of ROSCA"; nor did the FTC waive anything on appeal because an appellee need not "raise[ ] all possible alternative grounds for affirming the district court's original decision." Op. 11-12 [A043-44] (citation omitted).

The court held that modification of the judgment was proper under Rule 59(e) because this Court's *Credit Bureau I* decision was an "intervening change in the controlling law." Brown would not be unfairly prejudiced by having to address

Section 19 now because he knew since the complaint was filed that the FTC sought recovery of consumer loss and he therefore had a full opportunity to challenge that relief. He had notice of the Section 19 claim because the complaint directly sought consumer redress under Section 5(a) of ROSCA, which incorporates Section 19. Op. 24-25 [A056-57]. Moreover, he failed to explain how his litigation strategy would have been different had the FTC initially relied on Section 19 rather than Section 13(b). Op. 20. The court entered a new judgment "award[ing] the same consumer redress, this time under ROSCA and Section 19." Op. 26 [A058].

SUMMARY OF THE ARGUMENT

It has already been adjudicated and affirmed that Brown violated ROSCA, which had been pleaded in the complaint and which incorporates all remedies available under the FTC Act. The only question now is whether Brown may face monetary consequences for his illegal acts, as plainly contemplated by Section 19.

1.a. The district court correctly modified its judgment to order consumer redress under Section 19(b). ROSCA Section 8404(a) incorporates all of the FTC Act's enforcement provisions and remedies, including Sections 19(a)(1) and 19(b). By invoking ROSCA Section 8404(a) in the complaint, the FTC invoked all of the incorporated remedies; the FTC did not have to cite Section 19 specifically.

b. The FTC did not waive the Section 19 remedies available under ROSCA. The complaint expressly sought relief under *both* Section 13(b) and ROSCA. The

FTC did not relinquish or abandon its right to Section 19 remedies by pursuing Section 13(b) relief in the trial court based on then-binding precedent because it gained no strategic advantage from not asserting a duplicative claim under ROSCA. Neither was the FTC required to advance ROSCA in the first appeal to defend against Brown's challenges to the monetary remedy ordered under Section 13(b) because the law does not require an appellee to raise all possible grounds for affirmance. And in any event Fed. R. Civ. P. 54(c) would permit Section 19(b) remedies even if they hadn't been pleaded because the FTC was "entitled" to that relief as a result of Brown's ROSCA violations. Further, Brown cannot have suffered prejudice by having to defend himself under Section 19 after litigating Section 13(b) relief because "[t]he FTC [sought] the same remedy, for the same reasons, and for the same victims" under both provisions.

c. The district court properly modified the judgment under Fed. R. Civ. P. 59(e). The elimination of monetary remedies under Section 13(b) by the decisions in *Credit Bureau I* and *AMG Capital*, both decided after the original judgment, was an "intervening change in controlling law." Indeed, both decisions dramatically altered the law by overruling decades of Section 13(b) precedent in numerous circuits. Brown is wrong that an appellate reversal in the same case cannot be a change in law under Rule 59(e), but the claim does not matter anyway because *AMG Capital* separately altered the law.

d. The Court's mandate in *Credit Bureau I* did not prohibit the district court from modifying the judgment. The Court's decision in *Credit Bureau I* was limited to the ruling that Section 13(b) does not permit monetary remedies. The Court did not address Section 19, and indeed expressly acknowledged both the FTC's remedial authority under that provision and that ROSCA can be enforced through Section 19.

e. The district court properly calculated the amount of consumer redress. The court properly included redress to deceived consumers for time periods both before and after December 1, 2015. The district court ruled in its first decision that Brown forfeited the argument that his websites did not violate ROSCA before December 1, 2015. Since then, Brown has never challenged or even addressed that forfeiture ruling nor has he explained why it was wrong. The contention is unfounded anyway in light of Brown's own admission that his website disclosures were consistent throughout this period, as well as evidence that many consumers complained about his practices and thousands demanded chargebacks from their credit cards before December 2015.

The Supreme Court's decisions in *Liu* and *Kokesh* do not limit redress judgments under Section 19 to net profits. Section 19 expressly permits "the refund of money," a broader measure of redress than the "equitable relief" permitted under the securities statutes at issue in *Liu* and *Kokesh*. But even if those cases had

bearing on Section 19, the Court made clear in *Liu* (*Kokesh* is simply irrelevant to this question) that equity permits disgorgement of gross receipts when all profits "result[] from the wrongdoing," which describes Brown's scheme to a T.

f. Section 19 does not require tracing of assets. It expressly permits "the refund of money" taken from consumers, without limitation. And even if the plain statutory language were not so broad, if Brown commingled stolen money with other funds, he bears the burden to show which funds are untainted. Wrongdoers should not be able to shield ill-gotten gains from victim redress.

2. Brown's claim that the judgment improperly contemplates sending money not used for consumer redress to the Treasury is both waived and premature. He raised no such claim below and has no excuse for failing to do so. The original judgment contained the same provision and Brown knew no later than May 2021 that the proposed modifications did not change the existing language. Yet he did not object. The Court need not address the issue now anyway. The Commission has recovered only 20% of the judgment and expects to collect nothing further. It therefore is highly likely there will be no funds remaining after injured consumers receive redress. Moreover, because the district court must approve the disposition of money not sent directly to consumers, the fate of any such money is entirely conjectural at this point.

STANDARD OF REVIEW

The district court's ruling on a Rule 59(e) motion is reviewed for abuse of discretion. *Romo v. Gulf Stream Coach*, *Inc*., 250 F.3d 1119, 1121 (7th Cir. 2001), as is its judgment for monetary relief. *FTC v. Febre*, 128 F.3d 530, 533-34 (7th Cir. 1997). In making those determinations, the trial court's application of the law is reviewed de novo and its conclusions of fact for clear error. *Highmark Inc. v. Allcare Health Mgmt. Sys.*, *Inc.*, 572 U.S. 559, 563 (2014).

ARGUMENT

The district court properly amended its judgment and directed monetary redress for victimized consumers under Section 19 of the FTC Act. The plain terms of ROSCA expressly incorporate the Commission's Section 19 rule-enforcement authority, which in turn expressly permits the imposition of monetary remedies.

I. THE DISTRICT COURT PROPERLY MODIFIED ITS JUDGMENT TO PROVIDE CONSUMER REDRESS UNDER ROSCA AND SECTION 19 OF THE FTC ACT

A. ROSCA authorizes consumer redress under Section 19.

This Court has already determined that Brown violated ROSCA because his websites failed to "tell consumers that they were enrolling in a credit-monitoring service." *Credit Bureau I*, 937 F.3d at 770. The district court properly concluded that "section 5(a) of ROSCA plainly authorizes [the FTC] to seek monetary relief for ROSCA violations via sections 18 and 19 of the FTC Act." Op. 5 [A037]; *see*

also id. 24 [A056] (Section 19 "is incorporated by reference in Section 5(a) of ROSCA"). ROSCA makes clear in two ways that it permits monetary remedies under the authority of Section 19.

First, Section 5(a) of ROSCA states that a "[v]iolation of [ROSCA] . . . shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act." 15 U.S.C. § 8404(a).[2] Such rule violations can be enforced directly under Section 19(a)(1), which states plainly that "[i]f any person . . . violates any rule" under Section 18, "then the Commission may commence a civil action against such person." Section 19 expressly provides that in such a lawsuit the court "shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers … resulting from the rule violation," including "the refund of money or return of property." 15 U.S.C. §§ 57b(a)(1), 57b(b).[3]

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[2] Section 5(a) of ROSCA states in full that:

> Violation of this [Act] or any regulation prescribed under this [Act] shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices. The Federal Trade Commission shall enforce this [Act] 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 [Act].

15 U.S.C. § 8404(a).

[3] Section 19(b) of the FTC Act states in full that:

Second, ROSCA states that the Commission "shall enforce" ROSCA "in the same manner, by the same means, and with the same jurisdiction, powers and duties, as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of this Act." 15 U.S.C. § 8404(a). Section 19 is one such "applicable term and provision"; therefore, under its plain language, ROSCA may be enforced "in the same manner, by the same means, and with the same jurisdiction" as under Section 19, along with all remedies—including monetary remedies—that Congress made available under that statute. As this Court recognized in *Credit Bureau I* "the Commission can use the [FTC Act's] enforcement regime against [ROSCA] violators," and Section 19 remedies include "the refund of money." 937 F.3d at 769, 773. The Supreme Court likewise recognized in *AMG Capital* that the Commission may "use its authority under … § 19 to obtain restitution on behalf of consumers." 141 S. Ct. at 1352.

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

15 U.S.C. § 57b(b).

B. Because the Commission sued and requested relief under ROSCA, the District Court properly awarded consumer redress under Section 19.

The district court held that it could properly "amend its prior judgment and award the same consumer redress, this time under ROSCA and Section 19," not Section 13(b). Op. 26 [A058]. Brown asserts that the amendment was a legal error because the FTC brought its suit exclusively under Section 13(b) and thus waived any reliance on Section 19. *E.g.*, Br. 4, 6, 8, 30. Brown is wrong.

The Commission filed its complaint under both Section 13(b) and ROSCA. Paragraphs 1 and 5, for example, invoke § 8404(a) (and Section 13(b)), as providing authority to obtain "restitution [and] the refund of monies paid." Doc.1 ¶¶1, 5 [SA01-02]. The prayer for relief cited § 8404(a) (and Section 13(b)) as authority to seek "relief . . . to redress injury to consumers . . . including but not limited to . . . restitution [and] the refund of monies paid." *Id*. at 22 [SA022].[4] Brown admits as much. Br. 1. Because (as explained above) ROSCA incorporates all of the FTC Act's enforcement mechanisms, the complaint's invocation of ROSCA invoked Section 19 itself. In a case involving nearly identical

[4] Brown notes that the complaint's section "The Court's Power to Grant Relief," Doc.1 ¶63, refers only to Section 13(b). Br. 35. That made sense because when the Commission filed this suit in January 2017, it could get all necessary relief under Section 13(b). *See Credit Bureau I*, 937 F.3d at 785-86. But that does not negate the plain invocations of ROSCA elsewhere in its complaint. *See* Doc.1 ¶¶1, 5, at 22 [SA01-02, 022] (prayer for relief).

circumstances, where the FTC sought monetary relief under ROSCA, another district court ruled that "the FTC did not need to specifically cross-reference Section 19." *FTC v. Cardiff*, No. ED CV 18-2104-DMG (PLA), 2021 WL 3616071, *2 (C.D. Cal. June 29, 2021). In short, the FTC brought suit under ROSCA, which incorporates Section 19, and the record thus flatly refutes Brown's repeated claim that the Commission relied "solely" on Section 13(b) and waived any other remedial possibility.

For the same reasons, Brown is wrong in his related and oft-repeated argument that the district court could not provide relief under Section 19(b) because the case was not "commenced" under Section 19(a). Br. 7-8, 30-31, 36-37. Suing under ROSCA, as the FTC did, *is* commencing a suit under Section 19 by virtue of the incorporation clause. And even if that were not the case, Brown cites nothing in the statute that precludes relief if a case is "commenced" under a different statute and relief is later claimed under Section 19.

Brown is off-base in claiming that the Commission is barred from seeking Section 19 relief because it failed to consult with the Attorney General before "commencing" this suit, which Brown asserts is required under Section 56(a)(1) of the FTC Act, U.S.C. § 56(a)(1) (which would also be incorporated into ROSCA). Br. 7-8, 32, 36-37, 39-40. Brown forfeited this argument, Op. 22 [A054], but, under Section 56(a)(2), when the FTC files a case under Section 13 or Section 19

(as it did here), it has "exclusive authority" to undertake the case, and Section 56(a)(1) does not apply. In those cases, the FTC must "inform" the Attorney General about the matter but there is no temporal deadline. 15 U.S.C. § 56(a)(2). Even so, the FTC complied with its Section 56(a) responsibilities because it regularly informs the Attorney General of cases it has filed under Section 56(a)(2). Further, nothing in the statute indicates that dismissal of a law-enforcement complaint is somehow warranted at the defendant's insistence if the FTC violates this intra-governmental housekeeping requisite.

The district court thus correctly held that, by pleading and seeking relief under ROSCA § 8404(a), the Commission was entitled to the same consumer redress for Brown's ROSCA violations as provided in the original judgment, but this time under Section 19(b). Op. 26 [A058].

This case closely resembles *FTC v. Hanley*, Nos. 20-15143, 20-15144, 2022 WL 187848 (9th Cir. Jan. 20, 2022), where the Ninth Circuit held that, in the wake of *AMG Capital*, the FTC could obtain the same remedy for rule violations under Section 19(b) that was originally awarded under Section 13(b) by virtue of a statute incorporating the FTC's enforcement provisions. There, the FTC filed suit under both Section 13(b) and the Dodd-Frank Act, 12 U.S.C. § 5538. That statute, like ROSCA, authorizes the FTC to enforce rules promulgated under it as though "all applicable terms and provisions" of the FTC Act were incorporated into the Act,

§ 5538(a)(3). The district court initially imposed a monetary judgment under Section 13(b), but after *AMG Capital*, the Ninth Circuit ruled that "the FTC may still obtain restitution on behalf of consumers under section 19." 2022 WL 187848, at *1. The Court rejected the argument—effectively identical to Brown's—that the FTC had waived reliance on Section 19 by relying solely on Section 13(b) for monetary relief, concluding instead that "[a]lthough the FTC did not expressly invoke section 19 in its Complaint, it preserved the option of pursuing a judgment under that authority by expressly relying on the Dodd-Frank Act." *Id*.

Other courts have also refused to overturn monetary awards ordered under Section 13(b) where the same relief could be attained under Section 19. *See*, *e.g.*, *FTC v. John Beck Amazing Profits*, *LLC*, No. 2:09-cv-04719, 2021 U.S. Dist. LEXIS 185202, at *8 (C.D. Cal. Aug. 19, 2021) (denying Rule 60 relief from remedy based on Section 13(b) where relief could be granted under Section 19 for defendants' rule violations); *FTC v. Ah Media Grp.*, *LLC*, No. 19-cv-04022, 2021 U.S. Dist. LEXIS 210686, at *13-20 (N.D. Cal. Nov. 1, 2021) (refusing to reopen judgment ordered under Section 13(b) "where all it would likely mean is that the FTC would simply have to take a different procedural route to get to the same substantive outcome").

C. The Commission did not waive its right to a Section 19 remedy.

Brown claims that notwithstanding the complaint's reliance on ROSCA, the Commission affirmatively waived reliance on Section 19 because in both the trial court and on appeal the agency argued for monetary relief under Section 13(b) only and not also under Section 19. *E.g.*, Br. 6, 30, 33, 37. There was no waiver.

Waiver is the "intentional relinquishment or abandonment of a known right." *Bourgeois v. Watson*, 977 F.3d 620, 629 (7th Cir. 2020) (cleaned up). As the district court correctly determined, the FTC did not waive Section 19 relief because it did not intentionally relinquish or abandon its entitlement to relief under ROSCA § 8404(a). Op. 11-12 [A043-44]. To the contrary, the Commission invoked ROSCA from the beginning by relying on ROSCA § 8404(a) in its complaint as a source of liability and relief. Doc.1 ¶¶1, 5, 44-52 & at 22-23 [SA01-02, 016-018, 022-023] (prayer for relief). The FTC did not need to separately invoke Section 19 for all the reasons described above. *See* Op. 11 [A043].

Nor did the Commission intentionally relinquish or abandon its claim to relief under ROSCA § 8404(a) at summary judgment. The Commission did not raise Section 19 at that point because binding precedent (both in-circuit and in courts throughout the country) established conclusively that Section 13(b) authorized monetary relief. The Commission gained no strategic advantage from not asserting a wholly redundant claim. *See United States v. Anderson*, 866 F.3d

761, 764 (7th Cir. 2017) (waiver only where argument was forgone for strategic purposes).[5]

Same thing on appeal. As the appellee in *Credit Bureau I*, defending a judgment supported by decades of precedent, the FTC was not required "to have raised all possible alternative grounds for affirming the district court's original decision"; invoking "alternative grounds for affirmance is a privilege rather than a duty." *Schering Corp. v. Illinois Antibiotics*, 89 F.3d 357, 358 (7th Cir. 1996); *accord Frank v. Walker*, 819 F.3d 384, 387 (7th Cir. 2016). For that reason, 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. Having invoked ROSCA (and thus Section 19) in its complaint, the Commission preserved that alternate theory of recovery throughout the proceeding. *See* Op. 12 [A044] (citing *Frank* to conclude that the FTC's right to claim relief under Section 19 "remains open.").

Brown's cases do not support his waiver argument. *See* Br. 38. In *Burns v. Orthotek, Inc. Emps.' Pension Plan & Tr.*, 657 F.3d 571 (7th Cir. 2011), the Court

[5] Brown states fleetingly that the FTC also forfeited its Section 19 argument. Br. 26-27. Even if Brown's unsupported and perfunctory assertion preserved the issue, the FTC plainly did not forfeit seeking Section 19 relief. Forfeiture is the failure to raise a timely argument due to inadvertence, neglect or oversight. *Watson*, 977 F.3d at 629. As the district court concluded, not raising the Section 19 argument was due not to those factors but because doing so was unnecessary under the existing law. The Commission need not assert every possible basis for relief at every opportunity. Op. 12-13 [A044-45].

held that an appellate court "can affirm on any ground that the record fairly supports and the appellee has not waived," *id*. at 575, but the Court did not suggest that not raising an unnecessary argument resulted in waiver for all subsequent purposes. In *Tully v. Barada*, 599 F.3d 591 (7th Cir. 2010), the Court found waiver where the litigant "fail[ed] to raise [an argument] in the district court," *id*. at 594, which did not happen here. Same with *Duncan Place Owners Ass'n v. Danze*, *Inc.*, 927 F.3d 970, 973 (7th Cir. 2019).

D. The District Court's remedy was justified by Rule 54(c).

Even if the Commission had not invoked ROSCA in its complaint, the district court's decision should still be affirmed because the Commission was "entitled" to such relief. Under Fed. R. Civ P. 54(c), the court is obliged to "grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." *See Travis v. Gary Community Mental Health Center*, *Inc.*, 921 F.2d 108, 112 (7th Cir. 1990) (under Rule 54(c) court must award the relief to which the prevailing party is entitled, even if the party did not request such relief and even if it "relied on the wrong statute."); *accord Old Republic Ins. Co. v. Employers Rein. Corp.*, 144 F.3d 1077, 1081 (7th Cir. 1998) (Rule 54(c) permits a court "to grant whatever relief is appropriate . . . even if the parties have not specifically requested it."); *Z Channel Ltd. Partnership v. Home Box Office*, 931

F.2d 1338, 1341 (9th Cir. 1991) (relief for damages available under Rule 54(c) even though complaint only sought declaratory and injunctive relief).

By proving that Brown violated ROSCA, the Commission is entitled to the relief that will address that harm, namely redress to Brown's victims. And because the district court's original monetary judgment was based on "the amount of consumer losses," *Credit Bureau Ctr.*, 325 F. Supp. 3d at 867-68, the Commission sought (and the district court granted) the *same* amount of monetary relief as consumer redress under ROSCA and Section 19. Op. 26 [A058].

Brown's arguments that Rule 54(c) does not apply fall flat. He asserts that the Court's earlier decision in this matter barred the agency from receiving any monetary redress. Br. 44. But *Credit Bureau I* considered only relief under Section 13(b); the Court rendered no judgment on other avenues. Relief remains available under ROSCA and Section 19 as explained above. Brown claims that the FTC cannot obtain redress for consumers who are not parties "entitled" to a judgment in an FTC enforcement action, Br. 44, but the FTC is plainly entitled under Section 19(b) to "relief . . . necessary to redress injury to consumers" caused by Brown. Brown also claims that the FTC is seeking class action damages without complying with the requirements in Fed. R. Civ. P. 23, Br. 45, but this is a law enforcement matter under a statute that provides for consumer redress, not a private class action suit.

Brown also contends that the FTC waived its right to Section 19 relief by purportedly having unclean hands because it "misus[ed] Section 13(b) and circumvent[ed] the procedural requirements of Section 19 and Section 5." Br. 32-35 (citing, *inter alia*, *Credit Bureau I*, 937 F.3d at 784).[6] The charge is baseless; until *Credit Bureau I* and *AMG Capital*, every court to have considered the issue had ruled that the FTC could obtain victim redress under Section 13(b). *See* Op. 19-20 [A051-52]. And no Section 5 or 19 requirements were violated in any event. As Brown seemingly recognizes, Br. 33, the Commission may seek consumer redress resulting from a Section 5(b) administrative cease-and-desist order by filing a lawsuit under Section 19(a)(2) if certain conditions are met, but this case does not involve an administrative order. Redress is also available for Section 18 rule violations through suit under Section 19(a)(1), but Congress determined that violations of ROSCA "shall be treated as" per se violations of a Section 18 rule without first requiring the "detailed procedures" necessary before issuing such a rule. *See Credit Bureau I*, 937 F.3d at 784 (citing 15 U.SC. § 57a(b)).

[6] Brown relies on cases which denied equitable relief due to serious misconduct. Br. 35. *See Mercoid Corp. v. Mid-Continent Inv.*, 320 U.S. 661, 670 (1944) (holding injunction improper where it would advance "scheme" in violation of antitrust laws); *Precision Instr. Mfg. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816-20 (1945) (affirming dismissal of equitable claims tainted by perjury and fraud). But this Court affirmed a permanent injunction to restrain Brown and CBC from further violations of ROSCA and other laws.

Finally, Brown claims he had no opportunity to take discovery or to effectively oppose the Section 19 relief sought by the FTC. Br. 7. Nonsense. After the FTC filed its Rule 59(e) motion, Brown could (and did) oppose the motion, and could have sought leave to take discovery, though he did not. That is likely because he already engaged in full discovery in the first round of litigation, including discovery on remedy—which was exactly the same under Section 13(b) as under Section 19. Indeed, Brown admitted that he "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." Op. 20 [A052] (citing Doc.277 at 13); Doc.277-1 at 158, 161-62.

The district court thus correctly ruled that Brown suffered no unfair prejudice by having to defend against the FTC's claim for monetary relief under Section 13(b) and then again under Section 19 (through ROSCA), *id.* at 20, because "[t]he FTC seeks the same remedy, for the same reasons, and for the same victims under [ROSCA 8404(a)] via section 19 as it did under section 13(b)." *Id*. at 25. Because "[t]he same relief is being requested for the same misconduct," *id*. at 20, and Brown "had an opportunity to oppose, and did oppose, the requested award of restitution," *id.*, he was treated fairly.

E. The District Court's Modified Judgment complied with Rule 59(e).

Rule 59(e) permits a court to amend a previously entered judgment based on "an intervening change in the controlling law." *Romo*, 250 F.3d at 1121 n.3; *see also Cosgrove v. Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998); *Bryant v. New Jersey Dept. of Transp.*, 998 F. Supp. 438, 441-43 (D.N.J. 1998) (Rule 59(e) relief proper to consider legal theory that has taken on new importance due to recent Supreme Court decision).

This case experienced a major change in the controlling law. At the time the FTC filed its complaint and through the litigated summary judgment and imposition of a remedy, the law allowing monetary remedies under Section 13(b) had been settled for decades. After the district court rendered its original judgment resting on that established body of law, that precedent was seismically upended by this Court's decision in *Credit Bureau I* and the Supreme Court's decision in *AMG Capital*.[7] The district court thus was correct in holding that *Credit Bureau I* and *AMG Capital* constituted an intervening change in law under Rule 59(e) that warranted amending the original judgment. Op. 26 [A058] (citations omitted); *see*

[7] The FTC's motion was timely. Although Rule 59(e) motions must be filed within 28 days of the entry of judgment, Fed. R. Civ. P. 59(e), the clock resets if the judgment is modified significantly on appeal, as happened here. *See, e.g.*, *Charles v. Daley*, 799 F.2d 343, 348 (7th Cir. 1986); *cf. Berwick Grain Co. v. Illinois Dep't of Agric.*, 189 F.3d 556, 559-60 (7th Cir. 1999). The FTC filed its motion just hours after the mandate issued. Brown does not challenge that timing.

also FTC v. Cardiff, 2021 WL 3616071, at *3 (holding that *AMG Capital* constituted a change in the law to permit the FTC to assert relief under Section 19 and recognizing other decisions permitting parties to alter their theory of recovery in response to a change in law) (citation omitted).

Brown argues that the district court improperly rejected his argument that this Court's *Credit Bureau I* decision was not an intervening change of law at all. He first asserts that an intervening change of law under Rule 59(e) must be to the text of the FTC Act itself, not "this Court's correction to a misapplication of Section 13(b) of the Act." Br. 41 (citing *Credit Bureau I*, 937 F.3d at 767). But he provides no support for that proposition, which cannot be squared with any of the authorities cited above. Besides, a fundamental change to the interpretation of statutory text is tantamount to a change in the text itself.

He next contends that *Credit Bureau I* did not constitute a change in law under Rule 59(e) because the Seventh Circuit changed the law in this very case, as opposed to a different one. Br. 41-42. He again provides no authority for this novel principle. His reliance on *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 815-16 (1988), fails because that case stands only for the unremarkable proposition that when a court decides a rule of law, that decision continues to govern the same issues throughout the litigation.

Brown asserts that the law of the case doctrine makes *Credit Bureau I* something other than an intervening change of law, but his position makes little sense. The law of the case under *Credit Bureau I* is that Section 13(b) does not authorize monetary relief. We do not contest that regime. But the decision was a sea change that upended decades of the Court's consistent precedents, and it quite plainly amounted to a change in controlling law under Rule 59(e). Moreover, the district court correctly held that the law of the case established in *Credit Bureau I* did not prohibit *any* monetary remedy but left open the possibility of relief under ROSCA or Section 19 because *Credit Bureau I* did not address those provisions. Op. 15 [A047]; s*ee also id.* 9 [A041] ("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 also Hanley*, 2022 WL 187848, at *2 (vacating monetary award under Section 13(b) but remanding to district court to determine whether relief was appropriate under Section 19).

Brown gets no more help from the Wright & Miller treatise, which explains that "[p]erhaps 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." Br. 42 (citing 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Fed. Prac. & Proc. Juris.* § 4478. (2d ed. 1995)). But

exceptions to the law of the case doctrine don't matter here because there is no law of the case about the availability of relief under Section 19 and ROSCA.

Finally, even if Brown could show that the intervening decision under Rule 59(e) had to be rendered in a separate case, *AMG Capital* fills the bill. It definitively changed the law while the FTC's petition for certiorari in this case was pending.[8]

F. The District Court's Modified Judgment complied with the Mandate.

Brown asserts that the district court's amended judgment "failed to comply with this Court's mandate and thus violated the 'mandate rule.'" Br. 5, 29-31. The argument is nothing more than a variation on his theme that this Court decided in *Credit Bureau I* that the FTC could not receive a monetary remedy under any theory, and it fails for all the same reasons.

The mandate rule, a corollary of the law of the case doctrine, requires a lower court "to adhere to the command of a higher court" made earlier in the same case. *Delgado v. US. Dept. of Justice*, 979 F.3d 550, 557 (7th Cir. 2020). But the mandate controls only "matters within its compass" and "does not extend to issues

[8] Brown's reliance (Br. 42) on *GSS Group Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 812 (D.C. Cir. 2012), for the proposition that Rule 59(e) does not allow arguments that could have been raised prior to judgment is misplaced. *GSS Group* did not involve an intervening change in controlling law; it dealt only with late-filed assertions that had never been raised before, including in the complaint.

an appellate court did not address." *Moore v. Anderson*, 222 F.3d 280, 283-284 (7th Cir. 2000) (cleaned up). In other words, the "reach of the mandate is coextensive with the reach of [the appellate court's] holding" and thus "governs only that which was actually decided." *Id.*; *see also Big Ridge, Inc. v. NLRB*, 808 F.3d 705, 712 (7th Cir. 2015).

Brown claims that, by vacating the monetary judgment in *Credit Bureau I* under Section 13(b), this Court determined that the FTC could not obtain a monetary judgment against Brown under *any other* law provision. Br. 30-31; *see also id.* 4-5 ("the vacated award [in *Credit Bureau I*] included the FTC's ROSCA allegations"); *id*. 44 ("this Court already held the FTC was not entitled to monetary relief" at all because it held that such relief could not be found under Section 13(b)). That grossly mischaracterizes this Court's earlier decision. As discussed above, and as properly recognized by the district court, the mandate of *Credit Bureau I* is that monetary relief is unavailable under Section 13(b). *See* Op. 7 [A039] (*Credit Bureau I* opinion "plainly forecloses any further consideration of awarding restitution under section 13(b)."). This Court did *not* decide, expressly or by implication, that the FTC could not pursue monetary relief under section 19 of

the FTC Act or ROSCA § 8404(a). *See Moore*, 222 F.3d at 283–84. Neither did the Court hold that the FTC filed this case *exclusively* under Section 13(b).[9]

Quite to the contrary, *Credit Bureau I* expressly recognized the availability of relief under Section 19. 937 F.3d at 773-74. Thus, as the district court recognized, "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 Court's mandate here did not prevent the district court from considering whether the FTC was entitled to relief under Section 19 and ROSCA. See Op. 10 [A042] (citing *Kovacs v. United States*, 739 F.3d 1020, 1024 (7th Cir. 2014)).[10]

[9] Brown argues that the FTC did not seek to amend its complaint to expressly request monetary relief under Section 19, Br. 30, but the complaint already did so, as discussed at pages 14-15 above.

[10] None of the cases cited by Brown, Br. 29-30, involved a lower court addressing an issue that the appellate court "left open" like here. *See Kovacs v. U.S.*, 739 F.3d 1020, 1024-25 (7th Cir. 2014) (district court violated mandate by reinstating damages found to be time-barred); *Matter of Cont'l Ill. Securities Litigation*, 985 F.2d 867, 869 (7th Cir. 1993) (district court violated mandate by failing to comply with order regarding attorneys' fees); *Donohoe v. Consol. Operating & Prod. Corp.*, 30 F.3d 907, 910-11 (7th Cir. 1994) (district court complied with mandate instruction to consider particular claim).

G. The District Court's calculation of redress was proper.

Brown argues that, even if a monetary remedy was appropriate, the district court's modified judgment exceeded the amount of redress allowed under Section 19(b). Br. 23. The claim is that the $5.2 million judgment reflected all payments received from victims during the entire period of the Craigslist/fake landlord scheme, but that because the revised remedy is based only on ROSCA violations, "[r]edress should be limited to consumers who ordered on the ROSCA-defective websites during the 14-month period of their operation." Br. 47. The judgment therefore should exclude, Brown argues, any money he took from victims before December 1, 2015, because the FTC failed to prove ROSCA violations prior to that date. *Id*; *see also* Br. 25 n.3.

The problem for Brown is that the district court found in its original order that Brown had forfeited any claim that his websites did not violate ROSCA before December 1, 2015. *Credit Bureau Ctr*., 325 F. Supp. 3d at 869 n.5. He has never challenged (or even addressed) the forfeiture ruling either in his appeal in *Credit Bureau I*, *see FTC v. Credit Bureau Ctr., LLC*, No. 18-3310 (7th Cir.) (Docs. 23, 38), during proceedings below after *Credit Bureau I*, *see*, *e.g*., Doc.277; Doc.282 at 12, or in his opening brief in this appeal. Brown has given no reason why that forfeiture ruling should be vacated or his argument revived.

But even if he had not forfeited the argument, record evidence supports the district court's award. Section 4 of ROSCA, 15 U.S.C. § 8403, prohibits the use of a "negative option feature" to sell goods or services on the internet unless the seller (1) "clearly and conspicuously discloses all material terms of the transaction" and (2) "obtains a consumer's express informed consent before charging the consumer." *See* 325 F. Supp. 3d at 862-64.[11] There is no question that Brown's websites created on December 1, 2015, violated ROSCA. The district court held that those websites were "virtually devoid of *any* mention of the [credit-monitoring] service aside from the statement that the customer is to be billed for it." *Id.* at 863 (emphasis in original). "A website that fails to provide a consumer any information about a service cannot obtain a consumer's express *informed* consent to purchase that service." *Id.* (emphasis in original). This Court affirmed, agreeing that Brown failed to provide "all material terms of the transaction" in violation of § 8403, because his "websites did not provide certain information that ROSCA requires – namely that the subscription was for a credit-monitoring service." 937 F.3d at 770.

[11] A third element of § 8403 is not at issue. ROSCA defines a "negative option feature" as a provision [in an offer] under which the customer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer." *See* 15 U.S.C. § 8403 (incorporating by reference 16 C.F.R. § 310.2).

The record evidence also shows that the pre-December 1, 2015, websites violated ROSCA in the same way as the later modified ones. *See*, *e.g.*, Doc.215, ¶51 [SA027-028]; Doc.206-1 at 9 (Brown Dec. ¶23.b) [SA036] ("The negative option feature in the Subject Websites are identical to the negative option feature used in the Pre-Existing Websites."). Brown's failure to disclose all the material terms in the transaction in the pre-December 1, 2015, sites is further supported by the thousands of chargebacks incurred, *see* Doc.194 at 29-30 ¶¶72-73; *Credit Bureau Ctr.*, 325 F.Supp.3d at 856 (deemed admitted), and the many consumer complaints about unauthorized charges, Doc.194 at 34 ¶87; Doc.11-3 at 70-71 (McKenney Dec. ¶¶ 76e & f), received before December 2015. The record thus shows that Brown's websites violated ROSCA during the entire 2014-17 period. The district court therefore properly calculated monetary relief on the basis of Brown's net revenue—the amount consumers paid—during this time.[12]

[12] If the Court determines that the trial court erred in its redress calculation, the Commission urges the Court to conclude that any such error was harmless in light of Brown's inability to pay. *See Butler v. Kijakazi*, 4 F.4th 498, 504 (7th Cir. 2021) ("In assessing whether an error is harmless, we examine the record to determine whether we can "predict with great confidence what the result of remand will be.") (citation omitted). Remand will almost certainly not change the amount of redress consumers receive because the Commission has collected only 20% of the $5.2 million judgment and is unlikely to obtain more. Doc.268 at 3. While Brown now admits that his liability is at least $2,782,381 due to "consumers who ordered on the ROSCA-defective websites" beginning in December 2015, Br. 47, that amount is more than twice the funds collected. Remand will achieve nothing other than delaying redress to injured consumers.

Brown also argues that the court's monetary judgment constitutes a penalty barred under Section 19(b) because it was based on gross receipts and not net profits. Br. 20-22 (citing *Kokesh v. SEC*, 137 S.Ct. 1635, 1643-45 (2017); *Liu v. SEC*, 140 S. Ct. 1936 (2020)). *Kokesh* is wholly inapposite here, as it dealt only with a statute of limitations. The securities laws at issue in *Liu* allow only "equitable relief"; Section 19(b), by contrast, grants the power to "grant such relief as the court finds necessary to redress injury to consumers," including "the refund of money." 15 U.S.C. § 57b(b). Thus, remedies under Section 19(b) are not limited to unjust gains but can "restore the victim to the status quo"—in other words, full refunds. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606-07 (9th Cir. 1993). Brown himself acknowledges that Section 19 allows relief necessary "to make consumers whole." Br. 13 (citation omitted). *See also U.S. v. MyLife.com, Inc.*, No. CV 20-6692-JFW(PDX), 2021 WL 4891776, at *13 (C.D. Cal. Oct. 19, 2021) (concluding that "[t]he appropriate method to redress [injured] consumers under Section [19(b)] is to refund the amounts consumers paid" for ROSCA-violating subscriptions and thus awarding $15.8 million as consumer redress based on the defendant's net revenues).

Moreover, *Liu* did not limit equitable remedies to net profits "when the entire profit of a business or undertaking results from the wrongful activity." *Liu*, 140 S. Ct. at 1950 (cleaned up). That description applies foursquare to Brown's

Craigslist scheme, which this Court has already described as "fraudulent." *Credit Bureau I*, 937 F.3d at 767.

H. Monetary redress does not require asset tracing.

Brown next contends that *Liu* requires that a remedy may include only funds traced to his illegal scheme. Br. 46 (*citing Liu* at 1943-44). The district court rejected the claim in its initial ruling in this case, 325 F. Supp. 3d at 869, and it did so again in the order on review, holding that *Liu* did not address asset tracing. Op. 21-22 [A053-54]. That ruling was correct. Brown identifies nothing in *Liu* that requires, or even discusses, asset tracing. The *dissent* discusses the issue, but that discussion is not the law.[13]

Brown's position, if accepted, would give violators an easy out that would undo the intent of Congress. He admits he commingled stolen money with other funds but then argues that any commingled untainted funds cannot be used for redress. Br. 47. It is easy to see why courts have rejected that approach, instead placing the burden on the wrongdoer to establish the legitimacy of commingled money. *Febre*, 128 F.3d at 535 (citing *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1232 (D.C. Cir. 1989)); *see FTC v. Bronson Partners*, 654 F.3d 359, 373 n.8 (2nd

[13] In its original ruling, the district court held that "[t]he [FTC Act] authorizes legal restitution, which does not impose . . . tracing requirements." 325 F. Supp. 3d at 869. That reasoning applies even more forcefully under Section 19, which as discussed allows full refunds.

Cir. 2011) (explaining that courts apply an irrebuttable presumption that funds in commingled accounts belong to the victims of wrongdoing, not to the wrongdoers); *FTC v. Commerce Planet*, 815 F.3d 593, 601 (9th Cir. 2016) ("adopting those tracing requirements would greatly hamper the FTC's enforcement efforts").[14]

II. BROWN'S ARGUMENT THAT THE MODIFIED JUDGMENT PERMITS BROADER RELIEF THAN AUTHORIZED BY SECTION 19 IS BOTH WAIVED AND PREMATURE

The district court's remedial order directs consumer redress as plainly permitted by Section 19. Op. 26 [A058]. The judgment also states:

> "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."

Mod. Judg. 25, § IX.D [A025]. Brown asserts that anything besides redress constitutes "exemplary or punitive damages" prohibited by Section 19, and he

[14] Brown wrongly contends that the FTC agreed that 52% of his revenue derived from legitimate sources so that only 48% of money collected should be returned as consumer redress. Br. 47. In fact, the FTC disputed those figures. *See* Doc.211 at 32 [SA038]. The entire remedy is based on tainted revenue.

therefore has a right to keep any funds remaining after redress. Br. 19. Brown waived that argument, but the Court need not reach it in any event.

A. Brown waived his challenge.

Brown made no such challenge to the remedial order in the district court and may not do so now. *See Poullard v. McDonald*, 829 F.3d 844, 855 (7th Cir. 2016). His excuses are insubstantial. First, he says he preserved the issue when he contended that any monetary relief under Section 19 should be limited to CBC's "proceeds" and to the websites that violated ROSCA. Br. 26 (citing Doc.277 at 20-22). These objections clearly dealt with the *amount* of the remedy, not with the disposition of leftover money.

He also complains that ordinary principles of waiver should not apply because he "could hardly have anticipated" that the amended judgment would provide for "disgorgement to Treasury" or other non-redress distribution features. Br. 26. But in May 2021, Brown learned of the proposed version of the modified judgment containing the very distribution provision he now complains of. *See* Doc.275 at 11 n.3 [SA052] (referencing proposed modified final judgment and modifications the FTC sought from the court's original judgment, which did not include any changes to the fund distribution provision). Indeed, those clauses were simply carried over from the original judgment, with which Brown was surely familiar. He even referenced the judgment's distribution of "funds to consumers or

to the United States Treasury" in his motion to stay pending appeal. Doc.255 at 6 [SA044]. Any surprise is feigned.

Brown fares no better with the idea that waiver would work a "miscarriage of justice." Br. 28. His reliance on *Hormel v. Helvering*, 312 U.S. 552, 557-58 (1941), and *Hicks v. Avery Drei, LLC*, 654 F.3d 739, 744 (7th Cir. 2011), is misplaced. *Hormel* warned against litigants being "surprised on appeal" by "issues upon which they have had no opportunity to introduce evidence." 312 U.S. at 556. That concept does not help Brown, who had a full opportunity below to challenge the judgment but never did. *Hicks* simply refuted any notion that the appellant's forfeiture in that case should be excused due to "exceptional circumstances" or because "a miscarriage of justice" might result. 654 F.3d at 744.

Finally, Brown argues in passing that his argument is jurisdictional and "jurisdictional issues are not forfeited." Br. 29. That is wrong. The issue is whether the district court had statutory authority to grant a particular remedy, not whether it had subject-matter jurisdiction.

B. The Court need not reach the question whether the Modified Judgment orders impermissible relief.

It would be premature for the Court to address at this point whether the judgment properly addresses funds leftover after redress for two reasons. First, it is very likely that there will be no funds remaining after distribution to injured consumers. As explained above, consumers lost $5.2 million to Brown's scam, yet

the FTC has recovered only 20% of that amount. The district court recognized that, "[i]n reality the only amount likely to be paid on the judgment is the approximately $1,100,000 held by FTC or frozen." Doc.268 at 3 [SA047]. Furthermore, complete distribution of the money to the victims is highly likely, as the Commission has identified them and knows how much they paid. *See* Doc.194-11 at 3 (McKenney 3rd Supp Dec. ¶ 6) [SA026]. The overwhelming likelihood is that all collected funds will be used for direct consumer redress.

Second, even if residual funds remain, the FTC must seek court approval for a distribution plan related to Brown's violations and consistent with Section 19(b). Mod. Judg. 25 § IX.D [A025]. Indeed, Section 19(b) authorizes not just direct consumer redress, but also "public notification respecting the rule violation." 15 U.S.C. § 57b(b). The modified judgment expressly allows expenditure of leftover funds for "consumer information remedies" if the court approves. Mod. Judg. 25 § IX.D [A025]. Because the Commission must first obtain district court approval for the disposition of any leftover funds this Court need not address the matter now.

Brown contends that the Commission cannot "keep the money" collected from defendants and that is not used for consumer redress. Br. 16. Whether or not that is true, the Commission has never sought to do so, and the issue is unlikely to arise given the fraction of the total amounts consumers lost that has been collected.

Moreover, the district court would have to approve any such plan. Brown is therefore wrong that the FTC can decide on its own that '"redress' is impracticable and disgorge the award to Treasury." Br. 19.

Brown's contentions now are hypothetical, as the issues are not yet ripe. This Court should follow the course charted by the Supreme Court in *Liu*, where it deemed a directly analogous issue inappropriate to consider until there was a "specific order in this case directing" such distribution. 140 S. Ct. at 1948-49.

CONCLUSION

For the foregoing reasons, the district court's memorandum opinion and modified final judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief of the Federal Trade Commission complies with the type-volume limitation in Fed. R. App. P. 32(a)(7) and 7th Cir. R. 32(c) because it contains 9641 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). It also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and 7th Cir. R. 32(b), and the type style requirements of Fed. R. App. P. 32(a)(6), because the brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman type style.

Date: April 4, 2022

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CERTIFICATE OF SERVICE

I certify that on April 4, 2022, I served the foregoing Brief of the Federal Trade Commission on all counsel of record through the Court's electronic CM/ECF system.

Date: April 4, 2022

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