No. 22-1738

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,
and
MARC-PHILIP FERZAN,
Receiver-Appellee,
v.
YU LIN; QUAN LIN; JAMIE TENG; JULIANA TENGONCIANG; ALFONSO KOLB, JR.; JASMIN TENGONCIANG; ROEL PAHL; CLARISSA TENGONCIANG; ALLAN PRIJOLES; MARY JANE PRIJOLES; DARREN CHRISTIAN; CHAN MARTIN; JULIE SANTOS; DAVID HEIMAN; HEARTLAND PROPERTY GROUP, INC.,
Movants-Appellants.

On Appeal from the United States District Court
for the District of Maryland
No. 1:18-cv-3309 (Hon. Peter J. Messitte)

ANSWERING BRIEF FOR THE FEDERAL TRADE COMMISSION

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INTRODUCTION

This case involves a belated attempt by a group of corporate investors to intervene in litigation against their company. In 2018, the Federal Trade Commission (FTC) brought an enforcement action—the *Sanctuary Belize* case—against a group of companies and individuals who operated a real estate scam selling properties in Belize. The district court ultimately directed redress to victims exceeding $120 million and appointed a receiver who assumed control of the corporate defendants' assets. One of those defendants, Newport Land Group, LLC (NLG), which the court found had operated in a common enterprise with the other defendants, was held jointly and severally liable for the judgment. Appellants are NLG investors who sought to intervene in the *Sanctuary Belize* litigation. They made their investments knowing that both NLG managers and the principals of Sanctuary Belize had been implicated in prior fraudulent conduct. After the judgment had been entered and the case was on appeal, appellants attempted to intervene in order to try to recover their investments. They waited until the case was essentially over even though they knew that their investments were at stake the

entire time and had passed up multiple opportunities to seek to intervene earlier.

In the order on review, the district court denied appellants' request to intervene as of right. The court held that it lacked jurisdiction to consider the motion because the case was already in this Court. Alternatively, the district court found that appellants had slept on their rights, deliberately choosing to pursue litigation against NLG in state court rather than timely trying to enter the FTC's litigation. Appellants passed up multiple chances to seek intervention over a three-year period, waiting instead until the twelfth hour. The court denied a separate motion for relief from final judgment on the ground that nonparties such as appellants are not entitled to such relief.

The facts of this case are uncontested. This Court's precedent clearly establishes that the district court lacked jurisdiction to grant intervention once appeal of the relevant order had been filed. Assuming the court had jurisdiction, the uncontested facts show that the district court acted well within its discretion in all respects. The motion to intervene was grossly out of time and failed to meet the other conditions for intervention. Appellants make no showing to the contrary.

STATEMENT OF JURISDICTION

The district court lacked jurisdiction to rule on appellants' motions to intervene by right and for relief from judgment.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court lacked jurisdiction to rule on appellants' motions once the judgment from which appellants sought relief had been appealed to this Court.

2. Whether the district court, assuming it had jurisdiction, properly exercised its discretion when it denied appellants' motion to intervene after judgment had been entered and appealed and after appellants chose to pass up multiple prior opportunities to seek to intervene and where the only interest at stake was an investment in a corporate defendant.

3. Whether the district court, assuming it had jurisdiction, properly exercised its discretion when it denied appellants' motion for relief from judgment.

STATEMENT OF THE CASE

A. The *Sanctuary Belize* Litigation

1. The Sanctuary Belize Scheme

In late 2018, the FTC charged Andris Pukke, Peter Baker, John Usher, Michael Santos, and others, and numerous corporate entities through which they operated, with violations of the Federal Trade Commission Act, 15 U.S.C. §§ 41 *et seq*., and the Telemarketing Sales Rule (TSR), 16 C.F.R. pt. 310. DE_114 (amended complaint) [JA281]. The complaint alleged, and the district court ultimately found after a trial on the merits, that the defendants sold lots in a supposed luxury resort known as "Sanctuary Belize" using false promises that the resort would have world-class amenities and would be a safe investment with easy resale potential. DE_1352 (Memorandum Opinion) (Op.), at 1-2 [JA2003-2004]. Consumers who fell for the pitch were collectively swindled out of more than $120 million. Op. 4 [JA2006]. At the outset of the case, the court froze defendants' assets and appointed a receiver to manage the corporate defendants. DE_539; DE_615 [JA566].

The district court held a bench trial on the merits in early 2020. In August 2020, it issued a 179-page decision that held defendants in violation of the FTC Act and the TSR. DE_1020 at 33-132 [JA870-969].

It entered permanent injunctions tailored to the circumstances of each defendant and a compensatory monetary judgment of $120.2 million. DE_1020 at 146-161 [JA983-998]; DE_1194.

2. Newport Land Group's Role in Sanctuary Belize

Defendants carried out the Sanctuary Belize scheme using many companies and affiliates that, the district court found, operated as a common enterprise, all of whom were held jointly and severally liable for the consumer loss. DE_1020 at 79-86 [JA916-923]. One of those companies was NLG, which was named as a defendant in the amended complaint. *Id*. at 139-140 [JA976-977]. The court found "compelling factors" for including NLG in the Sanctuary Belize common enterprise, including interlocking relationships between NLG and the principals of the scam, such as Pukke and Santos; commingling of funds "for no ostensible legitimate business reason"; common addresses and de facto headquarters; and NLG's involvement in the Sanctuary Belize scheme. *Id*. at 140-41 [JA977-978]. Indeed, the very NLG prospectus that appellants relied on to support their intervention motion showed that NLG was used to market the Sanctuary Belize lots to consumers. DE_1317-1 at 8, 11 [JA1667, 1670].

NLG, along with all the other corporate defendants and one individual, chose to not answer the complaint or appear in court to defend itself. DE_1020 at 139 [JA976]; *see* DE_1278 at 2 [JA1625] (noting willful default).

The clerk entered a default, DE_799 [JA705], but the court withheld entry of default judgment until deciding the merits against the litigating defendants. *See* DE_974. The court then further withheld judgment against NLG, pending consideration of claims by investors in NLG, including appellant David Heiman and other appellants, that their investments should be returned to them.[1] DE_1020 at 139 [JA976]. After considering those claims, the court declined to remove any of NLG's assets from the receivership estate and entered final judgment against the company. DE_1109 at 4 [JA1492].

B. Appellants' NLG Investments and Multiple Forgone Opportunities to Seek to Intervene in the *Sanctuary Belize* Litigation

Appellants were a mixture of corporate insiders and individuals with special access to the operators of the Sanctuary Belize scam, such

[1] The court entered default judgment against the other defaulting defendants. DE_1020 at 5 n.2 [JA842]; DE_1112 [JA1494].

as Pukke and Santos. They went into business with Pukke and his partners after admittedly conducting "due diligence" on him and his operations,[2] so they were—or should have been—well aware of Pukke's history of consumer scams and criminal skirting of the law. Appellant Heiman, for example, testified at trial that he knew of Pukke's criminal history and of the allegations of misconduct in marketing the Sanctuary Belize lots. Tr. (02/07/2020), at 113:1-117:25, 146:4-147:14. Other appellants admitted in sworn declarations that they personally met with Pukke or one of his Sanctuary Belize partners before deciding to invest in NLG.[3]

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[2] *See* DE_1317-2 ¶3 [JA1675-1677]; DE_1317-3 ¶3 [JA1680-1682]; DE_1317-5 ¶3 [JA1688-1690]; DE_1317-6 ¶3 [JA1693-1695]; DE_1317-7 ¶3 [JA1698-1700]; DE_1317-8 ¶3 [JA1703-1705]; DE_1317-9 ¶3 [JA1708-1710]; DE_1317-10 ¶3 [JA1713-1715]; DE_1317-12 ¶3 [JA1722-1724]; DE_1317-15 ¶3 [JA1732-1734]; DE_1317-20 ¶3 [JA1740-1742]; DE_1317-22 ¶3 [JA1749-1750]; DE_1317-24 ¶3 [JA1762-1764].

[3] *See* DE_1317-12 ¶3 (Yu Lin) [JA1722-1724]; DE_1317-15 ¶3 (Quan Lin) [JA1732-1734]; DE_1317-2 ¶3 (Jamie Teng) [JA1675-1677]; DE_1317-3 ¶3 (Julianna Tengciang) [JA1680-1682]; DE_1317-5 ¶3 (Jasmin Tengciang) [JA1688-1690]; DE_1317-7 ¶3 (Clarissa Tengciang) [JA1698-1700]; DE_1317-9 ¶3 (Mary Jane Prijoles) [JA1708-1710]; DE_1317-10 ¶3 (Allan Prijoles) [JA1713-1715]; DE_1317-8 ¶3 (Roel Pahl) [JA1703-1705]; DE_1317-6 ¶3 (Alfonso Kolb Jr.) [JA1693-1695].

Appellants had multiple opportunities to move to intervene in the proceedings below, yet each time they chose to not do so.

Shortly after the FTC filed its suit, the court-appointed receiver notified the parties that it had determined that NLG was properly considered a "Receivership Entity." DE_453-2 ¶10 [JA500]. Instead of seeking to intervene, the investors—now appellants—opted instead to sue NLG in California state court to recover their investments. *See* DE_1323-1 Att. 6 at 2-3 (appellants' California complaint, referencing the FTC enforcement action) [JA1914-1915]. That suit was dismissed for mootness after the NLG assets were formally placed in the receivership as described below. *See* DE_1323-1 Att. 8 (Minute Order of Orange County Superior Court) [JA1930]. Even then, appellants did not seek to intervene in the *Sanctuary Belize* litigation.

In May 2019, appellants had another opportunity to press their claims for return of their investments in NLG, and they again declined. Specifically, the receiver sought court approval to use the NLG funds to pay for general receivership expenses. *See* DE_453 (receiver's motion) [JA478]. The receiver served the motion on appellants through their counsel in the California lawsuit. DE_453-5 at 2 [JA532]. But even

though one of the appellants, Darren Christian, filed a declaration in opposition to the receiver's motion, DE_1323-1 Att. 2 [JA1825-1835]; *see* DE_485 (receiver's response) [JA544], neither he nor any other appellant sought to intervene in the case to protect their purported interests. The court granted the receiver's motion over Mr. Christian's objections, holding that "all funds turned over to the Receiver from bank accounts held in the name of NLG, in the sum of $3,757,345.09, may be used by the Receiver for all receivership purposes." DE_507 at 2 [JA556]. Appellants learned of this ruling, at the latest, in June 2019, when Bank of America filed a notice of the ruling in their California action. DE_1323-1 Att. 7 [JA1925-1929]. Still, appellants sought no intervention or relief in the district court.

Yet another opportunity arose at the district court's own initiative. Appellant Heiman testified at trial as a Sanctuary Belize lot owner. The court concluded that NLG was liable for the violations of law charged in the complaint, DE_1020 at 139 [JA976], but it delayed entering final judgment against NLG until it heard from the investors, to give them their "day in court." *Id.* at 141 [JA978]. Although some of the appellants sent informal objections to the inclusion of the NLG assets in the

receivership, *see* DE_1032 Att. 1-11 [JA1017-1041], appellants still did not seek to intervene. Their decision to sit things out, they suggested to the court, was made "[o]n advice of counsel" as part of the legal strategy in the state court case. DE_1109 (court decision on appellants' informal objections), at 4 [JA1492].

After considering appellants' informal objections, the district court ruled that all NLG assets would remain in the receivership because they "were all extensively commingled with NLG assets primed with [the common enterprise] assets; none were shown to be held in trust for the investors." DE_1109 at 4 [JA1492]. Even though the court took steps to ensure that the NLG investors received notice of its ruling, *see* DE_1115 (court memorandum notifying nonparties of its ruling) [JA1533], appellants still did not seek to intervene.

In February 2021, appellants had—and forwent—yet another chance to be heard. The FTC proposed a redress plan, DE_1117 Att. 1 [JA1553-1601], which set forth the parameters for distributing money to the Sanctuary Belize victims, including by using the receivership assets. Several consumers objected to the plan, arguing for changes that would be beneficial to their specific interests. *See, e.g.*, DE_1142 –

DE_1148. But even though the proposed plan would effectively extinguish appellants' investments in NLG, appellants remained silent.

C. Appellants' Untimely Motions and the Decision on Review

Fifteen months after the court's final decision on the merits, ten months after its ruling rejecting appellants' nonparty claims against the receivership, and long after the case was already on appeal to this Court, appellants moved to intervene as of right under Fed. R. Civ. P. 24(a)(2), DE_1316 [JA1631], and for relief from judgment under Fed. R. Civ. P. 55(c) and 60(b)(5), DE_1317 [JA1644]. As with the informal requests for relief, appellants sought to recover their NLG investments by setting aside both the court's merits decisions against NLG, DE_1020 [JA838] & DE_1109 [JA1489], and the court's 30-months old ruling permitting the receiver to use the NLG assets, DE_507 [JA555].

Appellants' purported basis for their requests was the Supreme Court's decision seven months earlier in *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021), which held that Section 13(b) of the FTC Act does not permit the award of equitable monetary relief. Section 13(b) was one of the statutory grounds for the FTC's *Sanctuary Belize*

claims, and appellants contended that it provided a reason to return their investment money.

In the order on review, the district court denied both motions. Op. 1 [JA2003]. The court held first that it lacked jurisdiction over the motions because the decisions they sought to challenge were on appeal. Op. 6-7 [JA2008-2009]. *See* DE_1218 (notice of appeal by defaulting defendants); DE_1280 (amending DE_1218 to include denial of NLG's motion for post-judgment relief) [JA1627]. The district court explained that "appeal 'divests a district court of jurisdiction to entertain an intervention motion'." Op. 6-7 [JA2008-2009] (quoting *Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014)).

The court held further that appellants failed to satisfy the Rule 24 conditions for intervention anyway. Op. 7-17 [JA2009-2019]. For one thing, the motion was untimely. The case "has progressed about as far as any case could," with trial concluding two years prior, final judgment rendered and already on review, and the funds that appellants sought to recoup already spent by the receiver. Op. 10 [JA2012]. Moreover, appellants "filed their Motion over six months after *AMG* came out,

another nail in the coffin for their timeliness argument." Op. 12 [JA2014].

The court also found that intervention would cause substantial prejudice. Op. 12-13 [JA2014-2015]. First, it would prejudice the FTC because new intervenor pleadings may be filed and discovery may be reopened—two years after trial. Op. 13 [JA2015]. Second, the Sanctuary Belize victims would be prejudiced because intervention would delay their redress and even eat away at their potential share of the receivership funds. *Id*.

The court rejected appellants' proffered reasons for their delay as "wholly inadequate excuses." Op. 13 [JA2015]. Appellants "had every opportunity to intervene sooner and understood that NLG, in which they had invested, was impacted by this case." *Id*. Nor can the *AMG* decision excuse their lack of action "for years prior." Op. 14 [JA2016]. The court found the *AMG* excuse particularly unavailing given that appellants "admit[ted] that they did not seek to intervene in this case because they believed it was more strategic to pursue the California litigation." Op. 14 [JA2016].

The district court also rejected appellants' purported interest in the *Sanctuary Belize* litigation. Op. 15-17 [JA2017-2019]. It noted that appellants' "beef is really with NLG, not [with] the FTC in its case against [the Sanctuary Belize common enterprise]." Op. 17 [JA2019]. While appellants, as "potential creditors of NLG," may have claims against NLG, the court ruled, that "does not give them the right to cut in line ahead of the victims of [the Sanctuary Belize common enterprise]." *Id*.

The court also denied appellants' Rule 60(b)(5) motion for relief from the final judgment. It held that appellants, having "not satisfied the grounds for intervention," were nonparties to this case, and thus could not challenge the court's judgments. Op. 17 [JA2019]. At any rate, the court was "unpersuaded" by appellants' arguments for relief. Op. 17 n.11 [JA2019]. *AMG*'s "change in the law subsequent to the issuance of a final judgment, especially, as here, where the earlier judgment is neither res judicata nor provides collateral estoppel, does not provide a sufficient basis for vacating the judgment under Rule 60(b)(5)." Op. 12 [JA2014] (quoting *Dowell v. State Farm Fire & Cas. Auto Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993)).

This appeal followed.

STANDARD OF REVIEW

This Court "review[s] legal conclusions regarding jurisdiction de novo and factual findings for clear error." *World Fuel Servs. Trading, DMCC v. Hebei Prince Shipping Co.*, 783 F.3d 507, 512 (4th Cir. 2015); *accord Flame S.A. v. Freight Bulk Pte. Ltd.*, 762 F.3d 352, 356 (4th Cir. 2014).

A district court's ruling on a motion for intervention is reviewed for abuse of discretion. *Stuart v. Huff*, 706 F.3d 345, 349 (4th Cir. 2013); *accord In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991). Likewise, a ruling on a motion for relief under Fed. R. Civ. P. 60(b)(5) is reviewed for abuse of discretion. *United States v. Welsh*, 879 F.3d 530, 533 (4th Cir. 2018); *accord L.J. v. Wilbon*, 633 F.3d 297, 304 (4th Cir. 2011).

SUMMARY OF ARGUMENT

The district court properly denied appellants' motions for intervention and for judgment relief on multiple grounds. The facts underlying the court's decision are undisputed, and appellants' arguments on appeal are meritless.

1. The district court properly held that it lacked jurisdiction to consider appellants' motions because the judgment from which they

sought relief was already on review in this Court. Appellants are wrong that they sought to challenge rulings that were not appealed. The notices of appeal from the court's final decision included "all prior related and subsumed orders," which include those rulings relied on by appellants. Even if that were not the case, the rule of appellate procedure is that an appeal of a final decision necessarily includes all related subsidiary rulings. The district court's want of jurisdiction suffices by itself to dispose of this entire case.

2.a. Even assuming *arguendo* that the court had jurisdiction to rule on the motions, the court rightly exercised its wide discretion to deny on the merits appellants' motion for intervention. The motion was grossly untimely—coming two years after trial ended and months after appeal of the final decision. Appellants have no excuse for the delay and concededly forwent earlier opportunities to intervene in order to bolster their position in other litigation. Only after their gamble failed to pay off did they attempt to become parties to this proceeding, but having slept on their rights it is now too late.

Besides, intervention at this late hour would have prejudiced both the FTC, by leading to yet more litigation, and the victims of defendants' scam, by delaying and potentially reducing their redress.

b. The district court correctly held that appellants did not show a cognizable interest in the subject of this litigation. Their only interest is that they invested in NLG. Their claims of fraud and breach of contract against NLG are not related to the substance of the *Sanctuary Belize* litigation, but make them at most potential creditors of NLG. In directly analogous circumstances, this Court made clear in *Gould v. Alleco, Inc.*, 883 F.2d 281 (4th Cir. 1989), that such an interest is insufficient to support intervention under Rule 24(a).

Appellants also failed to show that no existing party in the litigation can adequately represent their interests. NLG sought the same objective as appellants—release of NLG's assets from the receivership—and advanced the same *AMG* argument for doing so.

3. Under Rule 60(b)(5), only parties to a case may seek relief from judgment. Appellants, having failed to intervene, are not parties and therefore do not qualify for Rule 60(b) relief. The district court thus correctly denied their Rule 60(b) motion.

Appellants' relief arguments fail on the merits anyway. *AMG* does not affect the judgment against NLG. By defaulting, NLG has admitted liability and its appeal is limited to whether the district court properly entered the default judgment accordingly. That *AMG* has reversed circuit precedent supporting that monetary judgment does not make upholding that judgment—a present remedy for a past wrong, without prospective effects—inequitable.

ARGUMENT

I. THE DISTRICT COURT LACKED JURISDICTION TO RULE ON APPELLANTS' MOTIONS

As a threshold matter that is dispositive of this appeal, the district court correctly held that it lacked jurisdiction to consider either of the appellants' motions. The decisions that appellants sought to challenge upon intervention were already on review before this Court, thus depriving the lower court of power over them.

"The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *accord Doe v. Public Citizen*, 749 F.3d 246, 258 (4th Cir. 2014).

The divestiture of jurisdiction extends to a district court's consideration of a motion for intervention as of right. As this Court repeatedly has held, "an effective notice of appeal deprives a district court of authority to entertain a motion to intervene after the court of appeals has assumed jurisdiction over the underlying matter." *Doe v. Public Citizen*, 749 F.3d at 258; *accord Cawthorn v. Amalfi*, 35 F.4th 245, 254 (4th Cir. 2022); *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 14 F.4th 322, 326 (4th Cir. 2021). All other courts of appeals that have considered the issue agree.[4]

It is undisputed that appellants' motion to intervene (and their derivative motion for post-judgment relief) were filed while the final judgments were on appeal before this Court. Both motions were filed on November 12, 2021. *See* DE_1316 [JA1631]; DE_1317 [JA1644]. The notice of appeal that pertains to NLG's final judgment, DE_1280 [JA1627],[5] was filed on August 27, 2021—10 weeks earlier. The district

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[4] *See, e.g.*, *Taylor v. KeyCorp*, 680 F.3d 609, 617 (6th Cir. 2012); *Drywall Tapers & Pointers of Greater New York, Local Union 1974 of I.U.P.A.T. v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 94–95 (2d Cir. 2007); *Roe v. Town of Highland*, 909 F.2d 1097, 1100 (7th Cir. 1990); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299 (5th Cir. 1984).

[5] NLG was not named in the original notices of appeal from the court's final judgment as to the defaulting defendants (DE_1112) [JA1494], of

court therefore lacked jurisdiction to consider appellants' motions. The Court should affirm on that ground alone.

Appellants' arguments to the contrary (Br. 21-24) are unavailing. Appellants do not dispute that they filed their motions after the defaulting defendants, including NLG, noticed appeals of the default judgments, and they do not challenge the binding principle that district courts lack jurisdiction over orders on appeal. Their sole argument is that they sought intervention to challenge rulings that were not on appeal, leaving the district court with jurisdiction over their motion. They refer specifically to "the district court's order permitting the receiver to take over the NLG Account," Br. 22 (citing DE_507 [JA555]); and both "Part C of the district court's Memorandum Opinion #2"—which "reiterates the court's denial of their requests for the return of their investments"—and the court's "informal order directed at them

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which NLG was one. *See* DE_1218 & DE_1219 (filed on May 14, 2021). NLG was named, however, in an "Amended Notice of Appeal," DE_1280 [JA1627], that added to the list of appealed decisions in DE_1218 & DE_1219 the district court's denial of the motion of several defendants, including NLG, for relief from their default judgment (DE_1278 [JA1624] & DE_1279 [JA1626]).

that incorporates Memorandum Opinion #2," Br. 23 n.3 (citing DE_1109 [JA1489] & 1115 [JA1533]).

The claim fails at the starting gate because appellants' motions list the court's final decision on the merits, DE_1020 [JA838], as the *principal* decision that they purportedly sought to challenge. *See* DE_1316 (motion for intervention), at 1-2 ¶2 [JA1631-1632]; DE_1317 (motion for relief from judgment), at 1 [JA1644]. That decision was unquestionably on appeal at the time of their motions. *See* DE_1197, 1200, 1208, 1210 (notices of appeal of DE_1020).

Even if appellants sought to challenge only the subsidiary rulings on which they now rely, those rulings were on appeal too. For one thing, the "Amended Notice of Appeal," DE_1280 [JA1627], which included NLG, incorporated by reference the original notice of appeal of the default judgment, DE_1218. That original notice listed as the subjects of appeal both the default judgment itself and "all prior related and subsumed orders," *id.*, which necessarily included the subsidiary rulings that appellants now cite, i.e. the court's decision to permit the receiver to use NLG's assets, DE_507 [JA555], and the court's later decision to deny relief from that original decision, DE_1109 [JA1489].

The last cited subsidiary ruling, DE_1115 [JA1533], was merely an informal transmittal of the court's Memorandum Opinion #2 (DE_1109) [JA1489], and contained no substantive rulings.

However the notice of appeal is interpreted, appellants still would be precluded from intervention while the final judgment is on review. The "general rule" of appellate procedure is that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, *in which claims of district court error at any stage of the litigation may be ventilated*." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (emphasis added). This approach guards against piecemeal appeals and serves as a corollary of the "final decisions" requirement of 28 U.S.C. § 1291. The pending appeal therefore incorporates all prior court rulings relevant to the final judgment, including the rulings appellants sought to challenge in district court.

The rule prohibiting district courts from exercising jurisdiction over orders on appeal "fosters judicial economy and guards against the confusion and inefficiency that would result if two courts simultaneously were considering the same issues." *Doe v. Public Citizen*, 749 F.3d at 258 (citing 20 James Wm. Moore *et al.*, MOORE'S

FEDERAL PRACTICE § 3902.1 (3d ed. 2010)). Had the court allowed appellants to intervene and entertained their motion for relief, the district court might have undone its NLG receivership orders or the default judgment at the same time that this Court affirmed those very orders. Avoiding such outcomes is precisely why intervention is not allowed in the situation here.

Finally, appellants seem to cast doubt on the validity of NLG's appeal. Br. 23. If they are right, that only would doom their argument. "Intervention is ancillary and subordinate to a main cause and whenever an action is terminated, for whatever reason, there no longer remains an action in which there can be intervention." *Black v. Central Motor Lines, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974). In other words, if NLG has not in fact appealed, or has abandoned its appeal, then its case ended long before appellants filed their motions, and there would be "no pending litigation in which [appellants] could intervene." *Houston General Ins. Co. v. Moore*, 193 F.3d 838, 840 (4th Cir. 1999); *see Black*, 500 F.2d at 408 (intervention motion filed after time for appeal of judgment ran out is untimely).

II. EVEN IF THE DISTRICT COURT HAD JURISDICTION, IT ACTED WITHIN ITS DISCRETION IN DENYING APPELLANTS' MOTION TO INTERVENE

A motion for intervention as of right must be "timely," and it must claim "an interest [in] the subject of the action" that would be "impair[ed] or imped[ed]" without intervention, and that the "existing parties" cannot "adequately represent." Fed. R. Civ. P. 24(a)(2). *See Berger v. North Carolina State Conf. of the NAACP*, 142 S. Ct. 2191, 2200-01 (2022); *Stuart v. Huff*, 706 F.3d at 349. The district court properly held in the alternative that appellants' motion failed to meet these conditions.

A. Appellants' Motion Was Untimely

A motion's "timeliness is a 'cardinal consideration' of whether to permit intervention." *Houston Gen. Ins. Co. v. Moore*, 193 F.3d at 839. "The determination of timeliness," moreover, is committed to the "wide" discretion of the district court. *Alt v. EPA*, 758 F.3d 588, 591 (4th Cir. 2014) (citing *Gould v. Alleco, Inc.*, 883 F.2d 281, 286 (4th Cir. 1989)). To properly reach that determination, "a trial court in this Circuit is obliged to assess three factors: first, how far the underlying suit has progressed; second, the prejudice any resulting delay might cause the

other parties; and third, why the movant was tardy in filing its motion." *Id.* (citing *Gould*, 883 F.2d at 286).

The district court found that all of those factors weighed heavily against intervention, and appellants offer nothing to show that the court abused its wide discretion. *See* Op. 8-15 [JA2010-2017]. The attempt to intervene came two years after trial concluded and months after final judgment was appealed. By that point, the receiver had spent any funds potentially traceable to NLG on receivership expenses.[6] During that entire time, appellants knew that their interests were at stake, yet they deliberately sat on the sidelines. Moreover, to allow appellants to intervene so late in the proceeding would have prejudiced both the FTC and the victims of the Sanctuary Belize scam. The FTC would have faced yet more litigation, and the victims' potential redress

[6] In August 2021, the receiver reported to the court that there was approximately $3.8 million left in the receivership. DE_1271-1 at 19. In 2019, the FTC had transferred $4.12 million (the proceeds of a settlement with another defendant) to the receiver. DE_559 § V [JA561]. That money was to be used to manage the receivership estate, *but only after* the receiver "exhausts" all other assets. DE_559 § V.B [JA561]. Because the receiver had less than $4 million remaining in August 2021, all the funds in the receivership necessarily came from the settlement money, meaning that any money theoretically traceable to NLG had been spent.

would have been delayed and possibly reduced as the receiver spent even more money on managing the receivership estate. Op. 12-13 [JA2014-2015].

Appellants' proffered excuses for their delay were "wholly inadequate." Op. 13 [JA2015]. As detailed above, appellants could have sought to intervene at many earlier points in the case without causing prejudice. Every time, however, they opted to forgo intervention to pursue their strategically preferred avenue of relief. Only after every other stratagem had failed did they file their intervention motion. The district court's unwillingness to reward appellants' tactics, and its lack of sympathy for their "deliberate forbearance" in intervening is both "understandabl[e]" and well within a court's discretion to consider. *Alt*, 758 F.3d at 591; *see Moten v. Bricklayers, Masons & Plasterers, Int'l Union of Am.*, 543 F.2d 224, 228 (D.C. Cir. 1976) (motion to intervene untimely where decision to forgo earlier intervention was tactical choice).

Appellants' attempts to excuse their tardiness are meritless. *First*, they assert that they "sought to intervene precisely to seek relief on grounds that the district court invited in its final judgment." Br. 27. The

claim fails at the outset because nothing that the district court said when it entered final judgment could excuse "lack of action for years prior." Op. 14 [JA2016]. More fundamentally, the court did not invite intervention. The court stated that it would, if necessary, recalculate the monetary remedy in the event of a remand by this Court in light of *AMG* and *Liu v. SEC*, 140 S. Ct. 1936 (2020). DE_1020 at 28 n.20 [JA865]. The court said nothing about intervention. To the degree appellants wished to raise *AMG*, they offer no explanation for their having waited seven months after that decision to seek intervention—"another nail in the coffin for their timeliness argument," Op. 12 [JA2014]—especially since the district court already had signaled its "belie[f]" that *AMG* will not change the calculus of redress. DE_1020 at 28 n.20 [JA865]. As the district court observed, appellants' claim of reliance on *AMG* does not square with their admission to the court that "they did not seek to intervene in this case because they believed it was more strategic to pursue the California litigation." DE_1352, at 14 [JA2016]. Appellants simply "gambled and lost." *Alt*, 758 F.3d at 591.

Second, appellants are simply wrong that their intervention would cause no prejudice because "the worst that could happen is that

innocent investors recoup funds that should never have been seized from them." Br. 29. Appellants ignore the potential for substantial additional litigation, which would prejudice both the FTC by draining its resources and the victims of the Sanctuary Belize scam by delaying and possibly reducing consumer redress. The claim that such harms will not occur because appellants' "entitlement to the return of their funds is a question of law," and no additional litigation would be needed, Br. 30, is untrue. Appellants invoked two theories for recovery of their invested NLG funds: constructive trust and breach of contract. *See* DE_1317-27 at 5-10 [JA1774-1779]. Both involve numerous factual determinations such as whether appellants' funds are traceable to the receivership estate, whether NLG obtained those funds by "fraud, accident, mistake, undue influence or other wrongful act," DE_1317-27 at 5 [JA1774] (appellants' motion for relief memorandum, citing California law requirements for constructive trust claim), whether a contract existed between appellants and NLG, whether a breach took place, and what the proper remedy would be. Indeed, in their motion for relief from judgment, appellants themselves "request[ed] a hearing to settle any factual disputes." DE_1317 at 15 [JA1658].

Third, the feebleness of appellants' motion is only highlighted by their argument that they "*did* pipe up at least three times prior to their intervention motion," but "were denied relief." Br. 29. The argument demonstrates that appellants were well aware for years that this case would affect NLG, but they deliberately chose not to move to intervene, instead pursuing their interests elsewhere.[7] That their repeated attempts to get money from NLG have been fruitless is no reason to allow them to intervene so late in the game to again seek the same relief. Having "gambled and lost in the execution of [their] litigation strategy," appellants' "deliberate forbearance understandably engenders little sympathy." *Alt*, 758 F.3d at 591.

Fourth, there is no substance to appellants' claim that they failed to intervene earlier because they lacked counsel. Br. 30. Even if lacking counsel could somehow excuse their delay, appellants represented to the district court the exact opposite: that their prior non-intervention

[7] Appellants are wrong in claiming that their intervention motion was timely because their California lawsuit was filed before NLG was a defendant in *Sanctuary Belize*. Br. 29 n.6. Appellants sued in state court *three years* before trying to intervene. Moreover, at the time of filing their state action, the receiver had already claimed that NLG belonged in the receivership. DE_453-2 ¶10 [JA500].

was "[o]n advice of counsel." DE_1109 (court decision on informal objections to NLG decision), at 4 [JA1492]; *see* DE_1032 Att. 1-11 (informal objections) [JA1017-1041].

Finally, although appellants attempt to blame the district court for their dereliction, they have made no such showing. They claim that it was "unfair" for the court to deny their intervention motion when the court had solicited appellant Heiman's motion for relief, *see* DE_1020 at 141 [JA978], "with no mention that Heiman might first need to file a motion to intervene." Br. 31 n.7. It was not up to the district court to act as appellants' lawyer, and nothing the court did could excuse the untimeliness of their intervention motion. Moreover, the district court did not deny relief to Heiman and the other nonparty objectors simply because they had not formally intervened; the court considered, and rejected, their arguments on the merits—even though the objectors presented those arguments informally and not, as the court requested, by motion for relief. DE_1109 at 4 [JA1492]. Nor could the court's actions toward Heiman explain the failure by the *other* appellants to seek intervention.

B. Appellants Have No Cognizable Interest in the Subject of the *Sanctuary Belize* Litigation and Their Asserted Interest Has Been Adequately Represented by NLG

Appellants' untimely motion also failed to demonstrate that they met the "interest" requirements of Rule 24(a)(2)—i.e. that they have an interest in the subject of the *Sanctuary Belize* litigation that would be impaired or impeded without their intervention and that no other party already in the litigation can adequately represent. *See In re Sierra Club*, 945 F.2d at 779 ("A party seeking intervention of right must show 'interest, impairment of interest, and inadequate representation'.") (quoting *Gould*, 883 F.2d at 284). *See generally* 7C C. Wright, A. Miller, & M. Kane, FEDERAL PRACTICE AND PROCEDURE §§ 1908-1909 (3d ed. Supp. 2022) ("*Wright & Miller*"). They have neither a cognizable interest, nor have they shown that NLG cannot protect their asserted interest.

1. Appellants have no cognizable interest in the Subject of the *Sanctuary Belize* litigation

Appellants claim an interest in $1.95 million that they invested in NLG, Br. 32, the assets of which became part of the receivership estate, DE_507 [JA555]. That money, according to appellants, was meant for a

land development in Costa Rica (the Rancho Del Mar project)—not for Sanctuary Belize. Br. 4-5; *see* DE_1323-1 Att. 6 (appellants' state action complaint), at 2-3 [JA1914-1915]. Appellants' claimed interest in this litigation is that they fear that depletion of NLG's funds in this case will leave nothing for *their claims against NLG*. *See id*. at 6-10 [JA1918-1922] (appellants' state claims for breach of contract and constructive trust against NLG).

Under binding precedent, such an interest is insufficient under Rule 24(a)(2). In *Gould v. Alleco, Inc.*, 883 F.2d 281 (4th Cir. 1989), this Court rejected a claim directly analogous to appellants' claim here. In *Gould*, corporate bondholders sought to intervene in a securities fraud class action against the corporation, claiming that a proposed class settlement would leave nothing for them to recover in their own lawsuit against the corporation. *Id*. at 283. Just like appellants' claim of a superior interest in NLG's assets as the supposed beneficiaries of a constructive trust, *see* Br. 33, the *Gould* bondholders asserted that they "have a superior interest in [the corporation's assets] to that of the [class members]." *Id*. at 285. Also like appellants here, the *Gould* bondholders claimed that "they have potential judgment claims against

[the corporation], full payment of which would be impaired if the [] settlement is permitted to proceed." *Id*. The Court rejected those asserted interests as insufficient to "satisfy Rule 24's requirement that the claim be 'relating to the property or transaction which is the subject of the action'." *Id*. "In a sense," reasoned the Court, "every company's stockholders, bondholders, directors and employees have a stake in the outcome of any litigation involving the company, but this alone is insufficient to imbue them with the degree of 'interest' required for Rule 24(a) intervention." *Id*. "To hold otherwise would create an open invitation for virtually any creditor of a defendant to intervene in a lawsuit where damages might be awarded." *United States v. Alisal Water Corp.*, 370 F.3d 915, 920 (9th Cir. 2004) (citing *Public Serv. Comp. of New Hampshire v. Patch*, 136 F.3d 197, 205 (1st Cir. 1998)).

Gould's holding and reasoning apply foursquare here. Appellants' claims to their investments in NLG, whether based on a breach of contract or constructive trust, have yet to be adjudicated, which renders them, at most, "potential creditors of NLG" who are ineligible to intervene under *Gould*. Op. 17 [JA2019]. Their interest in a potential judgment against NLG, like the *Gould* bondholders' interest, cannot

alone satisfy Rule 24's "interest" requirement. The district court thus correctly rejected their purported interest in the *Sanctuary Belize* litigation. Op. 15-17 [JA2017-2019].

Appellants misplace their reliance on *Teague v. Bakker*, 931 F.2d 259 (4th Cir. 1991), which they mischaracterize (Br. 32-34) as establishing that "all that Rule 24 requires is that a proposed intervenor 'stand to gain or lose' something on account of the intervention." Br. 32 (quoting *Teague*, 931 F.2d at 261). For one thing, that proposition cannot be squared with the rule set forth in *Gould*, which is not surprising because *Teague* held no such thing. There, class action plaintiffs sought to intervene on behalf of the class in a declaratory action filed by an insurer against three specific class members to determine the coverage of the insurer's policy. 931 F.2d at 261. The declaratory suit defendants had limited means to defend the case, and thousands of others who would be affected were not named. The Court allowed the other class members to intervene after recognizing that the insurer was attempting to cut off the rights of class action plaintiffs with claims on the very policy at issue in the suit. It held that persons who "stand to gain or lose *by the direct legal operation*

of the district court's judgment on [the insurer's] complaint," should be permitted to intervene. *Id.* (emphasis added).

Appellants are nothing like the class members in *Teague*. Their claims against NLG will not be adjudicated by "the direct legal operation" of the *Sanctuary Belize* matter the way the *Teague* intervenors' claims were. In *Teague*, the declaratory insurance dispute *centered* on whether the insurer would make payments to benefit the proposed intervenors. There is no such direct nexus here because this case concerns the deceptive sale of lots in Sanctuary Belize by defendants, including NLG. The case does not concern whether NLG defrauded or breached an agreement regarding the Costa Rica development with the appellants/investors.

Likewise significant, the insurer in *Teague* did not sue the class members as a tactic to increase the odds of a favorable ruling, *see* 931 F.2d at 261 n.3; similarly, appellants here repeatedly *declined* to move to intervene as a strategic decision and filed their motion only after all their other plans had failed. In both cases, courts declined to reward untoward tactics.

Appellants also argue that they are not mere "potential creditors" because their claims against NLG were based on a constructive trust theory. Br. 33-34. But that is beside the point. Whatever the theory of recovery, appellants' claims have yet to be adjudicated. All they can claim now is that one day they may secure a judgment against NLG—the very definition of "potential creditor." Indeed, as explained above, so far as their constructive trust claim is concerned, appellants are unlikely to succeed in tracing their investment monies to any existing receivership funds.

Finally, appellants are mistaken that "the relationship between the Costa Rica project and the Belize litigation was a primary reason that [their] funds were subjected to the receivership." Br. 32. The court placed NLG's assets in the receivership because it found that NLG was part of the Sanctuary Belize common enterprise. That some of those assets may have related to appellants' purported investments in Costa Rica had nothing to do with why the court placed NLG under the receiver's control. Even if appellants had claims against those assets, such claims would render them, at most, "potential creditors" of NLG without a cognizable "interest" in the *Sanctuary Belize* litigation.

2. Appellants cannot show "inadequate representation" of their asserted interest

Even if appellants' asserted interest were cognizable, their intervention still would be inappropriate because they could not show that no party in this case can adequately represent that interest. *See In re Sierra Club*, 945 F.2d at 779 (proposed intervenor of right "must show … inadequate representation."); 7C *Wright & Miller* § 1909 ("The adequacy of the representation of the absentee by the existing parties has been an important factor in intervention of right under Rule 24(a) since the rule was first adopted in 1938.").

NLG itself is a party in this litigation, and it has filed a notice of appeal from the final judgment against it. DE_1280 [JA1627]. Its interest in extricating its assets from under the receiver's control is coterminous with appellants' asserted interest in releasing those same assets from the receivership to use them to recover their investments. Moreover, appellants' sole basis for relief from the NLG default judgment—that *AMG* mandates reversal of NLG's monetary judgment and associated receivership rulings, *see* DE_1317 at 13-15 [JA1656-1658]—is a principal argument in the consolidated appeals from the final judgments, *see* Brief of Appellants, No. 20-2215 (L) *et al*. (Dec. 16,

2021), at 18-21; Reply Brief of Appellants, No. 2215 (L) *et al*. (Dec. 22, 2021), at 18-25, 32-35. Appellants thus share not only the same objective as NLG but also advocate the same means of achieving that objective. Where "the interest of the absentee is identical with that of one of the existing parties … representation will be presumed adequate unless special circumstances are shown." 7C *Wright & Miller* § 1909; *see, e.g.*, *Aluminum Co. of America v. Utilities Comm'n of North Carolina*, 713 F.2d 1024, 1025 n.1 (4th Cir. 1983) (where the interests of movants and existing plaintiffs coincided and plaintiffs adequately represented those interests, no abuse of discretion in denying motion to intervene).

Despite carrying the burden of explaining why NLG cannot adequately represent their asserted interest in this case, appellants did not address the issue in their brief.[8] Nor could they meet that burden. Before the district court, they argued that this litigation concerned

[8] The district court did not address the "inadequate representation" prong of appellants' motion to intervene, but their failure to meet that requirement is an independent basis for this Court's upholding the denial of that motion. *See Greenhouse v. MCG Cap. Corp.*, 392 F.3d 650, 660 (4th Cir. 2004) (court of appeals may affirm district court decision on any ground supported by the record, even if not relied upon by district court).

Sanctuary Belize whereas they "seek to recover funds they invested for the purpose of developing real estate in *Costa Rica*." DE_1316-1 at 8 [JA1641]. They did not explain how that statement shows "inadequate representation," when the parties in the consolidated appeals are seeking to overturn the money judgment against NLG and the other defaulting defendants and unwind the receivership.[9] Whatever the NLG funds were originally intended for has no bearing on those efforts.

Appellants also argued before the district court that "NLG was a defaulted defendant and thus could not possibly have represented" their interests. DE_1316-1, at 8 [JA1641]. But NLG *is* a party to these proceedings and had sought Rule 60(b)(5) relief based on *AMG* months before appellants' motion to intervene. *See* DE_1267 [JA1622-1623] (defaulting defendants', including NLG, motion for judgment relief, dated July 22, 2021); DE_1278 [JA1624-1625] (court's denial of relief). Appellants did not—and cannot—explain why NLG's efforts to protect its interest in overturning the default judgment against it and releasing

[9] If anything, appellants' statement—that they "seek to recover funds they invested for the purpose of developing real estate in *Costa Rica*"—is a clear concession that they do not have a Rule 24(a) "interest" in this case and thus may not intervene.

all its assets from the receivership would be inadequate to also protect their asserted interest in releasing those funds so they can be available for their claims against NLG.

III. EVEN IF THE DISTRICT COURT HAD JURISDICTION, IT PROPERLY EXERCISED ITS DISCRETION IN DENYING APPELLANTS' MOTION FOR JUDGMENT RELIEF

The district court correctly denied appellants' motion for relief pursuant to Fed. R. Civ. P. 60(b) on the ground that because appellants had no right to intervene, they were nonparties without any right to seek relief under that rule. Op. 17 [JA2019]. The rule expressly provides that "the court may relieve *a party or its legal representative* from a final judgment, order, or proceeding" for one of the reasons enumerated in the rule. Fed. R. Civ. P. 60(b) (emphasis added). The district court's denial of intervention rendered appellants nonparties without standing to seek Rule 60(b) relief. *See Houston General Ins. Co.*, 193 F.3d at 839 (denial of intervention moots derivative motion to vacate underlying judgment); *Richmond v. First Woman's Bank*, 104 F.3d 654, 655 (4th Cir. 1997) (denial of intervention renders proposed intervenors without standing to seek reconsideration of underlying ruling); *Gould*, 883 F.2d at 284 (denial of intervention "completely dispositive" of proposed

intervenors' request for relief). That is sufficient to affirm the district court's denial of appellants' motion for relief.

Appellants assert, however, that the district court "alternatively denied relief on the merits." Br. 35. To be sure, the court noted in a passing footnote that "[t]he Court is unpersuaded" by the arguments on the merits. Op. 17 n.11 [JA2019]. But that does not give appellants standing to obtain relief accorded only to parties.

In any event, appellants could not succeed on the merits of their arguments. Rule 60(b)(5) "provides a means by which a party can ask a court to modify or vacate a judgment or order if 'a significant change either in factual conditions or in law' renders continued enforcement 'detrimental to the public interest'." *Horne v. Flores*, 557 U.S. 433, 447 (2009) (quoting *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992)). "The party seeking relief bears the burden of establishing that changed circumstances warrant relief." *Id.*

First, appellants erroneously contend (Br. 35-36) that they were entitled to relief under the second clause of Rule 60(b)(5), which applies when a judgment "is based on an earlier judgment that has been reversed or vacated." Fed. R. Civ. P. 60(b)(5). Their claim is that the

court's decision to deny their request to "unfreeze NLG's assets and return their investments in full" was based "on the now-reversed judgment of the Fourth Circuit in *FTC v. Ross*, 743 F.3d 886 (4th Cir. 2014)." Br. 36. In fact, the second clause of Rule 60(b)(5) "is limited to cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion." 11 *Wright & Miller* § 2863. It "does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed." *Id.* This Court repeatedly has held that "[a] decisional change in the law subsequent to the issuance of a final judgment … does not provide a sufficient basis for vacating the judgment under Rule 60(b)(5)." *Dowell v. State Farm Fire & Cas. Auto Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993); *accord Schwartz v. United States*, 976 F.2d 213, 217 (4th Cir. 1992) (that the underlying convictions had been reversed did not require setting aside the judgment entered pursuant to a settlement agreement resolving forfeiture claims); *Werner v. Carbo*, 731 F.2d 204, 209 (4th Cir. 1984) (second clause of Rule 60(b)(5) only applies where liability

"was wholly derivative of, coexistent with, and limited by the judgment" that had been vacated).[10]

Appellants also assert (Br. 37) that they were entitled to relief under the third clause of Rule 60(b)(5)—for relief from judgment because "applying it prospectively is no longer equitable." Fed. R. Civ. P. 60(b)(5). They claim that it was inequitable for the district court to deny them relief "because it pledged that, if the Supreme Court overturned *Ross*, it would 'determine the amount Defendants are liable for on remand'." Br. 37 (quoting DE_1020 at 28 n.20 [JA865]). As discussed above in connection with appellants' timeliness argument, the district court merely noted that if *this* Court concluded that *AMG* requires a recalculation of the monetary equitable redress in this case, the district court would do that, "on remand." DE_1020 at 28 n.20 [JA865]. This Court has yet to rule on the consolidated appeals from the

[10] The other courts of appeals confronting the same question agree. *See, e.g.*, *Comfort v. Lynn School Committee*, 560 F.3d 22, 27 (1st Cir. 2009) ("emergence of controlling precedent *in some other case* that shows the incorrectness of the prior judgment is not sufficient" for Rule 60(b)(5) relief); *In re Fine Paper Antitrust Litig.*, 840 F.2d 188 (3d Cir. 1988) (final money judgment may not be reopened after time for appeal has expired because of favorable legal ruling in another party's appeal).

final judgment in this case, including the impact, if any, of *AMG*. At this point, invocation of the equity clause is, at best, premature.

Finally, appellants mistakenly argue—also under the "equitable" clause of Rule 60(b)(5)—that *AMG* constitutes a significant change in the law that renders it inequitable to deny them relief. Br. 38. As a threshold matter, appellants' request for relief on that basis—filed seven months after *AMG*—is untimely. *See SEC v. Bronson*, No. 22-1045, 2022 WL 5237474, *2 (2nd Cir. Oct. 6, 2022) (rejecting as untimely Rule 60(b)(5) motion for relief, based in part on *AMG*, filed at the same time as appellants' motion). Moreover, as the FTC argued in the consolidated appeals from the final judgments, *see* Brief of the Federal Trade Commission, No. 20-2215 (L) *et al*. (Dec. 10, 2021), at 26-28, *AMG* does not affect NLG's default judgment, and thus cannot be the basis for relief for appellants.

NLG defaulted below, *see* DE_1112 at 1-2 [JA1494-1495], so the pending appeal is strictly limited to "whether [the district court] abused its discretion in granting a default judgment in the first instance." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 128 (2d Cir.

2011); *accord Gulf Coast Fans, Inc. v. Midwest Elecs. Imps., Inc.*, 740 F.2d 1499, 1507 (11th Cir. 1984).

Appellants are also mistaken in arguing that, in light of *AMG*, upholding the NLG judgment would be inequitable. Only judgments with a "prospective effect" qualify for relief under the "equitable" clause of Rule 60(b)(5); a monetary judgment like the one against NLG—"a present remedy for a past wrong"—does not qualify. *Calif. ex rel Becerra v. EPA*, 978 F.3d 708, 717 (9th Cir. 2020). That clause is inapplicable when "the order" that appellants seek to challenge is without "anything left to do under [it]" and thus "has no prospective application." *Schwartz*, 976 F.2d at 218. Indeed, "[m]ost courts have agreed that a money judgment does not have prospective application, and that relief from a final money judgment is therefore not available under the equitable leg of Rule 60(b)(5)." *Stokors S.A. v. Morrison*, 147 F.3d 759, 762 (8th Cir. 1998).

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Respectfully submitted,[11]

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[11] The court-appointed receiver, Marc-Philip Ferzan of Ankura Consulting Group, LLC, has reviewed this brief, and joins in the arguments advanced herein.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would aid the Court in resolving the issues raised in this appeal.

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 8,919 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I certify further that it complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5)-(6) because it was prepared using Microsoft Word 2010 in 14 point Century Schoolbook.

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