17-669

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

JOSEPH K. RENSIN,
Defendant-Appellant,

BLUEHIPPO FUNDING, LLC, BLUEHIPPO CAPITAL, LLC,
Defendants

On appeal from the United States District Court for the Southern District of New York, No. 1:08-cv-1819-PAC

FINAL FORM BRIEF FOR FEDERAL TRADE COMMISSION

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QUESTION PRESENTED

Rensin was held in contempt for violating a prior judgment and ordered to pay compensatory sanctions. When he failed to pay, the FTC sought to have him held in contempt yet again. In the midst of the second contempt proceeding, Rensin filed a bankruptcy petition.

The question presented is whether the Bankruptcy Code's automatic stay provision prevents the district court from proceeding on the contempt motion.

INTRODUCTION

BlueHippo, a company controlled by appellant Joseph Rensin, entered into a consent order in 2008 that prohibited it from deceiving consumers in the sale of computer equipment. Rensin and his company later violated the consent order. The district court held Rensin in contempt and, in April 2016, ordered him to pay $13.4 million to compensate the tens of thousands of consumers injured by his deceptive practices. When Rensin failed to pay any of that sanction (yet continued to spend lavishly on himself), the Federal Trade Commission asked the district court to hold him in contempt yet again—and this time to incarcerate him until he complies.

Two days before Rensin was required to respond to a post-hearing brief spelling out the evidence against him—and in the wake of a contempt hearing at which the district court expressed doubt about his excuses—Rensin filed a petition for voluntary bankruptcy. He then claimed that the automatic stay under the

Bankruptcy Code, 11 U.S.C. § 362(a), prevented the district court from considering the matter any further.

In the order on review, the district court rejected Rensin's attempt to evade all scrutiny of his pre-bankruptcy order violations. It ruled that this contempt proceeding is a government regulatory action excepted from the automatic stay under 11 U.S.C. § 362(b)(4). In a subsequent ruling, the court also made clear that it would decide only whether Rensin should be held in contempt but would take no steps toward requiring compliance with any contempt judgment for the duration of the bankruptcy proceeding.

JURISDICTION

The FTC filed the underlying action in the United States District Court for the Southern District of New York seeking relief for violations of Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45. The district court's jurisdiction over this matter derives from 28 U.S.C. §§ 1331, 1337(a), and 1345, and 15 U.S.C. §§ 53(b) and 57b. The district court has inherent authority to enforce its judgment through contempt, *In re Weiss*, 703 F.2d 653, 660 (2d Cir. 1983), and jurisdiction to determine the applicability of the bankruptcy automatic stay to the proceeding pending before it, *SEC v. Brennan*, 230 F.3d 65, 82 (2d Cir. 2000).

On March 6, 2017, the district court issued the order on review ruling that Rensin's filing of a bankruptcy petition does not stay the present contempt

proceeding. On March 7, 2017, Rensin filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. § 1291. *See In re Sonnax Indus., Inc.*, 907 F.2d 1280 (2d Cir. 1990).

STATEMENT OF THE CASE

A. The FTC's Law Enforcement Action and Initial Contempt Proceedings.

Rensin was CEO of BlueHippo, a company that sold computers, mostly to consumers with poor credit. In 2008, the FTC sued the company, alleging that it violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and other consumer protection laws by misleading consumers about the material terms and conditions of their purchases. Dkt. 1. BlueHippo did not contest the charges and agreed to a consent order that forbade it from engaging in these unlawful practices and required it to pay equitable monetary relief for consumer injury. Dkt. 2.

Despite the consent decree, BlueHippo, under Rensin's direction, continued to sell computers using deceptive tactics. In November 2009, the FTC asked the district court to hold BlueHippo and Rensin in contempt and to impose a contempt sanction to compensate injured consumers. Dkt. 41. In July 2010, the district court held Rensin in contempt and imposed a compensatory sanction on him jointly and

severally with BlueHippo. Dkt. 76 at 11-12 (A. 0045-46).[1] (By that time, BlueHippo had declared bankruptcy and was in trusteeship. *Id*. at 1 n.1 (A. 0035).) After appeal, *see FTC v. BlueHippo Funding, LLC*, 762 F.3d 238 (2d Cir. 2014), the district court entered an April 19, 2016, Final Judgment Imposing Compensatory Contempt Sanctions, ordering Rensin to pay approximately $13.4 million to provide restitution to injured consumers. Dkt. 139 (A. 0047-55). The district court ordered Rensin, within seven days, "to pay a portion of the sanction"—$8 million—"subject to securing the remainder of the judgment through a letter of credit or bond." *Id*. at 5, ¶ 17, and 6-8, § B (A. 0051-54). The order specified that Rensin "should not benefit from the use of the funds while the redress is ongoing." *Id*. at 5, ¶ 17 (A. 0051). If Rensin failed to satisfy these conditions, the court ordered, he would have to "immediately pay the full amount of the judgment . . . to the Commission to be deposited in the Redress Fund." *Id*. at 8, § C (A. 0054). This Court recently affirmed that order. *See FTC v. Rensin*, No. 16-1599, 2017 WL 1363866 (2d Cir. Apr. 12, 2017).

B. The Second Contempt Proceeding.

Rensin did not pay a cent of the compensatory contempt sanction, nor did he secure any portion of the money due. Jan. 4, 2017 Tr. 24:12-15 (A. 0117).

[1] That was not Blue Hippo's first foray into contempt. Earlier in 2009, the district court twice ordered BlueHippo to show cause why it should not be held in contempt (Dkt. 3 and 27) and once found BlueHippo in contempt, for failing to provide compliance reports as required by the consent order (Dkt. 16).

Accordingly, in November 2016, the FTC moved yet again to hold Rensin in contempt. Dkt. 146. This time, to ensure compliance, the FTC asked the court to have Rensin incarcerated until he paid the money. *Id*.

At an evidentiary hearing held on January 4, 2017, the FTC produced evidence showing that Rensin had assets at his disposal with which he could have paid the contempt sanction, including a mortgage-free house valued at approximately $1 million, FTC Ex. 6 at 1 (A. 0192), Jan. 4, 2017 Tr. 29:1-12 (A. 0122), and $2 million worth of annuities (from which he receives $15,000 each month) held by a trust of which Rensin is both the settlor and sole beneficiary to receive payments, Jan. 4, 2017 Tr. 24:18-25:16, 27:11-15, 57:8-9, 60:18-24 (A. 0117, 0120, 0149, 0152). The FTC also showed that, even as he failed to pay any portion of the compensatory contempt order that prohibited him from benefiting from the use of these funds, Rensin maintained an extravagant lifestyle, including dining at pricey restaurants, taking vacations, and leasing a series of expensive cars. *E.g.*, FTC Ex. 30 at 1-19 (A. 0209-227); Jan. 4, 2017 Tr. 38:14-39:11, 50:6-51:25 (A. 0131-132, 0143-144).

The FTC showed, moreover, that Rensin had taken deliberate steps to place his assets beyond reach of the FTC. For instance, immediately after this Court issued its decision in favor of the FTC in the first appeal, Rensin consulted with a law firm that specializes in asset protection, Jan. 4, 2017 Tr. at 34:23-35:15, 36:1-

3, 37:2-20 (A. 0127-130), then quickly moved to Florida and paid cash for a million-dollar house there, *id*. at 38:6-12 (A. 0131)—and now he seeks to use that state's homestead exemption to excuse his failure to pay the compensatory contempt sanction, *see* Dkt. 151 at 17; Jan. 4, 2017 Tr. 82:20-23 (A. 0174). Rensin later moved $2 million dollars into offshore asset protection vehicles (the aforementioned annuities). Jan. 4, 2017 Tr. at 25:14-16, 27:5-10 (A. 0118, 0120). On April 6, 2016, the same day the district court in a telephonic hearing outlined the compensatory contempt order that it intended to enter, *see* Dkt. 128, Rensin cleared out his primary bank account, and moved the funds (over $42,000) into a new account, later claiming to the FTC that this was an annuity account exempt from attachment under Florida law. FTC Ex. 17 (A. 0196-198); FTC Ex. 19 (A. 0200-201); FTC Ex. 1 at 1-2, ¶ 1.h (A. 0182-183). And just four days after Rensin was forced to disclose that account's existence to the FTC in discovery, he withdrew most of the money from that account and moved it to a new account at another bank. FTC Ex. 20 at 5 (A. 0207).

At the contempt hearing, the district court expressed skepticism of Rensin's excuses for his disobedience of the compensatory contempt order. *E.g.*, Jan. 4, 2017 Tr. 78:15-79:4 (A. 0170-171) (doubting that Rensin's obligations under the order were limited by state law exemptions); *id*. at 81:22-82:1 (A. 0173-174) (asking Rensin's counsel, "What would stop him from saying, I recognize I owe

$13 million, I don't have $13 million, but I do receive $15,000 a month, and I'm willing to pay five, ten, twelve thousand dollars a month towards the judgment that I concededly owe?"); *id*. at 82:16-19 (A. 0174) ("Why does he have to live in a 5,000 square foot house that's worth somewhere between 750,000 and a million dollars? Couldn't he live just as well in a $500,000 house or a $300,000 house?"). The court directed the parties to submit post-hearing briefs. *Id*. at 87:3-20 (A. 0179).

On February 15, 2017, two days before Rensin's brief was due, he filed a Chapter 7 voluntary bankruptcy petition with the U.S. Bankruptcy Court for the Southern District of Florida. That same day, he filed a suggestion of bankruptcy in the district court below, asserting that the contempt proceeding "may" be subject to an automatic stay under 11 U.S.C. § 362(a). Dkt. 159.[2] In response, the FTC asked the district court to rule that the automatic stay did not apply to the contempt proceeding. But in light of the bankruptcy filing, the FTC modified its request for relief: instead of asking that Rensin be incarcerated to compel payment, the agency asked the district court to hold Rensin in contempt but to stay any coercive sanction pending resolution of the bankruptcy proceeding. Dkt. 160 at 2 (A. 0264).

[2] Rensin subsequently filed a motion in the bankruptcy court to enforce the automatic stay. The bankruptcy court abstained from deciding the motion because the issue was already before the district court. *See* Mar. 1, 2017 Bankr. Tr. 29:25-30:5 (A. 0122-123).

On March 6, 2017, in the order on review, the district court ruled that "the bankruptcy automatic stay is not applicable to the proceedings in this matter," which "fall within the government regulatory exception to the automatic stay, 11 U.S.C. § 362(b)(4)." Dkt 166 at 1 (A. 0311). Rensin appeals that order.

C. Subsequent Proceedings.

Rensin filed a notice of appeal and moved for a stay pending appeal in both the district court and this Court. On March 20, the district court denied the motion. Dkt. 171. On March 27, this Court temporarily stayed the March 6 order pending the determination of Rensin's motion by a three-judge panel.

Apparently unaware of the temporary stay, the district court on March 28 decided the merits of the contempt motion. Dkt. 173 (A. 0417-432). After it learned of the temporary stay, however, the district court stayed the March 28 order in its entirety.

Although the March 28 order is not before the Court in this case, the district court there explained in more detail its rationale for the March 6 ruling denying application of the bankruptcy automatic stay. The court explained that "[e]ven though the FTC may not effectuate or enforce any contempt sanctions ordered herein prior to resolution of Rensin's bankruptcy, that does not bar this Court from determining that Rensin is in contempt of the April 19, 2016 Order, and if so, what the appropriate sanctions should be." *Id*. at 7 (A. 0423).

In the same order, the district court held Rensin in contempt for failing to pay the compensatory contempt sanction, but denied the FTC's request for an order of incarceration to coerce his compliance. *Id*. at 12, 14 (A. 0428, 0430). Instead, the court ordered only that Rensin "meet in good faith with the FTC and negotiate a payment schedule, pursuant to which he shall pay the FTC a portion of the April 19, 2016 Order each month." *Id*. at 15, § I.A (A. 0431). But the court stayed that requirement until the bankruptcy automatic stay terminates. *Id*., § II. Rensin moved to vacate this order, which the district court denied. Dkt. 176, 177. The March 28 order is not before the Court in this case, but is the subject of a separate appeal, No. 17-1587.[3]

On May 2, 2017, a three-judge motions panel of this Court stayed the district court proceeding pending this appeal. Rensin later asked the district court to reconsider its denial of his motion to vacate the March 28 order, which the district court denied on the ground that it lacked jurisdiction over the matter in light of the May 2 stay order. Dkt. 182, 184.

SUMMARY OF ARGUMENT

1. The automatic stay imposed by Rensin's bankruptcy filing did not deprive the district court of authority to proceed on the FTC's contempt motion. This contempt proceeding is exempt from the automatic stay under its plain

[3] The Court has held that appeal in abeyance pending its determination of the present appeal. *See* Order of May 31, 2017 in No. 17-1587.

language because the proceeding seeks to enforce the FTC's "police or regulatory power" but does not seek "the enforcement of . . . a money judgment" while the bankruptcy proceeding is ongoing. 11 U.S.C § 362(b)(4).

a. *SEC v. Brennan*, 230 F.3d 65 (2d Cir. 2000), does not support Rensin. There, the Court held only that a post-judgment order requiring the repatriation of assets violated the automatic stay. Other aspects of the order such as an asset freeze remained in effect, however, and the Court nowhere suggested that the district court was prohibited from taking those actions. Thus, if anything, *Brennan* supports the decision below. Nor did *Brennan* establish a bright-line timing rule that prohibited any further action after judgment. To the contrary, in *SEC v. Miller*, 808 F.3d 623 (2d Cir. 2015), this Court squarely rejected the notion that the bankruptcy stay categorically prohibits post-judgment proceedings in a government regulatory action.

b. Rensin is wrong that any further contempt proceedings will have the effect of collecting or enforcing the April 19, 2016 judgment. The FTC has asked only that the district court find Rensin in contempt and then stay any coercive sanction pending resolution of the bankruptcy proceeding. Such an order—requiring *nothing* from Rensin at this time—would not impermissibly enforce a money judgment.

c. The policies behind both the automatic stay and the governmental unit exception favor allowing the district court to decide the FTC's contempt motion. Because the order sought by the FTC would stay any coercive sanction, the district court's decision of the contempt motion will not interfere one bit with the administration of the bankruptcy estate. On the other side of the coin, allowing the contempt proceeding to go forward would directly further governmental functions. Rensin defied a court order prohibiting deceptive practices, defied another court order requiring him to compensate consumers for their losses, and sought to hide and dissipate his assets. Rensin should not be allowed to use a strategically-timed bankruptcy filing to frustrate the FTC's efforts to hold him accountable for his wrongdoing. That is precisely what Congress sought to avoid when it enacted the governmental unit exception to the automatic stay.

d. Independent of the FTC's interests in this case, the district court has its own strong interest in vindicating its authority. Rensin's argument to the contrary is patently wrong; indeed, this Court has recognized preservation of judicial authority as a core purpose of the contempt power. Even though the court cannot require compliance with the compensatory contempt sanction until the bankruptcy proceeding is over, it has the right to determine now whether Rensin violated its order.

2. The remote possibility that Rensin's judgment debt might be discharged in bankruptcy is irrelevant to whether the bankruptcy automatic stay applies here. Nor does the possibility of changed circumstances as a result of Rensin's bankruptcy make the district court's contempt ruling an advisory opinion. The proceeding below presents justiciable questions: (1) whether Rensin's actions since the entry of the April 19, 2016 Order constitute contempt, and (2) if so, what the appropriate sanction for that contempt is. That a later event *might* cause the district court to alter its decision does not make a present ruling on the motion advisory.

STANDARD OF REVIEW

Whether the Bankruptcy Code's automatic stay provisions preclude the district court from taking further action in the pending contempt proceeding is a question of law reviewed *de novo*. *See Picard v. Fairfield Greenwich Ltd.*, 762 F.3d 199, 206 (2d Cir. 2014).

ARGUMENT

I. THE BANKRUPTCY AUTOMATIC STAY DOES NOT BAR THE DISTRICT COURT FROM CONTINUING THE CONTEMPT ACTION.

The only question before the Court on this appeal is whether the automatic bankruptcy stay prohibited the district court from taking any action at all on the FTC's contempt motion. The Bankruptcy Code and this Court's precedent applying it to contempt proceedings show firmly that the district court proceeded properly.

A. The Automatic Stay Does Not Apply To A Governmental Regulatory Action Unless It Enforces A Money Judgment.

Under Section 362(a) of the Bankruptcy Code, 11 U.S.C. 362(a), the filing of a petition for bankruptcy generally "operates as a stay" of proceedings against a debtor.[4] This automatic stay provision is designed to centralize in the bankruptcy court all disputes concerning property of the debtor's estate, prevent dissipation of assets, and provide for an orderly distribution to the debtor's creditors. *Brennan*, 230 F.3d at 70.

But the statute also includes a number of exceptions to the automatic stay. At issue here is the "governmental unit" exception, which provides that a bankruptcy petition does not stay:

> the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power[.]

11 U.S.C. 362(b)(4).

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[4] As relevant here, Section 362(a)(1) stays "the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the [bankruptcy] case . . . or to recover a claim against the debtor that arose before the commencement of the [bankruptcy] case."11 U.S.C. § 362(a)(1). Section 362(a)(2) stays "the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the [bankruptcy] case." 11 U.S.C. § 362(a)(2).

Accordingly, an action by the government to enforce its regulatory power is not stayed unless the government's action seeks to enforce a money judgment (a provision commonly referred to as the "exception to the exception"). The purpose of the governmental unit exception is to prevent a debtor from "frustrating necessary governmental functions by seeking refuge in bankruptcy court." *City of New York v. Exxon Corp.*, 932 F.2d 1020, 1024 (2d Cir. 1991) (internal quotation marks omitted).

B. The Contempt Proceeding Against Rensin Falls Within The Regulatory Power Exception.

The automatic stay in Section 362(a) does not bar all action on contempt proceedings brought by government enforcement agencies. Rather, as this Court has explained, Congress intended when it enacted the exception to the stay in Section 362(b)(4) that the automatic stay would not apply "where a governmental unit is suing a debtor to prevent or stop violation of fraud, . . . consumer protection, . . . or similar police or regulatory laws, or attempting to fix damages for violation of such a law . . . ." *Brennan*, 230 F.3d at 71 (citing H.R. Rep. No. 95-595, at 343 (1977); S. Rep. No. 95-989, at 52 (1978)). The FTC's civil contempt proceeding against Rensin, an attempt to fix the consequences of his legal violations, fits squarely within that description.

To begin with, there is no question that the underlying FTC enforcement action was a proceeding to enforce the FTC's "police or regulatory power," 11

U.S.C. § 362(b)(4). Courts have consistently held that FTC actions to stop unlawful practices and redress the harm to consumers fall within this exception to the automatic stay.[5] And Rensin has conceded that his bankruptcy petition did not bar the continuation of appellate proceedings on the underlying contempt proceeding because it, too, was an action to enforce the FTC's "police or regulatory power." He filed a suggestion of bankruptcy in that appeal, but later agreed that the appeal was excepted from the automatic stay under Section 362(b)(4). See Letter to the Court of Feb. 27, 2017 in *FTC v. Rensin*, No. 16-1599 (2d Cir).

The present contempt proceeding against Rensin likewise represents an exercise of the FTC's regulatory power. This action is not separate from the underlying FTC enforcement action but advances precisely the same government enforcement interests as the earlier phase of the case: "to protect consumers from economic injuries" arising from Rensin's deceptive practices. *BlueHippo Funding*, 762 F.3d at 243 (quoting *FTC v. Febre*, 128 F.3d 530, 536 (7th Cir. 1997)). As this Court explained, the compensatory contempt sanction here is a form of equitable

[5] *See, e.g.*, *FTC v. Consumer Health Benefits Ass'n*, No. 10-cv-3551, 2011 WL 2341097 (E.D.N.Y. June 8, 2011); *FTC v. Holiday Enters., Inc.*, No. 1:06-cv-2939, 2008 WL 953358, at *12 (N.D. Ga. Feb. 5, 2008); *FTC v. AmeriDebt, Inc.*, 343 F. Supp. 2d 451, 458-59 (D. Md. 2004); *In re First Alliance Mortg. Co.*, 264 B.R. 634 (C.D. Cal. 2001); *FTC v. U.S. Rarities, Inc.*, No. 92–363–CIV, 1992 WL 696965 (S.D. Fla. Feb. 24, 1992); *FTC v. R.A. Walker & Assocs., Inc.*, 37 B.R. 608, 610 (D.D.C. 1983).

disgorgement of the money bilked from consumers. *Id.* at 245. As such, the district court correctly concluded that the present contempt proceeding "fall[s] within the government regulatory exception to the automatic stay." Dkt. 166 at 1 (A. 0311). *Accord FTC v. Trudeau*, No. 1:03-cv-3904 (N.D. Ill. Apr. 26, 2013) (FTC contempt action for failure to pay a compensatory contempt sanction fell under § 362(b)(4) because its principal purpose was to redress the economic harm to consumers caused by the defendant's fraudulent practices).[6]

Decisions in the analogous context of securities fraud actions also consistently hold that contempt proceedings in support of disgorgement orders in preexisting enforcement actions fall within Section 362(b)(4). *See, e.g.*, *SEC v. Bilzerian*, 131 F. Supp. 2d 10, 14-15 (D.D.C. 2001) (civil contempt proceeding to address defendant's violation of a securities-fraud disgorgement order);[7] *SEC v. Kenton Capital, Ltd.*, 983 F. Supp. 13, 14-15 (D.D.C. 1997) (same). Notably, in

[6] This opinion was submitted to the district court and can be found at Dkt. 160-1 (A. 0273-280).

[7] In *Bilzerian*, the defendant—like Rensin here—had "not complied even minimally" with the court's prior orders. The court held that the contempt proceeding was excepted from the automatic stay not only because it involved government enforcement, but also because contempt would vindicate the court's own authority to enforce its orders. The court found that Congress could not have intended to "permit a party to blatantly violate direct orders of the court and then seek shelter" through a bankruptcy stay, and held that a "court must retain the ability to compel compliance with its orders" and that bankruptcy is not a "free [pass] to run rampant in flagrant disregard of the powers of the court." 131 F. Supp. 2d at 15 (citation omitted).

Brennan —a contempt action for violations of an SEC disgorgement order—this Court accepted without question that the proceeding was an exercise of the agency's "police and regulatory power." 230 F.3d at 71 (noting defendant's concession of that point). The only question was whether a particular order in that proceeding fell within the "exception to the exception." *Id*. As we show in the next section, the contempt proceeding here does not do so.

C. The "Exception To The Exception" Does Not Preclude The District Court From Deciding The Merits Of The FTC's Contempt Motion.

The "exception to the exception" applies the automatic stay to governmental "enforcement of . . . a money judgment." Rensin claims that by virtue of that provision, the district court could take no further action at all in the contempt proceeding once he filed for bankruptcy. He relies principally on *Brennan*, but neither that case nor any of the other cases he cites warrants this result.

1. *Brennan* does not support a complete stay of post-judgment proceedings.

In *Brennan*, this Court determined that a post-judgment order requiring the defendant to repatriate to the United States assets he had moved abroad amounted to the enforcement of a money judgment and therefore violated the automatic stay. 230 F.3d at 71. Repatriation of assets, the Court determined, amounted to an effort to "satisfy at least part of" the judgment, *id*. at 73, and thus fell within the "exception to the exception." But the Court's holding applied only to the order of

repatriation itself. The Court nowhere suggested that the contempt proceeding was stayed *in its entirety* as a result of the defendant's bankruptcy filing. Indeed, other aspects of the order—including a freeze of assets not part of the bankruptcy estate and a requirement that the defendant provide an accounting of assets—remained in effect. *See id*. at 70 n.2 (identifying other relief ordered by the district court that was not stayed).[8]

If anything, *Brennan* thus supports the decision below. The Court explained that the governmental unit exception to the automatic stay permits a court in a government enforcement case to find liability and determine a remedy—*i.e.*, the court may "fix" damages. *See* 230 F.3d at 71. In the present case, the only question at this point is whether the district court could undertake *any* proceedings on the FTC's contempt motion—and under *Brennan*, the answer is clearly yes. Doing so would not, as Rensin wrongly claims (Br. 16), render the "exception to the exception" "a nullity" because the district court still would be prohibited from requiring compliance with the compensatory contempt sanction.

Rensin protests that because the district court's April 19, 2016 judgment already "fixed" the amount he must pay, the court was permitted to go no further.

[8] *See Salomon Smith Barney, Inc. v. McDonnell*, 201 F.R.D. 297 (S.D.N.Y. 2001) (in related proceeding, court noted that "[o]ther relief imposed in connection with the [contempt] order was the subject of an appeal to the Second Circuit, but the asset freeze provision . . . has, at all times since its entry, remained in effect").

In other words, he argues that *Brennan* established a bright line that allows proceedings only up to entry of the judgment, but not beyond that point. Any other proceeding, Rensin asserts, is categorically subject to the automatic stay.

To the degree that *Brennan* suggested such a bright-line rule,[9] this Court later rejected it in *SEC v. Miller*, 808 F.3d 623 (2d Cir. 2015). There, the Court explained that it "did not intend in *Brennan* to impose a one-factor timing test whereby orders entered pre-judgment are always exempt from the automatic stay provision while orders entered (or with continuing force) post-judgment are always subject to the stay." *Id*. at 633. Instead, application of the automatic stay requires consideration of the particular relief sought, the procedural posture of the case, and the policy concerns behind the stay and the regulatory exception. *See id*. at 632-35. Of those criteria, the only one this case has in common with *Brennan* is its procedural posture as a post-judgment contempt proceeding. As shown above, *Brennan* did not rule out contempt proceedings, and as discussed below, all the other factors strongly support denying application of the automatic stay.

[9] To be sure, *Brennan* stated that "once liability is fixed and a money judgment has been entered, the government necessarily acts only to vindicate its own interest in collecting its judgment." 230 F.3d at 73. Whether that is true of SEC matters, it does not accurately characterize the FTC's continued efforts through this contempt proceeding to secure redress for the consumer injury caused by Rensin's wrongful conduct. *See supra* pp. 15-16.

Rensin's other cases also fail to support his position. Br. 14, 17-19. His reliance on *Trudeau* and *Bilzerian* is baffling. Both of those cases held that the government's post-judgment contempt actions in aid of eventual collection were *not* subject to the automatic stay. *See supra* p. 16. The remaining cases on which Rensin relies are likewise unavailing. Some address whether the regulatory exception allows entry of a money judgment in the first place. They have little bearing on the application of the bankruptcy stay to post-judgment proceedings.[10] Cases holding that private-party contempt actions are subject to the automatic stay are obviously inapposite.[11] And decisions holding that particular collection actions by state boards were not regulatory actions in the first place do not support a rule

[10] Thus, *NLRB v. 15th Ave. Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992) held that unfair labor practice proceedings were "police or regulatory power" actions and the exception allowed entry of a money judgment. Similarly, *NLRB v. Cont'l Hagen Corp., Inc.*, 932 F.2d 828, 834 (9th Cir. 1991), and *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934, 942-43 (6th Cir. 1986), addressed whether the entry of a judgment violated the automatic stay. *EEOC v. McLean Trucking Co.*, 834 F.2d 398, 401 (4th Cir. 1987), addressed whether the actions were brought to enforce EEOC's "police or regulatory power," not whether some EEOC action beyond entry of the judgment constituted enforcement of a money judgment.

[11] *See In re Siskin*, 231 B.R. 514 (Bankr. E.D.N.Y. 1999); *In re Newman*, 196 B.R. 700 (Bankr. S.D.N.Y. 1996).

that post-judgment contempt proceedings are categorically stayed.[12]

2. An order that stays the relief granted is not "the enforcement of . . . a money judgment."

Rensin asserts that any action taken by the district court on the FTC's contempt motion would have "the effect of . . . collect[ing] or enforc[ing]" the April 19, 2016 judgment in violation of the automatic stay. Br. 13. In fact, the FTC asked only that the district court declare Rensin to be in contempt but to stay any coercive sanction pending resolution of the bankruptcy proceeding. Dkt. 160 at 2. An order that does not require Rensin (or any other person) to do *anything* during the pendency of the bankruptcy proceeding does not "rise to the level of impermissible enforcement of a money judgment." *Miller*, 808 F.3d at 632. Thus, the Court in *Miller* declined to apply the automatic stay to a pre-judgment asset freeze that sought "not to modify or transfer assets in any way, but rather, merely to preserve the status quo." *Id*. (internal quotation marks omitted). An order that stays relief altogether is even less onerous than the asset freeze allowed in *Miller*.

But, Rensin insists, even if the district court stays coercive sanctions, that would still be prohibited because the money judgment exception bars the

[12] In *In re Massenzio*, 121 B.R. 688, 691-93 (Bankr. N.D.N.Y. 1990), the state insurance commission revoked debtor's license for failing to pay money owed to a private creditor; the court held that regulatory exception did not apply because the commission was merely protecting that creditor's pecuniary interest. In *In re Peterkin*, 102 B.R. 50, 52-53 (Bankr. E.D.N.C. 1989), the court held that a state agency's collection of past-due taxes was not an exercise of police or regulatory powers.

"enforcement" of a money judgment, not merely its "execution." Br. 20-21. He claims that in *EEOC v. Rath Packing Co*., 787 F.2d 318 (8th Cir.1986), the Eighth Circuit "rejected outright" the notion that "so long as the lower court does not enforce its enforcement order," the matter can proceed. Br. 20. That is not what the Eighth Circuit ruled. It held that, although the entry of a monetary judgment did not violate the automatic stay, the district court "established a detailed payment plan" that "went beyond the entry of a money judgment and therefore violated 11 U.S.C. § 362(a)." *Rath Packing*, 787 F.2d at 326. The only assurance the court had that the EEOC would not "attempt to actually obtain execution of the judgment," *id*., during the pendency of the bankruptcy proceedings was its own promise. Here, by contrast, the FTC has asked the district court to itself stay any enforcement of its contempt sanction. Because the district court's requested order will on its own terms limit the agency's ability to "actually obtain execution of the judgment," *id*., there is no risk of coercing payment during the bankruptcy proceeding.

3. The policies underlying the automatic stay provision and the governmental unit exception favor allowing the district court to decide the contempt motion.

The policies behind both the automatic stay and the governmental unit exception disfavor applying the automatic stay here. The automatic stay "allow[s] the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated

proceedings in other arenas." *Brennan*, 230 F.3d at 75 (quoting *In re U.S. Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999)). Because the order sought by the FTC would stay any coercive sanction, the district court's determination of Rensin's contempt liability will have no effect on the administration of the bankruptcy estate. Indeed, the bankruptcy court in this matter recognized as much when it stated at a hearing that, under the contempt order the FTC seeks, "there [will] be no collection at all, even potentially by attempting to force the debtor to pay from exempt assets." Mar. 1, 2017 Bankr. Tr. 23:22-24 (A. 0316). The bankruptcy court thus recognized that the requested order would have "no impact on administration [of the bankruptcy estate] at this point." *Id*. at 25:10-11 (A. 0318). *See Miller*, 808 F.3d at 634 (approving asset freeze where "the Bankruptcy Court itself endorsed" the freeze). Thus, allowing the district court to decide whether Rensin is in contempt does not contravene the policy of ensuring that the bankruptcy "reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *Brennan*, 230 F.3d at 75 (quoting *In re U.S. Lines*, 197 F.3d at 640).

The governmental unit exception is intended to "prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court." *Brennan*, 230 F.3d at 75 (quoting *Exxon Corp*., 932 F.2d at 1024.) Allowing the district court to decide the merits of the FTC's contempt motion is

fully consistent with that policy as well. Rensin's manifest purpose in filing his bankruptcy petition—just two days before his response to the FTC's post-hearing submission was due and after the district court expressed skepticism of Rensin's arguments at the show cause hearing—was to impede the FTC's efforts to hold him accountable for defrauding consumers. As this Court noted in *Miller*, "[t]he timing [of the bankruptcy filing] speaks loudly for itself." 808 F.3d at 634.

Allowing the contempt proceeding to go forward would directly further governmental functions. Rensin defrauded consumers in defiance of a court order and he refused to compensate those consumers for their losses, again in defiance of a court order. Instead, he used his ample assets to fund a lavish lifestyle, spending down thousands of dollars each month on fancy cars, travel, hotels, and restaurants. *See supra* p. 5. Rather than downsizing, he continued to occupy a 5,000 square foot mansion, paid for in cash that rightfully belongs to his defrauded victims. Jan. 4, 2017 Tr. 29:7-10; 31:18-19 (A. 0122, 0124). And the contempt proceeding did not curb Rensin's spending. Just three weeks after the contempt hearing and three weeks before he filed for bankruptcy, Rensin bought himself a brand new Lexus. *See* Dkt. 1, *In re Joseph K. Rensin*, No. 17-11834-EPK (Bankr. S.D. Fla.), at 57-58 (A. 0378-379) (2017 Lexus ES purchased Jan. 25, 2017). Meanwhile, Rensin took numerous steps to shield his assets from eventual collection, including purchasing a Florida "homestead," purchasing offshore

annuities,[13] and closing accounts disclosed to the FTC then moving those funds into to newly-opened accounts. *See supra* pp. 5-6.

This Court should not countenance Rensin's attempt to evade responsibility for his wrongful conduct. If the district court is disabled from issuing a contempt finding and establishing a sanction, it will have to start from scratch after the bankruptcy proceeding, leading to yet more delay. Certainly, the bankruptcy court cannot decide whether Rensin is in contempt of the district court's order, as that judge recognized. Mar. 1, 2017 Bankr. Tr. at 25:21-23 (A. 0318) ("I'm not going to decide whether someone is in contempt of someone else's court order. Not going to happen.").[14] If the gap were allowed, Rensin would have the opportunity to hide or dissipate assets or otherwise make it difficult or impossible for the FTC to recover the money he owes to consumers. Allowing Rensin to "frustrat[e] necessary governmental functions by seeking refuge in bankruptcy court,"

[13] Rensin did not list the annuities (from which only he has ever benefited) as assets in his bankruptcy filing, but instead listed their proceeds as income, reducing by roughly two-thirds the value of the bankruptcy estate. Dkt. 1, *In re Rensin*, No. 17-11834-EPK, at 10, 66-67 (A. 0331, 0387-388).

[14] In *Brennan*, by contrast, it was "undisputed" that the relief the SEC sought (repatriation of assets) was available in the bankruptcy court; thus it was "hard, if not impossible" to argue that Brennan was "seeking refuge in bankruptcy court." 230 F.3d at 75. In *Miller* on the other hand, the Court allowed an asset freeze because "the Bankruptcy Court may not be able to address dissipation of offshore assets by third parties," and therefore "[n]otwithstanding the ongoing bankruptcy proceedings, there is a clear need for the independent asset freeze to preserve the status quo." 808 F.3d at 635.

Brennan, 230 F.3d at 71, would undermine Congress's purpose in enacting the exception to the automatic stay, *id*. (quoting *Exxon Corp.*, 932 F.2d at 1024); *see also CFTC v. Co Petro Mktg. Grp, Inc.*, 700 F.2d 1279, 1283 (9th Cir. 1983) (exception "prevent[s] the bankruptcy court from becoming a haven for wrongdoers").

4. The district court should be allowed to decide Rensin's contempt liability to vindicate its own authority.

The district court has its own strong interest in vindicating its authority. Even when a court cannot require compliance with an order to pay money, it "has the right to determine whether or not [a] defendant . . . has defrauded the Court by not paying the disgorgement due well before the bankruptcy stay." *Kenton Capital*, 983 F. Supp. at 15; *accord Bilzerian*, 131 F. Supp. 2d at 14.

Rensin is wrong in claiming that such vindication is not a "proper purpose[] for civil contempt proceedings." Br. 26-27. To the contrary, the contempt power serves to "protect[] the due and orderly administration of justice and [to] maintain[] the authority and dignity of the court." *CBS Broad., Inc. v. FilmOn.com, Inc.*, 814 F.3d 91 (2d Cir. 2016) (alterations in original). That interest "activates immediately in each action in which the court's authority is defied, in each instance in which the court's authority is defied, and as to each actor through whom the court's authority is defied." *United States v. Coulton*, 594 F. App'x 563, 567 (11th Cir. 2014). In short, a compensatory civil contempt sanction is a

"[v]indication of [the court's] authority through enforcement of its decree." *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 194 (1949).

II. THE BANKRUPTCY COURT'S EVENTUAL DETERMINATION WHETHER OR NOT THE COMPENSATORY CONTEMPT SANCTION IS A DISCHARGEABLE DEBT IS IRRELEVANT TO WHETHER THE CONTEMPT PROCEEDING BELOW IS STAYED UNDER SECTION 362(a).

The possibility that Rensin's judgment debt might ultimately be discharged in bankruptcy (a dubious proposition)[15] is irrelevant to whether the bankruptcy automatic stay applies here. Rensin claims that the district court's assessment of his "inability to pay" argument below would interfere with the bankruptcy court's administration of the bankruptcy estate. It would not. The contempt proceeding was nearing its conclusion when Rensin filed for bankruptcy. The parties had already presented their evidence, and the district court was poised to decide the motion based on that evidence. Nothing about the decision will have any bearing on the bankruptcy court proceeding.

[15] The FTC has filed an adversary complaint in the bankruptcy proceeding, seeking a determination that the contempt sanction judgment is excepted from discharge under 11 U.S.C. § 523(a)(2)(A) (a debt for "false pretenses, a false representation, or actual fraud"), and § 523(a)(6) (a debt for "willful and malicious injury"). *See* Dkt. 1, *In re Joseph K. Rensin*, Adv. No. 17-01185-EPK (Bankr. S.D. Fla.). Other courts have determined that a judgment for deceptive trade practices under Section 5 of the FTC Act, which is analogous to the sanction at issue here, is excepted from discharge under the fraud exception. *See, e.g.*, *FTC v. Abeyta* (*In re Abeyta*), 387 B.R. 846 (Bankr. D.N.M. 2008); *FTC v. Porcelli* (*In re Porcelli*), 325 B.R. 868 (Bankr. M.D. Fla. 2005). If anything, a contempt sanction of the sort at issue here presents an even easier case.

The possibility that Rensin's ability—or obligation—to pay the judgment will change as a result of his bankruptcy petition does not, as Rensin contends, make the district court's contempt ruling an advisory opinion. The district court will be deciding "concrete legal issues, presented in [an] actual case[], not abstractions." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). If Rensin succeeds in discharging the judgment in bankruptcy, the contempt proceeding would become moot. The FTC, however, is seeking a determination that the judgment is excepted from discharge. At this point, Rensin is not entitled to a presumption that discharge will occur. Until it does, the proceeding below presents justiciable questions: (1) whether Rensin's actions since the entry of the April 19, 2016 Order constitute contempt, and (2) if so, what the appropriate sanction for that contempt is. That a later event *might* render a contempt ruling moot does not make a present ruling on the motion advisory.

CONCLUSION

The decision of the district court should be affirmed.

Respectfully submitted,

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July 10, 2017

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. 32 (a)(7)(B), in that it contains 7,057 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2017, I served the foregoing Final Form Brief for the Federal Trade Commission on counsel of record by electronic service through the Court's CM-ECF system.

/s/ Michele Arington
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