STATUTES

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INTRODUCTION

Fifteen years ago, appellant Gary Hewitt orchestrated a set of deceptive wealth-building schemes that defrauded consumers of nearly half a billion dollars. Thirteen years ago, the Commission sued to stop the fraud, leading to a summary judgment ruling that Hewitt's operation violated the FTC Act and the Telemarketing Sales Rule. Ten years ago, the court entered judgment pursuant to Section 13(b) of the FTC Act, permanently enjoining Hewitt and his codefendants from continuing their deceptive practices and ordering them to repay consumer losses in line with their level of participation in the scheme. Hewitt was ordered to repay the full measure of losses, over $478 million. Hewitt did not appeal, although one codefendant did, to no avail. *FTC v. John Beck Amazing Profits, LLC*, 644 Fed. Appx. 709 (9th Cir. March 3, 2016).

In the decade since, Hewitt has not repaid what he took from consumers. He now attempts to avoid that obligation altogether. In 2021, the Supreme Court held that Section 13(b) of the FTC Act authorizes injunctions but not monetary remedies. *AMG Capital Mgmt., LLC v. FTC*, 141 S.Ct. 1341. Subsequently, Hewitt asked the district court to relieve him from monetary portion of the 2012 judgment, invoking Federal Rule of Civil Procedure 60(b)(4), (5), and (6). Hewitt claims that *AMG* rendered the judgment retroactively void for lack of subject matter jurisdiction, justifying relief under Rule 60(b)(4); he claims it would now be unfair to

enforce the judgment prospectively, justifying relief under Rule 60(b)(5); and he claims the *AMG* decision was an extraordinary circumstance justifying relief under Rule 60(b)(6). The district court rejected all three arguments.

The Court should affirm. It is a settled principle that new law created by the Supreme Court does not apply to long-closed cases, and *AMG*—the sole basis for Hewitt's request—does not justify relief under any of the Rule 60(b) sections Hewitt invokes. *AMG* did not affect the district court's jurisdiction to hear an FTC enforcement case and therefore could not have rendered the district court's decision void under Rule 60(b)(4). The district court did not abuse its discretion in denying relief under Rule 60(b)(5) because that provision does not apply to unpaid monetary judgments, and even if it did, there is nothing inequitable about continuing to require that Hewitt repay his victims. Nor was there any abuse of discretion in the district court's finding that *AMG* did not amount to an extraordinary circumstance under Rule 60(b)(6) that would warrant reopening a judgment correctly decided under the prevailing law when it was entered ten years ago.

JURISDICTION

The district court had jurisdiction over the original action under 28 U.S.C. §§ 1331 and 1335, respectively, because the case arose under the FTC Act, a law of the United States, and because it was brought by the Federal Trade Commission, an agency of the United States. The district court denied a motion for relief from

judgment on August 19, 2021, ER 4-13, and appellant filed a timely notice of appeal. ER 1701-1702. This Court has jurisdiction under 28 U.S.C. § 1291 because "the denial of a Rule 60(b) motion is a final, appealable order." *Griffin v. Gomez*, 741 F.3d 10, 25 (9th Cir. 2014).

QUESTIONS PRESENTED

The district court denied Hewitt's request for relief from the monetary portion of a 2012 judgment entered against him for violations of the FTC Act and the Telemarketing Sales Rule. The questions presented are:

1. Did the Supreme Court's 2021 holding that Section 13(b) of the FTC Act does not authorize district courts to award monetary relief mean that the district court lacked subject matter jurisdiction over an enforcement action brought by the Commission twelve years earlier, and that the district court's monetary judgment is therefore void, justifying relief under Rule 60(b)(4)?

2. Does a money judgment have the prospective application required for relief under Rule 60(b)(5), and if so, did equity require the district court to relieve Hewitt from the ten-year-old monetary judgment in this case?

3. Did the district court abuse its discretion when it found the *AMG* decision was not an extraordinary circumstance that justified relief from the judgment under Rule 60(b)(6)?

STATEMENT

A. Hewitt's Get-Rich-Quick Scams

Gary Hewitt spearheaded a deceptive enterprise that promised to make consumers rich through a series of fraudulent schemes. He offered three product lines, each headed by a self-professed "guru" who claimed to have created a system to easily and quickly make money: "John Beck's Free and Clear Real Estate System"; "John Alexander's Real Estate Riches in 14 Days"; and "Jeff Paul's Shortcuts to Internet Millions." ER 256.

Hewitt promoted the three systems using infomercials that promised consumers easy wealth if they purchased the system for only $39.95. When consumers were lured to call the number provided, Hewitt's telemarketers failed to disclose that purchasers would be enrolled in a continuity membership plan and charged $39.95 *per month* unless they affirmatively acted to cancel. ER 275-276, 282-283, 285-288, 289. He then targeted purchasers with additional telemarketing designed to extract even more money through bogus one-on-one coaching services. ER 290. Not surprisingly, almost none of Hewitt's victims made any money at all, much less the riches promised.

B. The Commission's Enforcement Action

In 2009, the Commission sued Hewitt, his business partner, the three "gurus," and the numerous companies through which they perpetrated the scam. ER 1660-1697. The Commission sued under both Section 13(b) and Section 19 of the

FTC Act, ER 1661, charging that the operation's deceptive claims violated Section 5 of the FTC Act, and that the defendants had violated the Telemarketing Sales Rule, 16 C.F.R. Part 310, in numerous respects. ER 1691-1696.

In 2012, the district court found uncontroverted evidence proving all the violations charged in the complaint and entered summary judgment for the Commission. ER 255-308. The court found that the defendants' infomercials were deceptive, that the defendants enrolled consumers in continuity membership plans without the consumers' consent, and that the defendants deceived consumers to buy their "coaching" services, all in violation of Section 5 of the FTC Act. ER 275-293. The court found that the same uncontroverted evidence proved the Commission's claims under the Telemarketing Sales Rule. ER 293-296 (failure to disclose enrollment in continuity membership plans); 296-297 (charging consumers' credit cards for continuity membership plans without their consent); 297-299 (do-not-call list violations).

The district court permanently enjoined Hewitt from promoting purported wealth-generating products, producing informercials, telemarketing, and making misrepresentations similar to those used to perpetrate the scheme. ER 224-254. The court found that consumers sustained more than $478 million in losses and ordered

Hewitt to repay that amount.[1] More than half of the total—$280 million—represented consumer losses from conduct that the court found violated both Section 5 of the FTC Act and the Telemarketing Sales Rule. *See* ER 247-248, 293-297. The district court relied on the authoritative decisions of this Court for its authority to enter both injunctive and monetary relief under Section 13(b) of the FTC Act. ER 300, 304-305. The district court retained jurisdiction "for purposes of construction, modification, and enforcement of this Order." ER 254.

During the course of the litigation, Hewitt never challenged whether Section 13(b) of the FTC Act authorizes monetary relief, and he did not appeal the judgment for that reason or any other. His codefendant John Beck did appeal, and this Court affirmed. *See FTC v. John Beck Amazing Profits, LLC*, 644 Fed. Appx. 709 (9th Cir. March 3, 2016). On the same day as the affirmance in *John Beck*, the Court reaffirmed its longstanding precedent that Section 13(b) of the FTC Act authorized monetary relief—an interpretation of the law that was consistent with the decisions of every other court that had decided the issue. *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598-599 (9th Cir. 2016). The appellants in *Commerce*

[1] The court found that Hewitt's enterprise gained $113.4 million from sales of the John Beck system, $11.7 million from the John Alexander system, $33.8 million from the Jeff Paul system, $40 million from the bogus coaching products, and $280 million from continuity membership plans. ER 246-248.

Planet then sought review in the Supreme Court, which denied certiorari. *Gugliuzza v. FTC*, No. 16-913, 137 S.Ct. 624 (Jan. 9, 2017).

In the intervening years, the Commission has recovered only a small fraction of the judgment through garnishments and bankruptcy proceedings. Hewitt did not willingly pay any part of the judgment against him, the vast majority of which remains outstanding. *See* ER 69-70.

C. *AMG* and Hewitt's Motion for Relief from Judgment

Five years after *Commerce Planet* and nine years after Hewitt's time to appeal the district court decision in this case expired, the Supreme Court held that Section 13(b) of the FTC Act does not authorize monetary relief after all. *See AMG Capital Mgmt., LLC v. FTC*, 141 S.Ct. 1341 (2021). Hewitt then filed a motion for relief from the 2012 judgment, claiming that in light of *AMG*, the district court acted "in excess of jurisdiction when it made the monetary award that comprises a portion of the Judgment." ER 176. Hewitt argued that the monetary portion of the judgment (but not the injunction) was void for lack of jurisdiction, justifying relief under Rule 60(b)(4); that prospective enforcement of the judgment is no longer

equitable under Rule 60(b)(5); and that the *AMG* decision otherwise justified relief from judgment under Rule 60(b)(6).[2] ER 186-188.

The district court denied the motion. The court first rejected Hewitt's claim that its order was "void" under Rule 60(b)(4). ER 6-8. Although the court agreed that under *AMG*, Section 13(b) did not authorize the award of monetary relief, it held the judgment was not void because a court's remedial authority is "fundamentally different from a court's subject matter jurisdiction over a case and from its personal jurisdiction over the parties." ER 7 (quoting *United States v. Philip Morris USA Inc.*, 840 F.3d 844, 850 (D.C. Cir. 2016)). Accordingly, Rule 60(b)(4) "does not permit relief where a court has exceeded its remedial authority." ER 7-8.

The court next denied Hewitt's claim that prospective enforcement of the judgment is no longer equitable and therefore justified relief from the judgment under Rule 60(b)(5). The court reasoned that "[t]he portion of Rule 60(b)(5) that references equity applies to prospective injunctive relief, not the equitable monetary relief that Hewitt challenges." ER 8-9.

Lastly, the court denied Hewitt's claim that the *AMG* decision amounted to "extraordinary circumstances" justifying relief to prevent "manifest injustice"

[2] Rule 60(b) authorizes district courts to "relieve a party . . . from a final judgment" in specified circumstances, which include when "the judgment is void," Rule 60(b)(4); when "applying it prospectively is no longer equitable," Rule 60(b)(5); and "any other reason that justifies relief," Rule 60(b)(6).

under Rule 60(b)(6). ER 8 (quoting *Latshaw v. Trainer, Wortham & Co., Inc.*, 452 F.3d 1097, 1102 (9th Cir. 2006)). The court applied the case-by-case inquiry prescribed by this Court's decision in *Phelps v. Alameida*, 569 F.3d 1120, 1132-1133 (9th Cir. 2009), considering "all of the relevant circumstances surrounding the specific motion before the court in order to ensure that justice be done in light of all the facts." ER 10 (quoting *Henson v. Fidelity Nat'l Fin., Inc.*, 943 F.3d 434, 440 (9th Cir. 2019)). Because Hewitt's motion arose in a different context from the *habeas* question in *Phelps*, however, the court did not separately analyze each of the six factors described in *Phelps*, but instead looked to "only those *Phelps* factors that are pertinent to the unique circumstances present here." ER 10.

The court concluded that extraordinary circumstances did not warrant vacating the monetary judgment against Hewitt "because there is no 'manifest injustice' to prevent here." ER 13. The court found several of its summary judgment holdings relevant to determining whether relief was warranted; specifically:

(1) that Hewitt engaged in "serious, pervasive, and continuous violations" of both the FTC Act and the Telemarketing Sales Rule, ER 12;

(2) that Hewitt's personal involvement in the violations was "extensive and highly deliberate," *id.*;

(3) that Hewitt was liable both for his own deceptive conduct and that of the corporations he controlled, ER 11;

(4) that the complaint "expressly sought relief" under Section 19(a)(1) of the FTC Act, which authorizes monetary relief for violations of Commission rules such as the Telemarketing Sales Rule, and the Commission "could have chosen to prosecute the case entirely under Section 19(a)(1)," ER 12; and

(5) that "Hewitt's violations of the TSR resulted in a massive amount of consumer injury, involving an estimated loss of nearly $500 million dollars and almost one million customers," ER 13 (internal citations omitted).

The court found that the Commission "can hardly be faulted" for relying in its summary judgment motion on Section 13(b) rather than Section 19 for monetary relief because at the time, "every Circuit to have considered the issue had interpreted Section 13(b) as authorizing courts to issue equitable monetary relief." ER 12. The court also found it relevant that "Hewitt made no arguments challenging the Court's authority to issue equitable monetary relief under Section 13(b) at the time that Judgment was entered," ER 12-13, and concluded that vacating the judgment and reopening the case would likely result in "the same or a substantially similar end result" of monetary relief under Section 19. *Id.* Weighing all of those circumstances against the potential unfairness of preserving the judgment after the *AMG* decision, the court concluded that it "would do no justice to reopen these proceedings." *Id.*

SUMMARY OF THE ARGUMENT

New Supreme Court decisions do not retroactively apply to closed cases. The district court therefore acted well within its discretion when it denied Hewitt's request to be excused from the 10-year-old monetary judgment against him under each section of Federal Rule of Civil Procedure 60(b) that Hewitt invoked.

a. The district court correctly denied Hewitt's request for relief under Rule 60(b)(4) because the judgment does not meet the established criteria for voidness under that rule. A judgment is void under Rule 60(b)(4) only if the district court lacked subject matter or personal jurisdiction, or if the proceedings deprived the movant of notice or the opportunity to be heard. *United States v. Berke*, 170 F.3d 882, 883 (9th Cir. 1999); *Dietz v. Bouldin*, 794 F.3d 1093, 1096 (9th Cir. 2015).

The district court had subject matter jurisdiction because the action involved a federal question and was brought by an agency of the United States. *See* 28 U.S.C. §§ 1331, 1335. Hewitt does not claim otherwise. His argument that *AMG* rendered the judgment void fails because he challenges only the court's remedial authority, not its subject-matter jurisdiction or its jurisdiction over the parties, and Hewitt does not claim any violation of due process that deprived him of notice or the opportunity to be heard.

b. The district court did not abuse its discretion by denying Hewitt's request for relief under Rule 60(b)(5), which allows a district court to order relief from a

judgment when "applying [the judgment] prospectively is no longer equitable." An order is eligible for relief under Rule 60(b)(5) only if it has "prospective application" in that it is "executory or involves the supervision of changing conduct or conditions." *Harvest v. Castro*, 531 F.3d 737, 748 (9th Cir. 2008). As every court to consider the issue has found, money judgments do not have prospective application and therefore do not qualify for relief under Rule 60(b)(5).

Hewitt is incorrect that the district court had authority to alter the judgment because the judgment was entered pursuant to the district court's equitable authority. The authority to alter an order under Rule 60(b)(5) depends on whether the order has prospective application; it does not depend on whether the decree was entered pursuant to the court's powers in law or equity.

c. The district court was likewise within its discretion to deny Hewitt's request for relief under the catch-all provision of Rule 60(b)(6), which permits a district court to reopen a final judgment for "any other reason justifying relief from the operation of the judgment." Relief under Rule 60(b)(6) is available only in "extraordinary circumstances," which do not include a district court's correct application of the law as it stood when the judgment was entered, even if the Supreme Court later reaches a different decision. *Gonzalez v. Crosby*, 545 U.S. 524, 536 (2005).

In its analysis of Hewitt's claim under Rule 60(b)(6), the district court applied the case-by-case approach mandated by this Court's precedents, considering all of the relevant circumstances "to ensure that justice be done in light of all the facts." *Henson*, 943 F.3d at 440. The court considered the extent of Hewitt's culpability, the amount of harm he caused, his failure to contemporaneously challenge the basis for monetary relief, and the potential availability of an alternate source of authority for monetary relief—Section 19 of the FTC Act—based on the pleadings and proof in the original proceeding. The court's evaluation of those circumstances and its conclusion that justice would not be served by relieving Hewitt from the judgment were well within its discretion.

Although Hewitt challenges the extent to which Section 19 would support a monetary award, he does not attempt to show that the district court's analysis included the wrong circumstances or that it made any error in weighing them. He therefore fails to show that denying relief was outside the broad range of permissible conclusions and so beyond the pale of reasonable justification under the circumstances that it amounted to an abuse of discretion. Hewitt's Section 19 arguments do not support reversal in any event because they are incorrect or irrelevant. The district court's denial of relief from the judgment should be affirmed.

STANDARD OF REVIEW

The Court reviews a district court's denial of relief under Rule 60(b)(4) de novo. *Exp. Grp. v. Reef Indus.*, 54 F.3d 1466, 1469 (9th Cir. 1995). The denial of relief under Rule 60(b)(5) or 60(b)(6) is reviewed for an abuse of discretion. *SEC v. Coldicutt*, 258 F.3d 939, 941 (9th Cir. 2001); *Riley v. Filson*, 933 F.3d 1068, 1071 (9th Cir. 2019).

ARGUMENT

THE SUPREME COURT'S DECISION IN *AMG* DOES NOT WARRANT RELIEF UNDER RULE 60(b).

Hewitt asks the Court to pry open a ten-year-old order to repay the consumers he defrauded. He does not deny the fraud he committed, nor does he challenge the finding that his enterprise took nearly half a billion dollars from its victims. Instead, he argues that the Supreme Court's recent decision in *AMG Capital Management* should be given retroactive effect by (1) rendering a long-closed judgment void for lack of jurisdiction; (2) requiring the district court to relieve him from his unpaid obligation to his victims; and (3) treating victim compensation as unfair. Hewitt invokes three Federal Rules of Civil Procedure: Rule 60(b)(4), on the theory that the judgment is void; Rule 60(b)(5), on the theory that enforcing the judgment is no longer equitable; and Rule 60(b)(6), on the theory that the Supreme Court's decision is an extraordinary circumstance.

Hewitt's claim that *AMG* justifies relief under Rule 60(b) is misplaced. When the Supreme Court announces a new interpretation of federal law, it is given retroactive effect in cases still open on direct review, but not to "cases already closed." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995).[3] Thus, when the law changes, long-final judgments do not retroactively become void and thereby qualify for relief under Rule 60(b)(4). Moreover, monetary orders of the sort at issue here do not qualify for relief under Rule 60(b)(5) at all because they do not have prospective application. Finally, the Supreme Court's announcement of new legal principles is not, without more, an extraordinary circumstance that justifies relief under the catchall provision of Rule 60(b)(6). Regardless of the Supreme Court's recent interpretation of Section 13(b) of the FTC Act, there is nothing inequitable or unfair about continuing to enforce the district court's order that Hewitt repay his victims, who have never been made whole. To hold otherwise would flood the lower courts with motions to reopen ancient cases every time the Supreme Court resolves a circuit split or overturns precedent.

"[A] fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S.

[3] *See also Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993); *Teague v. Lane*, 489 U.S. 288, 308 (1989) ("[I]t has long been established that a final civil judgment entered under a given rule of law may withstand subsequent judicial change in that rule.").

605, 619 (1983). When a claim has been decided on the merits, it is "considered forever settled as between the parties." *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). A final judgment thus "puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever." *Nevada v. United States*, 463 U.S. 110, 129-130 (1983) (cleaned up).

Federal Rule of Civil Procedure 60(b) provides a limited exception to finality by authorizing relief from a final judgment in certain specifically defined circumstances. This Court has cautioned, however, that Rule 60(b) should not be used "to circumvent the strong public interest in the timeliness and finality of judgments." *Phelps*, 569 F.3d at 1135 (cleaned up).

A. Rule 60(b)(4) Does Not Apply Because The Judgment Is Not Void.

A district court may order relief from judgment under Rule 60(b)(4) if "the judgment is void." Fed. R. Civ. P. 60(b)(4). "But the scope of what constitutes a void judgment is narrowly circumscribed." *Hoffmann v. Pulido*, 928 F.3d 1147, 1151 (9th Cir. 2019). "A final judgment is 'void' for purposes of Rule 60(b)(4) only if the court that considered it lacked jurisdiction, either as to the subject matter of the dispute or over the parties to be bound, or acted in a manner inconsistent with due process of law." *Berke*, 170 F.3d at 883. Even then, mere errors in applying jurisdictional rules will not suffice. Judgments are deemed void for lack of jurisdiction "only where the assertion of jurisdiction is truly unsupported"—the

judgment "must lack even a colorable basis" for jurisdiction. *Hoffmann*, 928 F.3d at 1151. As the Supreme Court put it, "a judgment is void because of a jurisdictional defect [only in the] exceptional case in which the court that rendered judgment lacked even an 'arguable basis' for jurisdiction." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 271 (2010). Similarly, judgments are held void only for a violation of due process "that deprives a party of notice or the opportunity to be heard." *Dietz*, 794 F.3d at 1096 (quoting *Espinosa*, 559 U.S. at 271)).

The judgment against Hewitt plainly does not meet these criteria for voidness. The district court had subject matter jurisdiction over the action because the action involved a federal question and was brought by an agency of the United States. *See* 28 U.S.C. §§ 1331, 1335. Hewitt does not claim otherwise.[4] Nor does he claim a violation of due process that deprived him of notice or the opportunity to be heard. Hewitt was represented by counsel and fully participated throughout the district court proceedings. None of that changed when the Supreme Court announced a new interpretation of the remedies allowed by Section 13(b) nine years after the judgment in this case became final. The district court's denial of relief under Rule 60(b)(4) should thus be affirmed because Hewitt has not advanced any

[4] Hewitt's brief avoids admitting the obvious basis for the district court's subject matter jurisdiction by omitting any mention of jurisdiction in his "Jurisdictional Statement," which, tellingly, discusses only standards of review. Br. 11-12.

argument that, if true, would mean the judgment was void under the Court's well-settled standards.

Rather than address those standards, Hewitt falsely claims that the case law "doesn't provide helpful definitions" of what it means for a judgment to be "void." Br. 26-27. He instead offers his own syllogism that (1) voidness is tied to "underlying power and authority"; (2) in light of *AMG*, the district court never had authority to enter monetary relief under Section 13(b) of the FTC Act; and (3) "this means the court lacked subject matter jurisdiction to do so." Br. 27-31. That theory fails for multiple reasons.

To begin with, the "underlying power and authority" that Hewitt challenges is limited to the district court's authority to enter monetary relief under Section 13(b). But remedial authority is "fundamentally different from a court's subject matter jurisdiction over a case and from its personal jurisdiction over the parties." *United States v. Philip Morris USA Inc.*, 840 F.3d 844, 850 (D.C. Cir. 2016). Here, the district court had federal question jurisdiction to hear the case regardless of its ultimate remedial authority. And even if the court's remedial authority were relevant, Hewitt's theory fails to account for the district court's authority to enter an injunction under Section 13(b) of the FTC Act. Hewitt offers no logic explaining how the district court could have subject matter jurisdiction to hear the

Commission's request for an injunction (which he does not challenge) yet lack subject matter jurisdiction over the very same case with respect to monetary remedies.

In addition, Hewitt's theory would require the Court to retroactively apply *AMG* to a ten-year-old judgment, contrary to the Supreme Court's holding that "[n]ew legal principles . . . do not apply to cases already closed." *Reynoldsville Casket Co*, 514 U.S. at 758. His theory also directly contradicts settled law on voidness under Rule 60(b)(4). The Court's precedent is clear that "[a] judgment is not void merely because it is erroneous." *In re Ctr. Wholesale, Inc.*, 759 F.2d 1440, 1448 (9th Cir. 1985). Hewitt's argument boils down to the simple observation that, post-*AMG*, the district court's award of monetary relief under Section 13(b) became erroneous. But the new interpretation of Section 13(b) announced in *AMG* does not help Hewitt because "[a] court decision that is based on substantive law that is subsequently changed or clarified is not void." 12 Moore's Federal Practice - Civil § 60.44 (2022).

For the same reasons, Hewitt is wrong that declining to upend long-settled judgments when the underlying law changes violates substantive due process. Br. 35-37. The principle that new judicial decisions do not retroactively apply to closed cases means that Hewitt has no substantive right to relief from the judgment

by virtue of *AMG*. Hewitt is therefore incorrect that the district court's application of Rule 60(b)(4) improperly denied him such a right.

B. The District Court Correctly Denied Hewitt's Request For Relief Under Rule 60(b)(5).

Federal Rule of Civil Procedure 60(b)(5) allows a district court to order relief from a judgment when "applying [the judgment] prospectively is no longer equitable." By its plain language, the rule "applies only to those judgments that have prospective application." *Harvest*, 531 F.3d at 748. Although "virtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect," that "does not necessarily mean that [an order] has prospective application for the purposes of Rule 60(b)(5)." *Maraziti v. Thorpe*, 52 F.3d 252, 254 (9th Cir. 1995) (cleaned up).

To determine if an order qualifies as prospective under the Rule, courts look to "whether it is executory or involves the supervision of changing conduct or conditions." *Id.* (cleaned up); *see also, e.g.*, *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988); *Tapper v. Hearn*, 833 F.3d 166, 170 (2d Cir. 2016). For example, an injunction that requires supervised institutional reforms or ongoing monitoring has prospective application under the rule. *See, e.g.*, *Agostini v. Felton*, 521 U.S. 203, 215-218 (1997). And an order is "executory" if it "compels a party to perform or restrains it from performing a future act." *Twelve John Does*, 841 F.2d at 1139.

Money judgments are different. Courts that have reached the issue "agree[] 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); *see also, e.g.*, *DeWeerth v. Baldinger*, 38 F.3d 1266, 1275 (2d Cir. 1994); *Schwartz v. United States*, 976 F.2d 213, 218 (4th Cir. 1992); *McDonald v. Oliver*, 642 F.2d 169, 171 (5th Cir. 1981); *Marshall v. Board of Ed.*, 575 F.2d 417, 425 (3d Cir. 1978). While this Court has not directly decided the issue, it has invoked "continuing to feel the effects of a money judgment" to illustrate the sort of consequence from a judgment that is "*not* a 'prospective effect' within the meaning of rule 60(b)(5)." *Maraziti*, 52 F.3d at 254 (quoting *Gibbs v. Maxwell House*, 738 F.2d 1153, 1155-1156 (11th Cir. 1984) (emphasis added)); *see Stokors*, 147 F.3d at 762; *Tapper*, 833 F.3d at 172; *Twelve John Does*, 841 F.2d at 1139. The district court was therefore correct to deny relief under Rule 60(b)(5) because the order Hewitt challenges is a monetary judgment without prospective effect within the meaning of the rule.

Hewitt cites no case in which Rule 60(b)(5) was applied to grant relief from the continuing effects of a monetary judgment like the order in this case, and we are not aware of any. Instead, Hewitt argues that the district court was acting pursuant to its equitable power to enter an injunction and that the court therefore had

authority, under both its inherent equitable powers and Rule 60(b)(5), to modify the monetary relief in response to changes in the law. Br. 37-47. Hewitt claims that this authority is different from judgments at law, which he says are "immune to subsequent changes in the law." Br. 45. He claims further that the district court had "no discretion" not to "set aside the monetary portion of the Judgment." Br. 47.

That is incorrect on multiple levels. For starters, although Rule 60(b)(5) "codifies the courts' traditional authority, inherent in the jurisdiction of the chancery, to modify or vacate the prospective effect of their decrees," the rule is not confined to injunctions, "nor even to relief that historically would have been granted in courts of equity." *United States v. Asarco Inc.*, 430 F.3d 972, 979 (9th Cir. 2005) (cleaned up); 11 Wright & Miller, Federal Practice & Procedure § 2863 (3d ed.). The availability of relief depends on whether the order at issue has "prospective effect," *Asarco*, 430 F.3d at 979; it does not depend on whether the decree was entered pursuant to the court's powers in law or equity. Relief is not available here because Hewitt challenges a money judgment that does not have prospective effect, regardless of whether the court was exercising equitable or legal power.

Nor does the district court have greater authority to modify its judgment under its inherent powers than it has under Rule 60(b)(5). To the contrary, the "prospective application" clause of the rule was derived from cases elaborating the scope of the courts' inherent equitable powers. *See Twelve John Does*, 841 F.2d at

1138; *DeWeerth*, 38 F.3d at 1275; 11 Wright & Miller, Federal Practice & Procedure § 2863. In two decisions—*United States v. Swift & Co.*, 286 U.S. 106 (1932), and *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1856)—the Supreme Court established the principle that a court's equitable authority to modify earlier orders extends to those that are "executory" or "involve the supervision of changing conduct or conditions." *Twelve John Does*, 841 F.2d at 1138; *DeWeerth*, 38 F.3d at 1275. Courts therefore look to those standards when analyzing the availability of relief under Rule 60(b)(5). *See, e.g.*, *Maraziti*, 52 F.3d at 254. Because a money judgment such as the one at issue here is not executory and does not involve the supervision of changing conduct or conditions, it does not qualify for relief under either the court's inherent equitable powers or Rule 60(b)(5).[5]

Moreover, even if Hewitt could show that the monetary order against him has prospective application, his request for relief under Rule 60(b)(5) would still fail. Rule 60(b)(5) is only available when enforcing a judgment has become "no longer equitable." Here, Hewitt's operation defrauded consumers of nearly half a billion dollars. In the ten years since the judgment was entered, Hewitt has not

[5] For the same reason, Hewitt misplaces his reliance on the final clause of the judgment, in which the district court reserved jurisdiction to enforce or modify its order. Br. 24-25, 42-43. Hewitt offers no reason why the court may reserve for itself greater power under that clause than it has under its inherent equitable authority or Rule 60(b)(5).

willingly paid a dime, and the Commission has recovered only a tiny fraction of what consumers lost. As a result of Hewitt's intransigence, his victims still have not been repaid. Thus, Hewitt has it backwards in claiming that enforcing the judgment against him after *AMG* would turn the district court's order into an "instrument of wrong." Br. 45, 46, 47. Equity does not favor relief for one who profited from preying on consumers yet has avoided complying with a restorative judgment for a decade. Hewitt's preferred outcome would simply reward the recalcitrant wrongdoer. The district court was well within its discretion to deny Hewitt's motion.

C. The District Court Correctly Denied Hewitt's Request For Relief Under Rule 60(b)(6).

The district court was likewise within its discretion to deny Hewitt's request for relief under the catch-all provision of Rule 60(b)(6), which permits a district court to reopen a final judgment for "any other reason justifying relief from the operation of the judgment," aside from the specific circumstances set out in Rules 60(b)(1)-(5). "Relief under Rule 60(b)(6) is available only in 'extraordinary circumstances.'" *Buck v. Davis*, 580 U.S. 100, 137 S. Ct. 759, 777-778 (2017) (quoting *Gonzalez*, 545 U.S. at 535). Even then, whether to grant the requested relief is "addressed to the sound discretion of the district court." *Towery v. Ryan*, 673 F.3d 933, 940 (9th Cir. 2012).

Hewitt's claim for relief under Rule 60(b)(6) rests solely on the Supreme Court's decision in *AMG*. Br. 47-50. When a decision is rendered correctly under the "then-prevailing interpretation" of the law, however, "[i]t is hardly extraordinary" if the Supreme Court later "arrive[s] at a different interpretation." *Gonzalez*, 545 U.S. at 536; *see also Phelps*, 569 F.3d at 1135. Indeed, this Court has agreed that such a change in the law is "all the less extraordinary" where, as here, the party seeking relief from judgment fails to raise the issue on appeal. *Phelps*, 569 F.3d at 1135-1136 (quoting *Gonzales*, 545 U.S. at 537).

Nevertheless, this Court has held that in some circumstances a change in the controlling law can support relief under Rule 60(b)(6). *See Henson*, 943 F.3d at 444. To determine whether such a change amounts to extraordinary circumstances warranting relief under Rule 60(b)(6), district courts must perform a case-by-case inquiry, considering "all of the relevant circumstances surrounding the specific motion before the court in order to ensure that justice be done in light of all the facts." *Id.* at 440.

Here, the district court reasonably balanced the relevant circumstances to determine that justice does not require reopening the judgment to relieve Hewitt from his obligation to repay what he fraudulently took from consumers. *See* ER 10-13. In reaching that conclusion, the court properly considered the circumstances that led to the monetary judgment, including the severity of Hewitt's FTC Act and

Telemarketing Sales Rule violations ("serious" and "pervasive"), Hewitt's personal participation in them ("extensive" and "deliberate"), the injury he caused to consumers ("massive"), and the extent to which Hewitt is liable for not only his own conduct, but also the conduct of the corporations he controlled. ER 12-13.

Because Hewitt's claim turns on the unavailability of monetary relief under Section 13(b), the court was likewise reasonable to consider whether Hewitt's violations of the Telemarketing Sales Rule would separately support monetary relief under Section 19 of the FTC Act. *See id.* The analysis reasonably included whether the Commission pleaded claims under Section 19 in the complaint, whether it could have pursued monetary relief under that section at summary judgment, and whether it was reasonable for the Commission to have relied on the uniform circuit law holding that Section 13(b) authorized monetary relief. *Id.* The court properly balanced those factors against the potential unfairness of maintaining the monetary judgment after the decision in *AMG*, and reasonably weighed Hewitt's failure to challenge the availability of monetary relief in the underlying matter. *See id.* Balancing all of those circumstances, the court properly concluded there "is no 'manifest injustice'" in continuing to hold Hewitt responsible for repaying the losses that his fraud caused to consumers. ER 13. That conclusion was soundly within the district court's discretion.

Hewitt does not seriously attempt to show that the district court's denial of relief under Rule 60(b)(6) was an abuse of discretion. *See* Br. 48-51. He does not argue that the district court improperly considered the extent of his violations, his own participation in them, the injury he caused consumers, the reasonableness of the Commission's reliance on Section 13(b), or his failure to challenge the district court's authority to enter monetary relief. *See id.* Instead, he makes the astonishing claim that "enforcement of the judgment would work a significant injustice" because it would mean his victims' losses could still potentially be redressed, whereas the losses of the *AMG* victims cannot. Br. 48-49. But justice does not mean that perpetrators must be let off the hook so that all victims suffer equally. The district court did not abuse its discretion by finding no manifest injustice would be prevented by denying relief under Rule 60(b)(6).[6]

Nor is Hewitt aided by his arguments concerning the quantum of monetary relief that could have been awarded under Section 19 of the FTC Act (Br. 51-61). The district court weighed numerous circumstances in declining to order relief

[6] Hewitt's claim is also misinformed. The *AMG* victims have received more than $535 million in redress drawn from settlements with certain defendants and assets seized as part of the criminal case against Scott Tucker. *See* https://www.ftc.gov/news-events/news/press-releases/2022/05/federal-trade-commission-sends-out-second-round-redress-checks-payday-lending-scheme-operated-amg.

under Rule 60(b)(6); Section 19's monetary remedy was just one of them. And whatever the precise measure of the relief that could have been awarded under Section 19, that does not change the correctness of the judgment under Section 13(b) as it was interpreted when the judgment was entered, nor does it excuse Hewitt's earlier failure to challenge the district court's authority to order monetary relief. It also does not negate the seriousness of Hewitt's violations or the extent of the harm he caused consumers.

Hewitt does not challenge the district court's conclusion that vacating the monetary judgment under Section 13(b) would lead to the expenditure of "significant time and resources" litigating the Section 19 issues on remand. ER 13. At most, Hewitt's arguments challenge the court's conclusion that such proceedings would likely lead to a "substantially similar end result." *Id.* But Hewitt does not attempt to show that the district court made any error in weighing the relevant circumstances, much less that denying relief was outside the "broad range of permissible conclusions" and so "beyond the pale of reasonable justification under the circumstances" that it amounted to an abuse of discretion. *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir. 2010); *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000). The Court should therefore reject Hewitt's attempt to litigate the applicability of Section 19.

Hewitt's Section 19 arguments are largely incorrect or irrelevant in any event. For example, he argues that he would not be liable for monetary relief under Section 19 because there was no allegation he provided "substantial assistance" to the operation's telemarketing violations. Br. 57-59. But the district court found him *directly* liable for multiple telemarketing violations (ER 293-299) and no additional finding would be required to justify monetary relief under Section 19. Similarly, although Hewitt argues that monetary relief under Section 19(a)(2) would not have been available (Br. 54-56), he admits that Section 19(a)(1) applies to his violations, and the district court's decision discussed the availability of relief under Section 19(a)(1). Br. 56-57.

Hewitt also gets no help from his remaining arguments, which challenge only the amount of monetary relief under Section 19, not its availability. He claims the harm from his Telemarketing Sales Rule violations cannot be untangled from his Section 5 violations (Br. 57), but he ignores the district court's finding that "Hewitt's violations of the TSR resulted in a 'massive' amount of consumer injury, 'involving an estimated loss of nearly $500 million dollars." ER 13 (quoting *FTC v. John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1015 (C.D. Cal. 2012)). Indeed, the original judgment attributed more than $280 million of the consumer harm to Hewitt's deceptive continuity membership plans based on "the same evidence" that supported his Telemarketing Sales Rule violations. *See* ER 289, 293-

297. Hewitt's claim that monetary liability would be limited to the amounts he personally received (Br. 59-60) is contrary to the plain language of Section 19, which authorizes relief the court finds necessary to redress harm to consumers. 15 U.S.C. § 57b(b). Lastly, Hewitt's argument that Section 19's three-year statute of limitations would preclude any relief (Br. 60-61) fails because it cites only the dates that his deceptive informercials *originally* aired. The informercials continued to air during the statutory period.

At base, Hewitt wants to reopen a ten-year old case to escape from the obligation to repay the massive losses he caused to consumers. That is not what Rule 60(b) is for.

CONCLUSION

The district court's order should be affirmed.

Respectfully submitted,

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June 27, 2022

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32-1, in that it contains 6919 words.

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