

No. 20-15143 & 20-15144

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

SANDRA X. HANLEY
AND JONATHAN P. HANLEY,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Nevada
No. 2:18-cv-00030-JCM-BNW
Hon. James C. Mahan

BRIEF OF THE FEDERAL TRADE COMMISSION

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JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1337(a), and 1345; 15 U.S.C. §§ 45(a), 53(b), and 57a; and 12 U.S.C. § 5538. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTION PRESENTED

Did the district court correctly hold the appellants liable for monetary relief under Section 19 of the Federal Trade Commission Act, 15 U.S.C. §§ 57b(a)(1) & 57b(b), as incorporated by the Dodd-Frank Act, 12 U.S.C. § 5538(a)(3)?

STATEMENT OF THE CASE

The facts of this case are not in dispute. The district court found that Jonathan and Sandra Hanley preyed on consumers who were behind on their mortgages by promising to modify their loans to make the payments more affordable. ER 8. They told consumers that they had special relationships with mortgage holders or that they were affiliated with the federal government, and that they would reduce the consumers' payments and interest rates by substantial amounts. ER 8-10. They often claimed a perfect or nearly perfect success record and even guaranteed to successfully renegotiate homeowners' mortgage terms. ER 8.

In fact, the Hanleys had no special relationships with mortgage holders or status with the government, and they often failed to obtain any relief for their customers. ER 9-10. Some learned from their lenders that the Hanleys did not properly

request loan modifications, that they submitted irrelevant materials to the lenders, or that they never contacted the lenders at all. ER 8.

To pay for their sham service, the Hanleys convinced their customers to send them money the consumers would otherwise have applied to their mortgages. They told consumers that they would not begin work until they received \$3,900 in fees, which they usually collected in \$650 monthly installments. ER 8. At the same time, they instructed consumers *not* to contact their lenders and *not* to make their scheduled payments. ER 10. Consumers who followed that direction fell further behind on their payments, incurred additional interest charges, and were assessed additional penalties. ER 8. Some consumers fell into foreclosure and lost their homes. *Id.* The Hanleys' victims suffered monetary harm of more than \$18 million.

A. Regulation O and the Dodd-Frank Act

In 2010, the Federal Trade Commission issued the Mortgage Assistance Relief Services Rule (also known as the MARS Rule) in response to Congress's directive to address abusive practices by loan modification and foreclosure rescue services.¹ Later that year, Congress passed the Dodd-Frank Act, which transferred the Commission's rulemaking authority for mortgage relief services to the Con-

¹ 75 Fed. Reg. 75092 (Dec. 1, 2010); *see* Omnibus Appropriations Act, Pub. L. No. 111-8, § 626, 123 Stat. 524 (2009), as clarified by the Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 511, 123 Stat. 1734 (2009).

sumer Financial Protection Bureau.² *See* 12 U.S.C. § 5538. The Bureau then reissued the MARS Rule and dubbed it Regulation O. *See* 12 C.F.R. §§ 1015.1-1015.5.

Regulation O prohibits the exact practices that the Hanleys used to prey on consumers. It generally forbids providers of mortgage relief services from misrepresenting *any* aspect of their services (12 C.F.R. § 1015.3(b)), and specifically prohibits:

- asking for or receiving payment before the consumer has actually executed a loan modification agreement with their lender, 12 C.F.R. § 1015.5(a);
- misrepresenting the likelihood of obtaining a mortgage modification, 12 C.F.R. § 1015.3(b)(1);
- falsely claiming that the service is affiliated with either the government, 12 C.F.R. § 1015.3(b)(3)(i), or a mortgage holder, 12 C.F.R. § 1015.3(b)(3)(v); and
- telling consumers not to communicate with their lender, 12 C.F.R. § 1015.3(a).

² *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1097, 124 Stat. 1376 (2010).

Beyond those prohibitions, Regulation O also requires mortgage assistance services to affirmatively tell consumers that they are not affiliated with the government or the consumer's lender, 12 C.F.R. §§ 1015.4(a)(1), (b)(2); that the lender may not agree to change their loan, 12 C.F.R. § 1015.4(b)(3); and that "If you stop paying your mortgage, you could lose your home and damage your credit rating," 12 C.F.R. § 1015.4(c).

B. The Commission's Authority to Enforce Regulation O

Although the Dodd-Frank Act transferred rulemaking authority over mortgage relief services from the Commission to the CFPB, it allowed both agencies to enforce the statute. The Commission can enforce in two ways. First, the statute specifies that violations of rules issued under its authority are to be "treated as . . . violation[s] of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices." 12 U.S.C. § 5538(a)(1). The Commission may therefore use its traditional rule-enforcement authority under the FTC Act to enforce Regulation O as if it were a rule issued by the Commission.

Dodd-Frank also gives the Commission authority to enforce Regulation O under Dodd-Frank itself. The Act directs the Commission to enforce Regulation O (and similar rules) "in the same manner, by the same means, and with the same jurisdiction, as though all applicable terms and provisions of the Federal Trade

Commission Act were incorporated into and made part of this section.” 12 U.S.C. § 5538(a)(3). By incorporating the enforcement provisions of the FTC Act into Dodd-Frank, Congress thereby empowered the Commission to enforce Regulation O under the authority of Dodd-Frank, using the tools that reside in the FTC Act.

Whether the Commission enforces Regulation O by invoking Dodd-Frank or the FTC Act directly, the Commission has power to bring three types of rule-enforcement lawsuits in federal court: (1) a suit for a civil penalty under Section 5(m) of the FTC Act, 15 U.S.C. § 45(m); (2) a suit for a permanent injunction under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b); and (3) a suit for relief to redress harm to consumers under Section 19 of the FTC Act, 15 U.S.C. §§ 57b(a)(1), 57b(b).

Until the Supreme Court’s recent decision in *AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021), suits under both Section 13(b) and Section 19 allowed the Commission to obtain monetary redress for consumers harmed by a violation. *See, e.g., FTC v. Commerce Planet*, 815 F.3d 593, 598-599 (9th Cir. 2016). In *AMG*, however, the Supreme Court ruled that Section 13(b) does not allow monetary remedies. Accordingly, only Section 19 now authorizes consumer redress; specifically, Section 19(a)(1) permits the Commission to sue any person who violates a rule respecting unfair or deceptive acts or practices, and Section

19(b) empowers the court in such an action to “grant such relief as the court finds necessary to redress injury to consumers,” including “the refund of money or return of property.” 15 U.S.C. §§ 57b(a)(1); 57b(b). In *AMG*, the Supreme Court noted that its decision did not affect the authority to seek consumer redress under Section 19: “[n]othing we say today . . . prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers.” 141 S.Ct. at 1352.

C. Procedural History

In 2018, the Commission sued the Hanleys and their corporate entities to bring an end to their deceptive scheme and return the money they took from consumers. *See* ER 192-217. The lawsuit rested on two grounds. First, the Commission alleged that the Hanleys’ scheme violated Section 5 of the FTC Act directly because it involved “unfair and deceptive acts or practices” which Section 5 declares illegal. ER 209-211. Second, the complaint charged that their operation violated numerous provisions of Regulation O, including by receiving advance payments, misrepresenting their services, telling consumers not to talk to their lenders, and failing to provide required disclosures. ER 211-215.

Consistent with the alleged violations, the complaint invoked two statutory grounds for the Commission’s authority to bring suit and to recover monetary relief for victims: Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Dodd-Frank,

12 U.S.C. § 5538. ER 193-194; 216. With regard to Dodd-Frank, the Commission stated: “Section 626 of the Omnibus Act³] authorizes this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants’ violations of the MARS Rule (Regulation O), including rescission and reformation of contracts and the refund of money.” ER 216.

The district court entered summary judgment for the Commission, finding no genuine issue that the Hanleys had deceived their customers in violation of Section 5 of the FTC Act and had violated Regulation O in numerous respects. ER 13. The court specifically found that the Commission’s enforcement action was based on both Section 13(b) of the FTC Act and Dodd-Frank, ER 4, and it entered a permanent injunction banning the Hanleys from the debt relief business and forbidding them to engage in similar misrepresentations in the future. ER 13-14. The court also entered a monetary judgment of \$18,428,370, representing the total gross revenues that the Hanleys received from their illegal enterprise after subtracting refunds and chargebacks. ER 14. The court stated directly that the monetary judgment was based on the defendants’ violations of both “Section 5 of the FTC Act and Regulation O.” ER 12. And the court relied on both Section 13(b) of the

³ The authority to issue regulations regarding mortgage assistance services originated with the Omnibus Act, was clarified by a later statute, and was transferred to the CFPB under Dodd-Frank. *See* notes 1-2, *supra*, & accompanying text. For simplicity, this brief refers to the resulting statutory scheme as “Dodd-Frank.”

FTC Act and Dodd-Frank for the authority to enter monetary relief. It found that both laws “authorize the FTC . . . to initiate federal district court proceedings to enjoin violations of the FTC Act and Regulation O and to seek equitable relief as may be appropriate in each case, including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies.”

ER 5.

The Hanleys both appealed; their companies did not. ER 32, 34.

SUMMARY OF THE ARGUMENT

The Hanleys do not challenge the district court’s findings that their loan-modification business violated the FTC Act and Regulation O, and they do not deny that the district court properly entered a permanent injunction to prevent them from continuing their illegal practices. Their sole argument on appeal is that the district court lacked the power to order monetary relief under Section 13(b) of the FTC Act under the Supreme Court’s decision in *AMG*, and that the Commission relied “solely” on Section 13(b) when it sought monetary relief.

That argument fails because the district court had another source of authority to enter monetary relief. Dodd-Frank makes Regulation O equivalent to a rule issued by the Commission under Section 18 of the FTC Act, and it directs the Commission to use its FTC-Act authority to enforce Regulation O as if the applicable rule-enforcement terms of the FTC Act were incorporated into Dodd-Frank. 12

U.S.C. §§ 5538(a)(1), 5538(a)(3). The Commission’s authority to enforce Section 18 rules—and thus Regulation O—includes the authority to sue violators under Section 19 of the FTC Act and to recover “such relief as the court finds necessary to redress injury to consumers.” 15 U.S.C. §§ 57(b)(a)(1), 57b(b).

The Hanleys’ claim that the Commission relied solely on Section 13 for the authority to seek monetary relief is simply false. The complaint relied on Dodd-Frank in addition to Section 13(b), both for the Commission’s authority to bring suit and for the court’s authority to enter monetary relief. The Hanleys’ argument that the Commission waived any reliance on Section 19 is also false. Far from waiving Section 19, the Commission told the court that “Section 13(b) . . . is not the Court’s only basis for entering equitable monetary relief,” and explained directly how Dodd-Frank incorporates the Section 19 authority to enter consumer redress. ER 65. The court then relied on both Dodd-Frank and Section 13(b) when it entered judgment against the Hanleys. The judgment should be affirmed because the district court’s authority under Dodd-Frank and Section 19 was not affected by the Supreme Court’s decision in *AMG*.

STANDARD OF REVIEW

The district court’s entry of monetary relief is reviewed for an abuse of discretion. *FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009). Its application of the

law is reviewed de novo. *Husain v. Olympic Airways*, 316 F.3d 829, 835 (9th Cir. 2002).

ARGUMENT

The only question presented in this case is whether the district court properly entered a monetary judgment to redress the harm to consumers from the Hanleys' illegal operation, and the answer to that question is plainly yes. The statutory regime that Congress created under Dodd-Frank authorized victim redress by incorporating the Commission's Section 19 rule-enforcement authority, which expressly permits monetary remedies. The Hanleys claim the Commission relied *only* on Section 13(b) of the FTC Act and *not* Section 19, but the record shows the opposite: the Commission invoked Section 19 by invoking Dodd-Frank, which incorporates Section 19. The complaint relied on both Dodd-Frank and Section 13(b) as authority for monetary relief, and the district court likewise invoked both sources of authority when it entered the monetary judgment. The Hanleys even admit, undermining their own argument, that the Commission relied on both "Section 13(b) and 12 USC § 5538"—the operative section of Dodd-Frank. Hanley Br. 8.

Because Dodd-Frank authorized the district court to order consumer redress, the Hanleys are incorrect to argue that it lacked that authority after the Supreme Court's decision in *AMG*. *AMG* held that Section 13(b) does not authorize monetary relief, but it expressly left intact the court's remedial authority under Section

19. The Hanleys’ backup argument that the Commission waived Section 19 is simply wrong.

A. Dodd-Frank authorized the district court to order consumer redress for violations of Regulation O.

The district court’s authority to order monetary redress for the victims of the Hanley’s mortgage-relief scam flows directly and inescapably from the interaction between Dodd-Frank and the FTC Act.

The operative section of Dodd-Frank is found at 12 U.S.C. § 5538, which both authorized the Bureau of Consumer Financial Protection to prescribe Regulation O’s rules for mortgage-assistance services and specifies how such rules may be enforced. *See* 12 U.S.C. §§ 5538(a)(1), 5538(a)(3); *see* 12 C.F.R. Part 1015. Section 5538 states that “[a]ny violation” of such rules “shall be treated as . . . a violation of a rule under section 18 of the Federal Trade Commission Act.” 12 U.S.C. § 5538(a)(1). It states further that the Commission “shall enforce” such rules “in the same manner, by the same means, and with the same jurisdiction, as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made part of this section.” 12 U.S.C. § 5538(a)(3).

Two “applicable terms and provisions” that provide for the enforcement of Section 18 rules are Sections 19(a)(1) and 19(b) of the FTC Act. Section 19(a)(1) authorizes the Commission to “commence a civil action” against any person who violates a Commission rule “respecting unfair or deceptive acts or practices”—*i.e.*,

a rule under Section 18—and to seek the relief specified in Section 19(b). 15 U.S.C. § 57b(a)(1). Section 19(b) then provides that the court in a case alleging rule violations “shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers . . . resulting from the rule violation.” 15 U.S.C. § 57b(b). That relief may include (but is not limited to) “the refund of money or return of property.” *Id.* Putting that all together, Dodd-Frank incorporates the Commission’s Section 19 authority to seek—and the district court’s Section 19 authority to grant—consumer redress for violations of Regulation O.

The Hanleys admit much of the above in their opening brief. They agree with the provenance of Regulation O and that its violations are treated like violations of a Commission rule under Section 18. Hanley Br. 4. They also agree that under Dodd-Frank the Commission may “enforce rules issued by the Bureau of Consumer Financial Protection ‘in the same manner, by the same means, and with the same jurisdiction,’ as though all applicable terms and provisions of the FTC Act was incorporated into the CFPA⁴.” *Id.* at 9 (quoting 12 U.S.C. § 5538(a)(3)); *see also id.* at 10 (repeating the same point). And they do not dispute that the FTC Act’s enforcement scheme permits “filing actions to enforce administrative rules

⁴ “CFPA” refers to the Consumer Financial Protection Act, another name for Dodd-Frank.

adopted under Section 18 of the FTC Act *including monetary relief for such violations.*” *Id.* at 6-7 (emphasis added).

Nevertheless, the Hanleys appear to conclude that Dodd-Frank limits the Commission to pursue relief only under Section 13(b). After quoting Section 5538’s incorporation of “*all* applicable terms and provisions of the FTC Act” (emphasis added), they state: “Thus, if the FTC cannot pursue monetary relief under Section 5 of the Act by invoking Section 13(b) of the FTC Act, it cannot pursue monetary relief against Defendants based on Regulation O.” Hanley Br. 10. That argument simply ignores that Section 19’s rule-enforcement provisions are “applicable terms and provisions of the FTC Act” incorporated by Dodd-Frank for the enforcement of Regulation O. 12 U.S.C. § 5538(a)(3).

B. The Commission and the district court relied on the authority of both Dodd-Frank and Section 13(b), and the Commission did not “waive” its Dodd-Frank authority.

The Hanleys’ true argument appears to be that the Commission never relied on or affirmatively waived reliance on Section 19 as a source of authority for monetary relief. That claim is also wrong.

To begin with, both the Commission and the district court made clear that they were invoking that authority. The complaint expressly cited *both* Dodd-Frank *and* Section 13(b) as authority for redress. Paragraph 5, for example, invokes Section 13(b) and 12 U.S.C. § 5538—the operative provision of Dodd-Frank—as

granting authority to obtain “restitution [and] the refund of monies paid.” ER 194. In a section of the complaint titled “This Court’s Power to Grant Relief,” the Commission stated that Dodd-Frank “authorizes this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants’ violations of the MARS Rule (Regulation O), including rescission and reformation of contracts and the refund of money.” ER 216. The Commission referred to both sources of authority again in its prayer for relief, which included the request for monetary relief. ER 216-217.

The record thus flatly refutes the Hanleys’ repeated claim that the Commission relied “solely” on Section 13(b) of the FTC Act to pursue monetary relief in the district court (*see* Hanley Br. 2, 4-5, 8). Indeed, two sentences after making that claim, the Hanleys identify paragraph 5 of the complaint as its “key allegation” and admit that “[t]he FTC reli[ed] on Section 13(b) *and* 12 USC § 5538.” Hanley Br. 8 (emphasis added); *see also id.* at 3-4 (citing the same two sections for the Commission’s authority to obtain monetary relief). Because Section 5538 incorporates Section 19 of the FTC Act, invoking Dodd-Frank is the same as invoking Section 19 itself.

Not only did the Commission invoke Dodd-Frank, the district court also relied on that statute (along with Section 13(b)) as the basis for both the agency’s authority and the judgment. The court expressly held that the case was brought under

both Section 13(b) and Dodd-Frank, ER 4; that the two statutes entitled the Commission to seek relief “including rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies,” ER 5; and that a monetary award against the Hanleys was proper “for their violations of Section 5 of the FTC Act and Regulation O,” ER 12.⁵

The Hanleys are also wrong to assert that the Commission “expressly waived” Section 19. *See* Hanley Br. 4-5, 11 n.1. They imply that in its summary judgment motion, the Commission said its claims were “brought under Section 13(b) of the Act (and *not* Section 19).” Hanley Br. 11 n.1. That language does not show any waiver because it is taken grossly out of context. It appears in the motion as a parenthetical quotation from an opinion discussing the claims in a different case, *FTC v. Inc21.com*, 745 F. Supp. 2d 975, 1012 (N.D. Cal. 2010), which the Hanleys do not cite. *Compare* Hanley Br. 11 n.1 *with* ER 186.⁶ There is no reasonable way to read the Commission’s pleading as expressly or impliedly waiving a right to monetary relief via Dodd-Frank and Section 19.

⁵ The district court’s reliance on Dodd-Frank would be sufficient to affirm even if the Commission had not invoked the statute itself. Under Federal Rule of Civil Procedure 54(c), the court was obliged to “grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.”

⁶ The Hanleys misidentify the Commission’s argument as appearing on pages 183-184 of the Excerpts of Record rather than pages 185-186.

If there were any doubt about the matter, the Commission removed it in its summary judgment reply brief by expressly telling the district court that “Section 13(b) . . . is not the Court’s only basis for entering equitable monetary relief.” ER 65. The Commission then explained in detail how Dodd-Frank incorporates the Commission’s Section 19 authority to seek monetary relief for rule violations, concluding that “the Court has authority to enter the requested monetary relief against Defendants.” *Id.*⁷

C. The district court’s authority to enter monetary relief under Dodd-Frank was not affected by the Supreme Court’s decision in *AMG*.

After the Hanleys filed this appeal, the Supreme Court decided in *AMG Capital Management, LLC v. FTC*, 141 S.Ct. 1341 (2021), that Section 13(b) of the FTC Act authorizes the Commission to seek a permanent injunction against practices that violate the FTC Act but does not authorize monetary relief. The Commission does not dispute that following *AMG*, the district court’s reliance on Section 13(b) for the authority to enter monetary relief cannot be sustained.

Nevertheless, the Hanleys’ argument that *AMG* requires this Court to reverse the monetary judgment fails because the district court also relied on the authority of Dodd-Frank. As described above, Dodd-Frank incorporates the district court’s

⁷ The applicability of Section 19’s limitations period on the calculation of the judgment is not before the Court. The Hanleys did not raise that question in their opening brief and have thereby waived it. *Cruz v. Int’l Collection Corp.*, 673 F.3d 991, 998 (9th Cir. 2012).

authority under Section 19 of the FTC Act to order “such relief as the court finds necessary to redress injury to consumers . . . resulting from the rule violation,” including “the refund of money or return of property.” 15 U.S.C. § 57b(b); *see* 12 U.S.C. §§ 5538(a)(1) & 5538(a)(3). And the Supreme Court specifically stated in *AMG* that its decision did not affect Section 19: “[n]othing we say today . . . prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers.” 141 S.Ct. at 1352. Indeed, by the Hanleys’ own description, the Supreme Court concluded “the FTC had authority to obtain restitution [under] Sections 5 and 19” but not Section 13(b). Hanley Br. 8.

Because the district court’s judgment rests on Dodd-Frank and Dodd-Frank incorporates Section 19, the judgment may be affirmed notwithstanding *AMG*.⁸

CONCLUSION

The judgment should be affirmed.

⁸ To the extent the Hanleys claim that *AMG* somehow divested the district court of subject matter jurisdiction (Hanley Br. 5-6), that too is incorrect. The complaint charged that the Hanleys violated federal law, namely the FTC Act and Regulation O. Accordingly the “the district court had federal question jurisdiction because the dispute was one ‘arising under’ federal law.” *FTC v. AT&T Mobility LLC*, 883 F.3d 848, 853 (9th Cir. 2018) (quoting 28 U.S.C. § 1331). Nothing in *AMG* could have transformed this case into one that does not arise under federal law.

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7), in that it contains 3896 words.

August 23, 2021

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