UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 9-4719-MWF (CWx) **Date: August 19, 2021**
Title: Federal Trade Commission v. John Beck Amazing Profits, LLC et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER DENYING DEFENDANT GARY HEWITT'S MOTION TO VACATE JUDGMENT [858]

Before the Court is Defendant Gary Hewitt's Motion to Vacate Judgment (the "Motion"), filed on May 24, 2021. (Docket No. 858). Plaintiff Federal Trade Commission ("FTC") filed an opposition on June 7, 2021. (Docket No. 862). Defendant Hewitt filed a reply on June 14, 2021. (Docket No. 863).

The Court has read and considered the papers filed in connection with the Motion and held a telephonic hearing on June 21, 2021, pursuant to General Order 21-07 arising from the COVID-19 pandemic.

For the reasons stated below, the Motion is **DENIED**. Hewitt has failed to demonstrate that relief is warranted under Rule 60(b). Although Hewitt is correct that Section 13(b) of the Federal Trade Commission Act did not authorize the Court to grant equitable monetary relief, it would do no justice to reopen these proceedings, which ceased nearly a decade ago, and then spend significant time and resources arriving at the same or a substantially similar end result.

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I. BACKGROUND

On August 21, 2012, the Court issued final judgment against Defendants (the "Judgment"), awarding the FTC, *inter alia*, equitable monetary relief under Section 13(b) of the Federal Trade Commission Act ("FTC Act"). (Docket No. 643).

On April 22, 2021, the Supreme Court unanimously held that Section 13(b) does not authorize the FTC to seek, or a court to award, equitable monetary relief. *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341, 1344 (2021).

Relying on *AMG*, Hewitt now moves under Federal Rule of Civil Procedure 60(b) to modify the Judgment to vacate the portion imposing equitable monetary relief. (Motion at 8).

II. LEGAL STANDARD

Rule 60(b) "provides for reconsideration [from a judgment] only upon a showing of (1) mistake, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment; (5) a satisfied or discharged judgment; or (6) 'extraordinary circumstances' which would justify relief." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1442 (9th Cir. 1991) (citing *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985)).

"Reconsideration for any of the reasons set forth in Rule 60(b) is an 'extraordinary remedy that works against the interest of finality and should be applied only in exceptional circumstances.'" *Audionics Sys., Inc. v. AAMP of Fla., Inc.*, CV 12-10763-MMM (JEMx), 2015 WL 11201243, at *7 (C.D. Cal. Nov. 4, 2015) (citations omitted). "Motions for relief from judgment pursuant to Rule 60(b) are addressed to the sound discretion of the district court and will not be reversed absent an abuse of discretion." *Casey v. Albertson's Inc.*, 362 F.3d 1254, 1257 (9th Cir. 2004).

III. DISCUSSION

Hewitt asserts that relief is warranted under three provisions of Rule 60(b): (1) Rule 60(b)(4), the judgment is void; (2) Rule 60(b)(5), the judgment has been satisfied or discharged; and (3) Rule 60(b)(6), other reasons justifying relief. (Motion at 7-10).

A. Rule 60(b)(4) - Void Judgment

According to Hewitt, *AMG*'s holding — *i.e.*, that courts lack power to order equitable monetary relief under Section 13(b) — means that the Court entered that portion of the Judgment without jurisdiction, rendering it void *ab initio*. (Motion at 7-9). The FTC argues that the specific provisions of the FTC Act are not the source of the Court's jurisdiction over this matter, and as a result, a misinterpretation of the provisions, even as to their scope, cannot render the Judgment void. (Opposition at 5-8). The Court agrees with the FTC.

"A judgment is not void . . . simply because it is or may have been erroneous." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) (citations omitted). "Instead, Rule 60(b)(4) applies only in the rare instance where a judgment is premised either on a certain type of jurisdictional error or on a violation of due process that deprives a party of notice or the opportunity to be heard." *Id.* at 271 (citations omitted). "Total want of jurisdiction must be distinguished from an error in the exercise of jurisdiction, and only rare instances of a clear usurpation of power will render a judgment void." *Id.* (quoting *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990)) (internal alterations and quotation marks omitted). "[T]he scope of what constitutes a void judgment is narrowly circumscribed, and judgments are deemed void only where the assertion of jurisdiction is truly unsupported." *Hoffmann v. Pulido*, 928 F.3d 1147, 1151 (9th Cir. 2019).

In *Hoffmann*, for example, the Ninth Circuit denied the plaintiff relief under Rule 60(b)(4), holding that although the magistrate judge lacked statutory authority to dismiss his complaint, the dismissal was "[a]t worst, . . . an error regarding the

contours of a magistrate judge's authority pursuant to 28 U.S.C. § 636[,]" which "is not equivalent to acting with total want of jurisdiction and does not render the judgment a complete nullity." 928 F.3d at 1151. The *Hoffmann* court reasoned that because there was "plainly an 'arguable basis'" for the magistrate judge's assertion of jurisdiction — in that magistrate judges routinely dismissed actions in similar situations prior to a recent Ninth Circuit decision prohibiting the practice — the judgment did not "fall into the narrowly circumscribed set of void judgments" under Rule 60(b)(4). *Id.*

In *United States v. Philip Morris USA Inc.*, the D.C. Circuit explained that a court's authority to fashion relief under a particular statute is "fundamentally different from a court's subject matter jurisdiction over a case and from its personal jurisdiction over the parties, both of which concern the power to proceed with a case at all." 840 F.3d 844, 850 (D.C. Cir. 2016). The court held that "Rule 60(b)(4) does not permit relief where a court has exceeded its remedial authority" because "[s]uch errors are simply not the type of fundamental defects the [Supreme] Court had in mind in *Espinosa*." *Id.* at 276 (citing *Boch Oldsmobile, Inc.*, 909 F.2d at 662 ("Consent decrees that run afoul of the applicable statutes lead to an erroneous judgment, not to a void one.")).

Here, the Court determines that the portion of the Judgment granting the FTC equitable monetary relief was erroneous because it was not authorized by Section 13(b), but it was not void within the meaning of Rule 60(b)(4) for two reasons:

First, as in *Hoffman*, there was plainly an "arguable basis" for the Court's exercise of jurisdiction in issuing the Judgment, namely that the Ninth Circuit at the time construed Section 13(b) as authorizing courts to fashion equitable monetary relief. *See, e.g.*, *Federal Trade Commission v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994).

Second, the Court agrees with the reasoning of the D.C. Circuit in *Philip Morris* that Rule 60(b)(4) does not permit relief where a court has exceeded its remedial

authority. Otherwise, "[c]omplex remedial schemes in voting rights, securities fraud, affirmative action, prison conditions, and scores of other cases could all be challenged [under Rule 60(b)(4)] on the ground that the remedies imposed were, in one litigant's view, unauthorized by the statute at issue." *Philip Morris*, 840 F.3d at 851. This broad reading of Rule 60(b)(4) would contravene the Supreme Court's warning in *Espinosa* that the list of defects rendering a judgment void must be "'exceedingly short,' lest 'Rule 60(b)(4)'s exception to finality swallow the rule.'" *Id.* (quoting *Espinosa*, 559 U.S. at 270) (internal alterations omitted).

Because the Judgment is not void, Hewitt is not entitled to relief under Rule 60(b)(4).

B. Rule 60(b)(5) and (6) – Equity of Prospective Application and Extraordinary Circumstances

Rule 60(b)(5) provides that a court may relieve a party from a final judgment where "the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable[.]" Rule 60(b)(6) is a "catch-all" provision allowing for relief from a judgment or order for "any other reason that justifies relief." *Latshaw v. Trainer Wortham & Co., Inc.*, 452 F.3d 1097, 1102 (9th Cir. 2006). This rule is used to prevent "manifest injustice" where "extraordinary circumstances" are present. *Id.*

Hewitt argues that relief is warranted under both Rule 60(b)(5) and Rule 60(b)(6) because it would be unequitable to force him "to continue to suffer under a massive judgment for money when Congress never authorized it," and that this Court "has no business entering or enforcing liabilities that Congress never created, or exercising jurisdiction that Congress never granted." (Motion at 10).

It does not appear that Rule 60(b)(5) applies here. The Judgment has not been satisfied, released, or discharged, nor was it based on an earlier judgment that has been reversed or vacated. The portion of Rule 60(b)(5) that references equity applies to

prospective injunctive relief, not the equitable monetary relief that Hewitt challenges here. *See California by & through Becerra v. U.S. Environmental Protection Agency*, 978 F.3d 708, 713-17 (9th Cir. 2020) (discussing Rule 60(b)(5) as the standard for modifying an injunction "with prospective effect," in contrast to "judgments that offer a present remedy for a past wrong").

Under Rule 60(b)(6), "a change in the controlling law can — but does not always — provide a sufficient basis for granting relief[.]" *Henson v. Fidelity National Financial, Inc.*, 943 F.3d 434, 444 (9th Cir. 2019) (citing *Phelps v. Alameida*, 569 F.3d 1120, 1132-33 (9th Cir. 2009)). "To assess a Rule 60(b)(6) motion predicated on an intervening change in the law, a district court must evaluate the circumstances surrounding the specific motion before the court." *Id.* (citing *Phelps*, 569 F.3d at 1132) (internal quotation marks omitted). This "case-by-case inquiry requires the trial court to intensively balance numerous factors, including the competing policies of the finality of judgments and the incessant command of the court's conscience that justice be done in light of all the facts." *Id.* (citing *Phelps*, 569 F.3d at 1132) (internal quotation marks and alterations omitted).

In *Phelps*, the Ninth Circuit considered six factors in determining whether relief under Rule 60(b)(6) was warranted:

1) "the nature of the intervening change in the law";
2) the movant's "interest in pursuing relief";
3) the parties' "reliance interest in the finality of the case";
4) "the delay between the judgment and the Rule 60(b) motion";
5) "the relationship between the original judgment and the change in the law"; and
6) "concerns of comity."

Id. at 446-53 (citing *Phelps*, 569 F.3d at 1135-39).

The Ninth Circuit cautioned, however, that its discussion of the six factors in *Phelps*, which arose in the habeas corpus context, "was not meant to impose a rigid or exhaustive checklist, because Rule 60(b)(6) is a grand reservoir of equitable power, and it affords courts the discretion and power to vacate judgments whenever such action is appropriate to accomplish justice." *Id.* at 445 (citing *Phelps*, 569 F.3d at 1135) (internal quotation marks and alterations omitted). The Ninth Circuit further explained that, especially when "a district court is faced with applying [the *Phelps*] factors in an entirely new context, the court should assess how that different context might alter the calculus of the factors' application, and whether those factors adequately capture all of the relevant circumstances." *Id.* at 446. That is, the Ninth Circuit requires courts to "consider 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 FTC asserts that the *Phelps* factors weigh against granting relief, while Hewitt does not even attempt to address them, contending that the factors are unhelpful under the circumstances of this case, which appears outside of the habeas corpus context and involves relief that the Court lacked authority to issue in the first instance. (Opposition at 14-17; Reply at 15 n.5). The Court agrees with Hewitt that the *Phelps* factors offer little assistance here outside of the habeas context. As a result, the Court references only those *Phelps* factors that are pertinent to the unique circumstances present here.

At the hearing, the FTC argued that the Motion should be denied because the Judgment because would have been justified on an alternate basis under Section 19 of the FTC Act. Hewitt contested this assertion, arguing that the FTC did not prove up Section 19's "reasonable man" standard. As a result, the Court issued an Order on June 22, 2021, directing the parties to file supplemental briefing addressing Hewitt's argument with respect to the "reasonable man" standard and explaining why judgment would or would not have been justified on an alternate basis under Section 19. (Docket No. 873).

The FTC filed its supplemental brief on July 6, 2021 (the "FTC Supp."). (Docket No. 875). Hewitt filed his supplemental brief on July 13, 2021 (the "Hewitt Supp."). (Docket No. 876). As an initial matter, the parties now appear to agree that Section 19's "reasonable man" standard applies to actions under Section 19(b), not Section 19(a). (*See* Hewitt Supp. at 4).

Section 19(a)(1) creates liability for Telemarketing Sales Rule ("TSR") violations. *See* 15 U.S.C. § 57b. The FTC contends that the Judgment could have been obtained by pleading the entire case as a violation of 16 C.F.R. § 310.3, the general misrepresentation provision of the TSR. (FTC Supp. at 3). Pursuant to 16 C.F.R. § 310.3(b), it is "a violation of this Rule for a person to provide substantial assistance or support to any seller or telemarketer when that person knows or consciously avoids knowing that the seller or telemarketer is engaged in any act or practice that violates §§ 310.3(a), (c) or (d), or § 310.4 of this Rule."

The Court previously granted summary adjudication of Claims 8, 9, 10, 11, 12, 13, and 14 against Defendants — all of which involved TSR violations pursuant to 16 C.F.R. § 310.3(a)(1)(vii), 16 C.F.R. § 310.4(a)(6), and 16 C.F.R. § 310.4(b)(1)(iii)(A). *See FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1076-79 (C.D. Cal. 2012). The Court further explained that

> individuals may be held liable for monetary relief in their own right for their own deceptive conduct. An individual is liable for corporate violations of the FTCA if "(1) he participated directly in the deceptive acts or had the authority to control them and (2) he had knowledge of the misrepresentations, was recklessly indifferent to the truth or falsity of the misrepresentation, or was aware of a high probability of fraud along with an intentional avoidance of the truth." *Stefanchik*, 559 F.3d at 931.

Id. at 1082 (internal citations omitted). The Court ruled that Hewitt was individually liable for equitable monetary relief due to his role as a principal of Family Products, LLP ("FP") and his control of the other corporate defendants. *Id.*

The Court further determined that a broad order permanently enjoining Hewitt "from engaging, participating, or assisting others in telemarketing and the production or dissemination of any infomercial" was warranted given Hewitt's "serious, pervasive, and continuous" violations of the FTCA and TSR. *FTC v. John Beck Amazing Profits LLC (John Beck II)*, 888 F. Supp. 2d 1006, 1013 (C.D. Cal. 2012), *aff'd*, 644 F. App'x 709 (9th Cir. 2016). The Court found that "Hewitt's personal involvement in the violations w[as] extensive and highly deliberate," and that he "authored and approved the deceptive claims and continued to engage in improper practices even in the face of consent decrees and court orders." *Id.* at 1015.

As a technical matter, Hewitt is correct that the Court did not make an ***express*** finding under Section 19(a)(1) that Hewitt knowingly violated 16 C.F.R. § 310.3(b) by providing "substantial assistance or support" to a seller or telemarketer engaged in a violation of the TSR. That being said, given the similarity between Section 19(a)(1) and Section 13(b), it does appear that the FTC could have chosen to prosecute the case entirely under Section 19(a)(1). Indeed, the Complaint expressly sought relief pursuant to Section 19(a)(1). (*See* Complaint ¶ 4). The FTC can hardly be faulted for relying on decades of binding precedent in ultimately seeking relief under Section 13(b) instead of Section 19(a)(1), particularly considering that every Circuit to have considered the issue had interpreted Section 13(b) as authorizing courts to issue equitable monetary relief. *FTC v. Ross*, 743 F.3d 886, 891 (4th Cir. 2014) (listing cases, including *Pantron*, 33 F.3d at 1102); *see also id.* ("A ruling [that Section 13(b) does not authorize courts to grant equitable monetary relief] would forsake almost thirty years of federal appellate decisions and create a circuit split, a result that we will not countenance in the face of powerful Supreme Court authority pointing in the other direction."); *Henson*, 943 F.3d at 448 ("[I]t is not in this Court's institutional interest, or that of the litigants before it, to fault lawyers who proceed on the basis that an established procedural rule will remain intact, absent some tangible indication (such as a pending Supreme Court case) that it may not.").

Moreover, unlike the defendant in *Ross*, 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, a factor that weighs against relief. *See Henson*, 943 F.3d at 459 ("In *Phelps*, because the petitioner sought the benefit of a favorable change in the law, the fact that the petitioner had been diligent in advancing the legal position that was ultimately adopted by that change in the law was relevant to the equitable considerations implicated by a Rule 60(b)(6) motion.").

On the one hand, Hewitt has a certain point about the unfairness in preserving the Judgment notwithstanding the Court's lack of authority to issue it under Section 13(b). On the other hand, as stated above, the FTC cannot be faulted for its decision to pursue equitable monetary relief under Section 13(b) given binding Ninth Circuit precedent authorizing it to do so.

Considering all of the relevant facts, "extraordinary circumstances" do not warrant vacating the Judgment because there is no "manifest injustice" to prevent here. 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." *John Beck II*, 888 F. Supp. 2d at 1015. If the Court were to grant the Motion, the FTC would move to amend its pleadings. (*See* Opposition at 20). The FTC would then prosecute the case anew, and once again move for summary judgment — this time under Section 19(a)(1). (*See id.*). It would do no justice to reopen these proceedings, which ceased nearly a decade ago, and then spend significant time and resources arriving at the same or a substantially similar end result.

Accordingly, the Motion is **DENIED**.

IT IS SO ORDERED.