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No. 21-14161-G

In the

United States Court of Appeals for the Eleventh Circuit

FEDERAL TRADE COMMISSION,

Plaintiff–Appellee,

v.

NATIONAL UROLOGICAL GROUP, INC., ET AL.,

Defendants–Appellants.

On appeal of right from the United States District Court
for the Northern District of Georgia,
Atlanta Division, No. 1:04-cv-03294-CAP

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CORPORATE DISCLOSURE STATEMENT AND CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 to 26.1-3, Appellants Jared Wheat, Hi-Tech Pharmaceuticals, Inc., and Stephen Smith submit this Corporate Disclosure Statement and Certificate of Interested Persons:

Jared Wheat is a natural individual. Stephen Smith is a natural individual. Hi-Tech Pharmaceuticals, Inc. is not a publicly traded company. Hi-Tech Pharmaceuticals, Inc. has no parent company, and no company owns 10% or more of its stock.

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument because it would significantly aid the decisional process. This appeal primarily concerns the enforcement of a $40 million civil-contempt judgment composed of consumer redress and disgorgement. The Federal Trade Commission obtained that judgment based on the violation of an injunction entered under the Federal Trade Commission Act, 15 U.S.C. §§ 45(a), 52, and 53(b). Subsequently, in *AMG Capital Management, LLC*, 141 S. Ct. 1341 (2021), the Supreme Court undermined the district court's authority to award equitable monetary relief in this action.

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JURISDICTIONAL STATEMENT

I. The district court had subject-matter jurisdiction

The district court had federal subject-matter jurisdiction under 28 U.S.C. § 1331.

In 2004, the Federal Trade Commission filed a complaint asserting claims under the FTC Act, 15 U.S.C. §§ 45(a), 52, and 53(b). Doc. 1. In 2008, the district court eventually granted summary judgment for the FTC under the FTC Act, Doc. 219, and entered a permanent injunction enjoining the Defendants from violating the FTC Act, Doc. 230.

In 2011, the FTC moved to hold certain Defendants in contempt for allegedly violating the injunction. Doc. 332. "[T]he court that enters an injunctive order retains jurisdiction to enforce its order." *Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 970 (11th Cir. 2012). After multiple hearings and appeals, in 2017 the district court entered an order and judgment holding certain Defendants in civil contempt and imposing $40 million in equitable monetary relief. Doc. 966; Doc. 969. In 2019, this Court affirmed that judgment. Doc. 995.

In December 2020, after the United States Supreme Court had granted certiorari in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 194 (2020), Defendants Hi-Tech Pharmaceuticals, Inc., Jared Wheat, and Stephen Smith moved for relief from the judgments under Federal Rule of Civil Procedure 60(b). Doc. 1096.

After the Supreme Court issued its decision in *AMG Capital Management, LLC*, 141 S. Ct. 1341 (2021), in May 2021, Hi-Tech, Wheat, and Smith filed a new motion for relief under Rule 60(b) and sought an accounting of monies collected by the FTC in this case. Doc. 1101. On September 30, 2021, the district court entered an order denying the motion. Doc. 1104.

II. This Court has appellate jurisdiction

This Court has appellate jurisdiction under 28 U.S.C. § 1291. On November 22, 2021, within 60 days after the district court's order denying relief under Rule 60(b), Hi-Tech, Wheat, and Smith timely filed a notice of appeal to this Court. Doc. 1109; Fed. R. App. P. 4(a)(1)(B) (time for appeal is 60 days where a governmental agency is a party). "The denial of a Rule 60(b) motion is, in itself, a final appealable order." *Gulf Coast Fans, Inc. v. Midwest Elecs. Importers, Inc.*, 740 F.2d 1499,

1507 (11th Cir. 1984); *see Banister v. Davis*, 140 S. Ct. 1698, 1710 (2020). The order is immediately appealable also insofar as it denied an accounting. *See Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1161 (11th Cir. 2019).

STATEMENT OF THE ISSUES

Concluding that Defendants–Appellants Hi-Tech Pharmaceuticals, Inc., Jared Wheat, and Stephen Smith had made unsubstantiated efficacy claims in advertisements about dietary supplements, the district court in 2008 entered summary judgment for the Federal Trade Commission under the Federal Trade Commission Act. 15 U.S.C. §§ 45(a), 52, & 53(b). For remedies, the district court imposed $15.9 million in disgorgement and consumer redress (which has been fully collected) and entered a permanent injunction prohibiting further violations of the FTC Act. Subsequently, the district court held Hi-Tech, Wheat, and Smith in civil contempt for violating the injunction, imposing an additional $40 million in disgorgement and consumer redress.

After these judgments had been entered, but while the district court retained jurisdiction and control over judgment enforcement and the disbursement of collected funds, the Supreme Court decided *AMG Capital Management, LLC*, 141 S. Ct. 1341 (2021). In *AMG Capital*, the Supreme Court struck down the statutory basis for the equitable monetary remedies obtained by the FTC.

1. The first question is whether, under Federal Rule of Civil Procedure 60(b)(5) and in light of *AMG Capital*, it is inequitable for the district court to prospectively enforce and administer the $40 million civil-contempt judgment and for the government to retain funds collected but unclaimed by consumers.

2. The second question is whether, under Federal Rule of Civil Procedure 60(b)(6) and in light of *AMG Capital*, it is otherwise unjust for the district court to continue to enforce and administer the $40 million civil-contempt judgment and for the government to retain funds collected but unclaimed by consumers.

3. The third question is whether Hi-Tech, Wheat, and Smith are entitled to an accounting of funds the FTC has collected.

STATEMENT OF THE CASE

I. Introduction and nature of the case

This appeal stems from the district court's denial of relief from judgments under Federal Rule of Civil Procedure 60(b) and its denial of a request for an accounting of funds the FTC has collected.

The FTC obtained summary judgment against Hi-Tech, Wheat, and Smith for violating the FTC Act via advertisements about dietary

supplements. The district court imposed $15.9 million in disgorgement and consumer redress (which the FTC has collected) and entered a permanent injunction prohibiting further violations of the FTC Act. The district court later held Hi-Tech, Wheat, and Smith in civil contempt for violating the injunction via new advertisements about different supplements. The district court imposed $40 million more in disgorgement and consumer redress.

After the judgments had been entered, but while the district court retained jurisdiction and control over collection and disbursement, the Supreme Court decided *AMG Capital*, 141 S. Ct. 1341. In that case, the Supreme Court held that, contrary to the FTC's and many courts' longstanding interpretation of the FTC Act, Congress intended for equitable monetary remedies to be available only where (unlike here) administrative action had first been taken. That ruling undermined the basis for the FTC's decades-long program of seeking consumer redress directly in court. That ruling, viewed in conjunction with *Liu v. SEC*, 140 S. Ct. 1936 (2020), has similarly eliminated the basis for the disgorgement and consumer-redress remedies imposed here against Hi-Tech, Wheat, and Smith.

The FTC has already collected over $18 million from Hi-Tech, of which (per the FTC) no more than $12 million has been returned to consumers. In light of *AMG Capital*, it is inequitable and unjust for the district court to continue to enforce the punitive $40 million judgment and for the government to permanently retain funds left unclaimed by consumers.

II. Factual and procedural background

A. The FTC sued Defendants for violation of the FTC Act without first pursuing administrative relief

Hi-Tech, a Georgia corporation, manufactures and sells dietary supplements. Doc. 966 at 11. Wheat and Smith are officers of Hi-Tech. *Id.* at 11–12.

Two federal agencies oversee dietary supplements. The FDA regulates dietary supplements and their labeling under the Dietary Supplement Health and Education Act of 1994 ("DSHEA"), Pub. L. No. 103-417, 108 Stat. 4325 (Oct. 25, 1994). Since DSHEA's enactment, the FDA has generally regulated dietary supplements as a food and presumed them to be safe for sale without requiring pre-market approval, as is required for drugs. *Compare, e.g.,* 21 U.S.C. § 321(ff) *and*

21 U.S.C. § 342(f) *with* 21 U.S.C. § 355; *see Nutritional Health Alliance v. Shalala*, 144 F.3d 220, 224 (2d Cir. 1998); 21 C.F.R. § 314.126.

The FTC regulates dietary-supplement advertising by enforcing the FTC Act's general prohibitions against false advertising and unfair and deceptive trade practices. *See* 15 U.S.C. §§ 45(a) & 52. Under DSHEA, a dietary-supplement advertiser may make claims about how a supplement affects the human body's structure or function so long as the claim has "substantiation" that renders the statement "truthful and not misleading." 21 U.S.C. § 343(r)(6)(B).

In 2004, the FTC filed an enforcement action in federal district court against Hi-Tech, Wheat, Smith, and others, contending that certain dietary-supplement advertising by Hi-Tech violated the FTC Act. Doc. 1. According to the FTC, Hi-Tech was making weight-loss and other health-related efficacy claims about three dietary supplements without adequate scientific substantiation. The FTC did not pursue an underlying administrative action, and no administrative order was entered before the FTC brought this enforcement action.

B. The FTC was awarded disgorgement and consumer redress under the FTC Act

In 2008, the district court granted summary judgment for the FTC under the FTC Act. Doc. 219. Relying on an FTC expert, the district court held that Hi-Tech's efficacy claims should have been, but were not, substantiated by "independent, well-designed, well-conducted, randomized, double-blind, placebo-controlled clinical trials." *Id.* at 64–66. That kind of extensive testing is typically required for new drugs before they can be sold, but not for dietary supplements. *See* J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2191–2200 (2015).

The district court nonetheless imposed jointly and severally against the Defendants $15,882,436 in equitable monetary relief—disgorgement and redress to consumers—under § 13(b) of the FTC Act, 15 U.S.C. § 53(b). Doc. 219 at 89–95, 98; *see* Doc. 226; Doc. 230. That amount comprised Hi-Tech's total gross receipts for sales of the supplements at issue. Doc. 219 at 91.

The FTC featured the judgment in a 2009 press release. FTC, *Court Rules In Favor of FTC In National Urological Group Case; Orders*

Marketers of Thermalean, Lipodrene, and Spontane-es To Pay More Than $15 Million, 2009 WL 98492 (Jan. 15, 2009).

C. The FTC's overreaching consumer-redress program and its handling of monies collected from Hi-Tech

The FTC's consumer-redress program—also known as the § 13(b) fraud program—stems from Congress's amendment of the FTC Act in the 1970s to expressly permit district courts to award injunctive relief in enforcement actions commenced in court, without a prior administrative proceeding. Pub. L. No. 93–153, 87 Stat. 576, § 408(f) (Nov. 16, 1973), *codified at* 15 U.S.C. § 53(b). At the FTC's urging, most courts—including this Circuit—eventually began interpreting this statutory grant of injunctive relief as permitting district courts to award unstated kinds of equitable relief:

> Although section 13(b) [i.e., 15 U.S.C. § 53(b)] does not expressly authorize courts to grant monetary equitable relief, the FTC argues that the unqualified grant of statutory authority to issue an injunction under section 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits. We agree with the FTC.

FTC v. Gem Merch. Corp., 87 F.3d 466, 468 (11th Cir. 1996); *see*

Dee Pridgen, et al., CONSUMER PROTECTION & THE LAW, CONPROT § 12:21 (Nov. 2021).

Armed with that interpretation, the FTC "embarked on a decades-long campaign to transform this seemingly limited set of powers into an arsenal of enforcement methods, including disgorgement and other types of restitution …." Angel Reyes & Benjamin Hunter, *Does the FTC Have Blood on Its Hands? An Analysis of FTC Overreach & Abuse of Power After* Liu, 68 BUFF. L. REV. 1481, 1485 (2020); *see* Beales & Muris, *FTC Consumer Protection at 100*, 83 GEO. WASH. L. REV. at 2175. The FTC has thus "read section 13(b) in an increasingly expansive manner over the past four decades to secure large monetary remedies." Aiste Zalepuga, *Updating the Federal Agency Enforcement Playbook*, 96 NOTRE DAME L. REV. 2083, 2085 (2021).

In 1980, for example, the FTC reported that "[m]ore than $100 million in consumer redress was obtained for the American public as a result of selective law enforcement actions." FTC, *Annual Report of the FTC For the Fiscal Year Ended September 30, 1980*, 1980 WL 356513, at *2.

Thirty-seven years later, in 2017—the year the contempt judgment at issue here was finally entered, *see infra* at 16–17—the FTC obtained no less than $5.29 billion in total consumer-redress and disgorgement awards. *See* FTC, *FTC Stats & Data 2017*, https://www.ftc.gov/reports/annual-highlights-2017/stats-and-data (last visited Feb. 25, 2022). Of those total awards, consumers have actually received $269 million. *Id*. Reports for other recent years yield similar statistics. *See, e.g.*, FTC, *FTC Stats & Data 2020*, https://www.ftc.gov/reports/annual-highlights-2020/stats-data-2020 (last visited Feb. 25, 2022).

In this case, after the FTC had collected nearly $8 million, at a May 2012 status conference the Defendants questioned whether any amount had actually been paid to consumers. Doc. 400 at 32–35. The FTC admitted that none had been. *See id*. at 35:17–24.

Weeks later, on August 28, 2012, the FTC issued a press release, announcing that it was mailing to consumers checks totaling over $6 million, which consumers would have to cash within 60 days. FTC, *FTC Refunds $6 Million To Consumers Who Bought Deceptively Advertised Supplements That Were Supposed To Cause Weight Loss and Treat*

Erectile Dysfunction, 2012 WL 3679292 (Aug. 28, 2012). The Defendants later questioned how much of that had actually been claimed by consumers. Doc. 534-9 at 15–16; Doc. 573 at 25–26; Doc. 621 at 52–53.

By August 2015, the FTC had fully collected the $15.9 million award issued seven years earlier, in June 2008. *See* Doc. 827. Nearly five years after that, in May 2020, and over 11 years after summary judgment had been awarded, the FTC issued another press release, announcing that it had previously returned "more than $6 million" to consumers and was mailing out to consumers another $8.5 million worth of checks. FTC, *FTC Sending Refund Checks Totaling More Than $8.5 Million To Consumers Defrauded By Misleading Claims For Dietary Supplements*, 2020 WL 2537642 (May 19, 2020).

To date, however, we still don't know how much of the $15.9 million judgment has actually been put into the hands of consumers—the point of consumer redress—and how much remains in the government's hands. (Nor do we know why it took the FTC years to attempt redress.) In briefing, the FTC has suggested (though not proved) that over $4 million remains unclaimed. Doc. 1097 at 10 n.8.

On March 4, 2020, the Office of the Inspector General published an audit of the FTC's consumer-redress program, which indicated, among other things, that the FTC needs an "updated approach to analyzing program data." Audit of FTC Redress Process Controls, OIG Report No. A-20-06 (Mar. 4, 2020) (redacted for public release), at 4, https://www.ftc.gov/system/files/documents/reports/final-oig-report-audit-redress-process-controls-redacted-version/final_oig_report_on_audit_of_ftc_redress_controls_redacted.pdf (last visited Feb. 25, 2022).

D. The FTC obtained an injunction under the FTC Act, had Hi-Tech, Wheat, and Smith held in contempt, and obtained equitable monetary remedies

Meanwhile, back in 2008, the district court had also granted the FTC's motion for a permanent injunction under the FTC Act, 15 U.S.C. § 53(b). Doc. 219 at 82–88; Doc. 230; *see* Doc. 1 at 29–30; Doc. 172-1 at 42–47. The injunction prohibited the Defendants from, among other things, making future efficacy claims about any dietary supplement without "competent and reliable scientific evidence" substantiating those claims. Doc. 230 at 16–17.

The district court borrowed this "competent and reliable scientific evidence" standard from *Dietary Supplements: An Advertising Guide for Industry* (2001), the FTC's informal guidance for advertising supplements. Doc. 230 at 5; *see* Doc. 876-4. The FTC published the *Guide* after Congress had enacted DSHEA, which permits dietary supplements to be sold without having to satisfy the stringent pre-marketing requirements for drugs. *See* 21 U.S.C. § 348; Pub. L. No. 103-417, § 2(13), (14); *United States v. Bayer Corp.*, No. CV 07-01(JLL), 2015 WL 5822595, at *3 (D.N.J. Sept. 24, 2015); *supra* at 4–5.[1]

In defining "competent and reliable scientific evidence," the *Guide* explains that the standard is flexible and product-specific: "There is no fixed formula for the number or type of studies required or for more specific parameters like sample size and study duration." Doc. 876-4 at 9. The *Guide* never requires "independent, well-designed, well-conducted, randomized, double-blind, placebo-controlled clinical trials" for all efficacy claims. *Id.* at 8–18. And the injunction, adopted nearly

[1] To date, the *Guide* has remained unchanged despite significant changes in the dietary-supplement market.

wholesale from an FTC draft, never even mentions that standard. Doc. 230; *see* Doc. 172-30; Doc. 227.

Nonetheless, relying on that standard, three years later in 2011, the FTC moved to hold Hi-Tech and others in civil contempt for violating the 2008 injunction. The FTC contended that Hi-Tech was making unsubstantiated efficacy claims about four new weight-loss supplements, which had not been at issue before. Docs. 332 & 332-1. The FTC could have brought a separate action against Hi-Tech concerning the new products, but instead it filed a motion for contempt. The FTC sought contempt on the ground that the efficacy claims should have been but (supposedly) were not backed up by "independent, well-designed, well-conducted, randomized, double-blind, placebo-controlled clinical trials" for each product. Doc. 332-1 at 3–4.[2]

[2] Courts have raised concerns about the FTC waiting to bring enforcement and contempt actions, permitting allegedly unlawful advertising to go on for years and resulting in increased claimed damages amounts for the FTC. *See, e.g.*, *FTC v. Lane Labs-USA, Inc.*, 624 F.3d 575, 592 n.19 (3d Cir. 2010); *FTC v. Alcoholism Cure Corp.*, No. 10-cv-266, 2010 WL 11474441, at *3 (M.D. Fla. Dec. 13, 2010); Petition for Writ of Certiorari, *AMG Capital Management, LLC v. FTC*, U.S. Sup. Ct. Case No. 19-508, 2019 WL 5390115, at *7 (Oct. 19, 2019).

The FTC sought to impose that drug-oriented substantiation standard because, by 2010, the FTC had become frustrated with courts' flexible interpretation of "competent and reliable scientific evidence." *See* David C. Vladeck, *Charting the Course: The FTC's Second Hundred Years*, 83 GEO. WASH. L. REV. 2101, 2127–29 (2015). "[I]n 2010 the FTC began demanding a more rigorous standard of substantiation for companies previously charged with making unsubstantiated claims: two adequate, well-controlled human clinical trials that are double-blinded and placebo controlled." J.W. Schomish, ed., 1 FDA ADVERTISING & PROMOTION MANUAL ¶ 311, 2016 WL 11577748 (Mar. 2016 Supp.). By requiring such clinical trials, the highly expensive "gold standard" for medical research, the FTC sought—contrary to DSHEA—to "restor[e] the rigors of the drug approval process [to dietary supplements] in everything but name." Beales & Muris, *FTC Consumer Protection at 100*, 83 GEO. WASH. L. REV. at 2194.

Instead of engaging in the public give-and-take of rulemaking, the FTC was unilaterally restricting the dietary-supplement industry by bringing enforcement actions in court that sought equitable monetary remedies and broad injunctions, including injunctions that demanded

randomized clinical trials to substantiate efficacy claims about dietary supplements. *See id.*; J. Howard Beales III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. 1, 4 (2013); CONSUMER PROTECTION & THE LAW, CONPROT § 12:21. Moreover, as this case illustrates, the FTC was also reinterpreting earlier injunctions, which incorporated the *Guide*'s flexible substantiation standard, as invariably requiring randomized clinical trials for virtually any efficacy claim. *See, e.g.*, *Bayer Corp.*, 2015 WL 5822595, at *3–4; *Basic Research, LLC v. FTC*, No. 2:09-CV-0779 CW, 2014 WL 12596497, at *4–5 (D. Utah Nov. 25, 2014).

The FTC took that very position here. *See* Doc. 332-1 at 3, 11, 21–23; Doc. 394; Doc. 446-1. Agreeing with the FTC and its experts that only randomized clinical trials for each product could substantiate any efficacy claim for any supplement, Doc. 390 at 7–10, the district court held Hi-Tech, Wheat, and Smith in civil contempt for not having them, Doc. 524; Doc. 650.

For a remedy, the district court ordered Hi-Tech, Wheat, and Smith to pay $40,000,950—Hi-Tech's gross receipts from sales of the products at issue—in "compensatory sanctions … owed to consumers."

Doc. 650 at 23. (Hi-Tech's profits had been only $5,534,690. Doc. 621 at 12–13; Doc. 629 at 14–15.) Those funds were to be paid into the district court's registry and to be used to reimburse consumers who had bought the products. Doc. 650 at 24, 37–38. The district court also ordered a "recall" of remaining product from store shelves. *Id.* at 28–29. And when the product removal wasn't going as fast as desired, the district court had Wheat and Smith incarcerated for 65 days. Doc. 726; Doc. 795; Doc. 796.

On appeal, this Court vacated the contempt judgment because the district court had erroneously deemed the substantiation-standard question already adjudicated and so refused to consider any expert evidence from Hi-Tech, Wheat, and Smith. Doc. 815; *FTC v. Nat'l Urological Grp., Inc.*, 785 F.3d 477 (11th Cir. 2015).

On remand, in 2017 the district court conducted a two-week bench trial during which experts battled over the appropriate substantiation standard for Hi-Tech's efficacy claims. *See* Docs. 945 – 954. Agreeing once again with the FTC that only product-specific randomized clinical trials would do, and that Hi-Tech didn't have them, the district court

again held Hi-Tech, Wheat, and Smith in contempt of the 2008 injunction. Doc. 966.

At the FTC's request, Doc. 957 at 23–30, the district court imposed jointly and severally the exact same $40,000,950 equitable monetary remedy as before, Doc. 966 at 127–31. The district court ordered that Hi-Tech, Wheat, and Smith must disgorge that amount, which represented Hi-Tech's gross sale amounts, and that the monies collected must be deposited in the district court's registry and used to reimburse consumers who had purchased the products. *Id*. at 130–31. "Any funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement." Doc. 230 at 18–19 ¶ D.

On appeal from the re-entered contempt judgment, this Court affirmed primarily on the ground that Hi-Tech, Wheat, and Smith had forfeited their challenge to the injunction's validity and scope by not raising it when the injunction had first been entered in 2008, years before the FTC had even moved for contempt. Doc. 995; *FTC v. Nat'l Urological Grp., Inc.*, 786 F. App'x 947 (11th Cir. 2019), *cert denied sub nom. Hi-Tech Pharms., Inc. v. FTC*, 141 S. Ct. 659 (Case No. 19-1445, Nov. 2, 2020).

To date, the FTC has collected through garnishments approximately $2.3 million of the $40 million contempt judgment. Doc. 1050; Doc. 1093; Doc. 1094; Doc. 1102 at 14.

E. After the Supreme Court held in AMG Capital *that the FTC Act does not support equitable monetary remedies without a prior administrative order, Hi-Tech, Wheat, and Smith sought relief under Rule 60(b) and an accounting*

On July 9, 2020, while Hi-Tech, Wheat, and Smith's petition for a writ of certiorari in this case (filed on July 1, 2020) remained pending, the Supreme Court granted certiorari in *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 194 (July 9, 2020). On December 30, 2020, Hi-Tech, Wheat, and Smith moved for a stay of collection activities by the FTC and for an accounting of monies collected. Doc. 1096; Doc. 1096-1.[3]

While that motion was pending, the Supreme Court decided *AMG Capital Management, LLC v. FTC*, 141 S. Ct. 1341 (Apr. 22, 2021).

[3] In reply in support of their petition, Hi-Tech, Wheat, and Smith noted that the Supreme Court had recently granted certiorari in the *AMG Capital* case. Reply Br. for Petitioners (Sup. Ct. Case No. 19-1445, Oct. 9, 2020), at 12 n.6. Despite having called for a response from the government, the Supreme Court denied Hi-Tech, Wheat, and Smith's petition on November 2, 2020. Doc. 1095; *Hi-Tech Pharms.*, 141 S. Ct. 659.

In *AMG Capital*, the Supreme Court recounted how, "[b]eginning in the late 1970s, the Commission began to use § 13(b), and in particular the words 'permanent injunction,' to obtain court orders for redress of various kinds in consumer protection cases—without prior use of the administrative proceedings in § 5" of the FTC Act (15 U.S.C. § 45). *AMG Cap.*, 141 S. Ct. at 1346 (citing, e.g., Beales & Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 ANTITRUST L.J. at 3–4); *see* 15 U.S.C. § 53(b). Despite having for a time limited the use of § 13(b) per internal policy, "the Commission presently uses § 13(b) to win equitable monetary relief directly in court with great frequency." *AMG Cap.*, 141 S. Ct. at 1347.

That expansive interpretation of § 13(b), which provided the statutory linchpin for the FTC's consumer-redress program, had long been criticized as agency overreach. *See supra* at 7–11. "The FTC has essentially admitted that it relies on Section 13(b) because it makes it easier for the FTC to win cases with less oversight or due process rights for defendants." Reyes & Hunter, *Does the FTC Have Blood on Its Hands? An Analysis of FTC Overreach and Abuse of Power After* Liu, 68 BUFF. L. REV. at 1485.

In *AMG Capital*, the Supreme Court rejected that interpretation of the FTC Act. Its ruling focused on the text and structure of the FTC Act and the express enforcement powers that it bestows. *See AMG Capital*, 141 S. Ct. at 1346. For that reason, a brief summary of that structure is instructive.

The FTC is authorized to enforce the FTC Act either though an administrative process or directly through an enforcement action in court. *See* 15 U.S.C. § 45(b); 15 U.S.C. § 53(b). The kind of remedies offered by the FTC Act depend on whether an administrative process has been used.

On the one hand, § 5(l) and § 19 of the FTC Act permit the FTC to seek and courts to grant limited equitable monetary relief, but only after the FTC has first completed an administrative proceeding by obtaining a final cease-and-desist order. Section 5 of the FTC Act describes the administrative process, which begins with an FTC complaint submitted to an administrative law judge. 15 U.S.C. § 45(b). Where the FTC prevails, the administrative law judge may issue a cease-and-desist order. Such an order may be appealed to the Federal

Trade Commission and subsequently to the United States Court of Appeals. 21 U.S.C. § 45(c).

When a final cease-and-desist order has been violated, § 5(l) of the FTC Act permits the FTC to obtain equitable monetary relief in district court. *See* 15 U.S.C. § 45(l) (empowering district courts "to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission"). Section 19 permits the district court to grant additional relief needed to redress harm to consumers, such as disgorgement and redress. *See* 15 U.S.C. § 57b(a)(2) & (b) (permitting district courts to "grant relief under subsection (b)," such as "the refund of money or return of property" or "the payment of damages" or other "redress" where the defendant has violated a "final cease and desist order" issued by the FTC). In either case, a condition to obtaining equitable monetary relief is the prior completion of an administrative process and the Commission's issuance of a cease-and-desist order. *AMG Cap.*, 141 S. Ct. at 1348–49.

On the other hand, § 13(b) of the FTC Act expressly permits a district court to enter a preliminary or permanent injunction to enjoin

the violation of "any provision of law" enforced by the FTC, regardless of whether administrative action has first been taken. 15 U.S.C. § 53(b). But as the Supreme Court has explained, § 13(b) says nothing about other kinds of equitable remedies: "An 'injunction' is not the same as an award of equitable monetary relief." *AMG Cap.*, 141 S. Ct. at 1347. The "structure of the Act" thus confirms Congress's intent to give district courts the power to impose equitable monetary relief, such as consumer redress, only where the FTC has first taken administrative action. *AMG Cap.*, 141 S. Ct. at 1348, 1352.

Following *AMG Capital*, this Court has acknowledged, contrary to its earlier position stated in *Gem Merchandising*, 87 F.3d at 468, and progeny, that 15 U.S.C. § 53(b) "does not permit an award of 'equitable monetary relief such as restitution or disgorgement.'" *FTC v. On Point Cap. Partners LLC*, 17 F.4th 1066, 1071 (11th Cir. 2021) (citation omitted).

On May 13, 2021, shortly after *AMG Capital* was decided, Hi-Tech, Wheat, and Smith withdrew their motion for a stay of collection, Doc. 1100, and replaced it with a new motion for relief relying on *AMG Capital*. Doc. 1101; Doc. 1101-1; Doc. 1103. In addition to seeking an

accounting of monies collected by the FTC, they sought equitable relief under Federal Rule of Civil Procedure 60(b) from further collection and disbursement under the judgments at issue. The FTC opposed the motion. Doc. 1102.

F. The district court denied Hi-Tech, Wheat, and Smith's motion

On September 30, 3021, the district court entered an order denying Hi-Tech, Wheat, and Smith's motion. Doc. 1104. First, the district court held that Rule 60(b)(5), which permits relief from a judgment where "applying it prospectively is no longer equitable," does not apply here. Doc. 1104 at 5–10. Second, the district court held that *AMG Capital* has no bearing on the motion and that no extraordinary circumstance existed that might warrant relief under Rule 60(b)(6). Doc. 1104 at 10–13. Finally, the district court denied the request for an accounting of monies collected. *Id*. at 13–16. This appeal followed.

III. Standards of Review

Questions of law are reviewed de novo. *See United States v. Knight,* 562 F.3d 1314, 1322 (11th Cir. 2009). The district court's denial of relief under Federal Rule of Civil Procedure 60(b)(5) and 60(b)(6) is reviewed for abuse of discretion. *Galbert v. W. Caribbean Airways*, 715

F.3d 1290, 1294 (11th Cir. 2013). The district court's denial of an accounting is also reviewed for abuse of discretion. *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1153 (11th Cir. 2019).

SUMMARY OF THE ARGUMENT

The Federal Trade Commission is one of America's most powerful federal agencies. From the 1970s until recently, the FTC's power over commerce had expanded greatly, not based on Congress's express grant of power but rather based on the FTC's—and many courts'—expansive interpretation of the FTC Act. Though the FTC Act says courts can impose equitable monetary remedies (such as disgorgement) for violations of administrative cease-and-desist orders, those remedies are not permitted without an administrative order. So, the FTC contended that the unstated powers it desired were implicitly given by the statute. Many courts, including this Court, agreed.

Armed with that interpretation, the FTC embarked on a decades-long program of skipping cumbersome administrative proceedings to seek equitable monetary remedies directly in court. By 2020, the FTC

was obtaining billions of dollars per year in such equitable monetary awards styled as consumer redress.

In 2021, in *AMG Capital*, the Supreme Court called a halt to that agency overreach. 141 S. Ct. 1341. Congress never intended for the FTC to wield the FTC Act in that way. The FTC may seek, and courts may award, equitable monetary relief under the FTC Act only after an administrative proceeding has been completed—just as the FTC Act itself plainly says. *See supra* at 20–22. Put another way, the courts lack the power to award a remedy that the FTC lacks the authority to obtain.

Not only that, but the imposition of disgorgement for any purpose other than consumer redress amounts not to a compensatory equitable remedy, but rather to a penalty. *See Liu v. SEC*, 140 S. Ct. 1936 (2020).

The remedies imposed here against Hi-Tech, Wheat, and Smith—a $15.9 million summary judgment and a $40 million civil-contempt judgment, each consisting of disgorgement and consumer redress under the FTC Act—are exactly the kind of punitive and unsupported remedies that the Supreme Court has made clear are prohibited. So far, the FTC has collected from Hi-Tech over $18 million and says it has

returned about $12 million (perhaps) to affected consumers. The remainder—$6 million still in the government's hands and $38 million to be collected—should not be collected or permitted to remain permanently in the government's coffers. To permit that would be inequitable under Federal Rule of Civil Procedure 60(b)(5) and otherwise unjust under Rule 60(b)(6). Any amounts collected but not claimed by consumers should be returned to Hi-Tech, and the remainder of the contempt judgment should no longer be collected. To carry out those objectives, an accounting is warranted.

The District Court abused its discretion by denying such relief. First, contrary to the district court's view, the $40 million sanction is not merely a "money judgment" that Hi-Tech, Wheat, and Smith seek to upend retroactively. It is an equitable monetary judgment, imposed under the FTC Act for violation of the FTC Act, that requires continuing court supervision and control. Hi-Tech, Wheat, and Smith properly seek relief from its prospective application and the return of unclaimed funds.

Second, in denying relief under Rule 60(b), the district court tried to shield its contempt judgment from *AMG Capital*'s reach by

characterizing its imposition of equitable monetary relief as stemming from the district court's inherent power rather than from the FTC Act. To accept that position, however, would permit the FTC and courts simply to sidestep *AMG Capital* by substituting contempt as a basis for awarding equitable monetary relief. This Court should reverse and remand for an accounting and reimbursement to Hi-Tech.

ARGUMENT AND CITATIONS OF AUTHORITY

In light of the Supreme Court's holding in *AMG Capital*, which undermines the basis for the judgments at issue here, the Court should grant Hi-Tech, Wheat, and Smith relief from the further collection and retention of monies. Additionally, the Court should order the FTC to provide an accounting of all monies collected from Hi-Tech.

I. The district court should have granted Hi-Tech, Wheat, and Smith relief under Rule 60(b)

Federal Rule of Civil Procedure 60(b) gives courts the equitable power to grant relief from a judgment. Courts should grant relief under Rule 60(b) "'whenever such action is appropriate to accomplish justice.'" *Griffin v. Swim-Tech*, 722 F.2d 677, 680 (11th Cir. 1984) (citation omitted). The rule "'strike[s] a delicate balance between countervailing impulses: the desire to preserve the finality of judgments and the

incessant command of the court's conscience that justice be done in light of all the facts.'" *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 741 F.3d 1349, 1355 (11th Cir. 2014) (citation omitted). Although final judgments should not be affected lightly, Rule 60(b) "should be construed in order to do substantial justice." *Griffin*, 722 F.2d at 680; *accord Safari Programs, Inc. v. CollectA Int'l Ltd.*, 686 F. App'x 737, 743 (11th Cir. 2017).

A. This Court should grant Hi-Tech, Wheat, and Smith relief under Rule 60(b)(5)

Under Rule 60(b)(5), courts may relieve a defendant from a final judgment where "applying [the judgment] prospectively is no longer equitable ...." Fed. R. Civ. P. 60(b)(5). This rule "encompasses the traditional power of a court of equity" to consider changed circumstances. *See Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004). In this case, it is no longer equitable to enforce the contempt judgment against Hi-Tech, Wheat, Smith or for the government to retain unclaimed funds.[4]

[4] Rule 60(b)(5) authorizes the district court to 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." Fed. R. Civ.

1. It is inequitable for the district court to continue enforcing and administering the punitive and unsupported civil-contempt sanction

In this case, the FTC has twice obtained multi-million-dollar disgorgement and consumer-redress awards against Hi-Tech, Wheat, and Smith without ever having gone through any administrative process.

First, in 2008, the district court awarded the FTC summary judgment, imposing $15,882,436—Hi-Tech's gross sales for the products at issue—in equitable monetary relief under the FTC Act (disgorgement and consumer redress). Doc. 219 at 89–95, 98; 15 U.S.C. § 53(b). Over a decade later, the FTC had fully collected the judgment and announced consumer reimbursement to an unverified extent (suggesting that at least $4 million remains unclaimed). *Supra* at 9–10.

Second, in 2008, the district court also entered an injunction against Hi-Tech, Wheat, and Smith, broadly enjoining them from making any future efficacy claims about any dietary supplements absent substantiation with "competent and reliable scientific evidence."

P. 60(b)(5) (emphasis added). Given the inclusion of the disjunctive "or," relief is warranted on any of these grounds. *Peery v. City of Miami*, 977 F.3d 1061, 1069 (11th Cir. 2020).

Doc. 230 at 16–17 ¶ VII. In substance, the injunction—whose entry was authorized only by the FTC Act—effectively enjoined the Defendants from violating the FTC Act, 15 U.S.C. §§ 45(a) and 52, by not substantiating efficacy claims in advertisements as required under DSHEA, 21 U.S.C. § 343(r)(6)(B).

In 2017, the district court found Hi-Tech, Wheat, and Smith in civil contempt of that injunction, ordering them jointly and severally to disgorge $40,000,950—Hi-Tech's gross receipts (as opposed to its profits of $5,534,690)—for sales of the supplements at issue. Doc. 966 at 127–31; *see* Doc. 621 at 12–13; Doc. 629 at 14–15. Disgorged funds must be paid into the district court's registry and be used to reimburse consumers who had bought the products, used to reimburse the FTC for its expenses, and finally distributed as the district court deems proper. Doc. 966 at 130–32; Doc. 230 at 18–19. As of May 2021, the FTC has collected approximately $2.3 million, which remains in the district court's registry. Doc. 1050; Doc. 1093; Doc. 1094; Doc. 1102 at 14.

Recent decisions by the Supreme Court reveal these disgorgement and redress remedies to be improperly punitive and unsupported by the FTC Act or by equity.

In *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), the Supreme Court held that the SEC's remedy of disgorgement, under which only some ill-gotten funds were paid to victims, constitutes a penalty for purposes of the applicable statutory limitation period. Where some disgorged funds go to reimburse consumers, some go to reimburse the SEC, and the remainder falls "'within the court's discretion to determine how and to whom the money will be distributed"—such as by dispersing it into a court's registry or the United States Treasury—disgorgement does not constitute a compensatory remedy, but rather a penalty. *Id*. at 1643–44. Disgorgement remains punitive, for example, where funds are (as here) distributed to consumers as "feasible," with the remainder payable into the United States Treasury. *Id*. Although the Supreme Court expressly limited its holding to the narrow question whether disgorgement is a penalty for limitation-period purposes under the Securities Act of 1933, *id*. at 1642 n.3, its rationale remains instructive here.

Next, the Supreme Court decided *Liu v. SEC*, 140 S. Ct. 1936 (2020). *Liu* concerned whether the Securities Act's grant of power to courts to award "any equitable relief," 15 U.S.C. § 78u(d)(5), permits imposing "an equitable remedy in excess of a defendant's net profits

from wrongdoing." *Liu*, 140 S. Ct. at 1946. The answer is no. Although equity has traditionally permitted a "remedy tethered to a wrongdoer's net unlawful profits," *id.* at 1943, the equitable remedy of disgorgement requires courts to deduct legitimate expenses and to demand only the return of net profits. *Id.* at 1946–47, 1949–50. Moreover, imposing disgorgement jointly and severally (as opposed to limiting disgorgement to a person's actual receipt of profits) will also "transform any equitable profits-focused remedy into a penalty." *Id.* at 1949.[5]

Although *Kokesh* and *Liu* concerned disgorgement under the Securities Act, "the SEC uses disgorgement in much the same way as the FTC does," and disgorgement as "used by the FTC, bears the same 'hallmarks of a penalty'" described in *Kokesh*. Reyes & Hunter, *Does the FTC Have Blood on Its Hands? An Analysis of FTC Overreach and Abuse of Power After* Liu, 68 BUFF. L. REV. at 1505. "And when a remedy is a penalty, it cannot be an equitable remedy, because punishment is not the job of courts of equity." *Id.*

[5] Hi-Tech, Wheat, and Smith cited *Liu* in their Petition for a Writ of Certiorari (Sup. Ct. Case No. 19-1445, Oct. 9, 2020), at 21.

The civil-contempt judgment at issue here permits some monies to go to the United States Treasury if not to consumers, Doc. 966 at 130–32; *see* Doc. 230 at 18–19; requires Hi-Tech to disgorge its gross receipts of $40,000,950, as opposed to its net profits of $5,534,690, Doc. 966 at 127–31; Doc. 621 at 12–13; and imposes disgorgement of the entire $40 million jointly and severally against Wheat and Smith without considering their individual profits (if any), Doc. 966 at 132. Those features bear the "hallmarks of a penalty." *See Kokesh*, 137 S. Ct. at 1644. And "equity never 'lends its aid to enforce a … penalty.'" *Liu*, 140 S. Ct. at 1941 (citation omitted).

Tellingly, in earlier briefing, the FTC couldn't help but reveal its true intent to use the disgorgement remedy punitively to "deter" Hi-Tech, Wheat, and Smith from violating the FTC Act in the future. *See, e.g.*, Doc. 1102 at 4 n.3 ("To permit defendants such as these to use the proceeds of one fraud to compensate the victims of a second, separate fraud would perversely incentivize them to take steps to frustrate the Commission's collections and redress efforts, while providing no *deterrence* against future fraudulent conduct." (emphasis added)). Using

disgorgement for deterrence is "inherently punitive," even when coupled with a compensatory aim. *Kokesh*, 137 S. Ct. at 1643.

The Supreme Court then decided *AMG Capital*, 141 S. Ct. 1341. As explained above, in *AMG Capital* the Supreme Court rejected the longstanding interpretation of § 13(b) as authorizing disgorgement and restitution in enforcement actions filed originally in court—a flawed interpretation that the FTC had relied on for decades "to win equitable monetary relief directly in court with great frequency." *AMG Cap.*, 141 S. Ct. at 1347; *supra* at 7–11. The Supreme Court thus abrogated 40 years' worth of FTC remedial overreach in very much the same way it had done with the SEC. *See* CONSUMER PROTECTION & THE LAW, CONPROT § 12:21.

In fact, *Liu*'s prior holding is broad enough that, combined with *AMG Capital,* its "implications on agency enforcement powers can already be seen in the FTC." Zalepuga, *Updating the Federal Agency Enforcement Playbook*, 96 NOTRE DAME L. REV. at 2100. In light of *AMG Capital*, *Liu* "limits FTC enforcement powers in several ways":

> *Liu*'s first limiting principle suggests the FTC will have to reimburse funds to consumers, rather than continuing its practice of depositing funds with the Treasury. *Liu*'s second limiting principle

> suggests the FTC will no longer be able to impugn multiple defendants using joint and several liability, marking the end of a common practice by the FTC. And *Liu*'s third limiting principle … [requires that, m]oving forward, the FTC will likely have to measure such ill-gotten profits on net profit.

Zalepuga, *Updating the Federal Agency Enforcement Playbook*, 96 NOTRE DAME L. REV. at 2100.

Each of those principles has been violated here. For all these reasons, the Court should hold that it is inequitable to permit the FTC to continue to enforce the civil-contempt judgment against Hi-Tech, Wheat, and Smith. *See* Fed. R. Civ. P. 60(b)(5).

Even before *AMG Capital*, sanctions for civil contempt could properly accomplish only the following two ends: coercing the defendant into compliance with the court's order and compensating the complainant for losses sustained. *McGregor v. Chierico*, 206 F.3d 1378, 1385 n.5 (11th Cir. 2000). But a civil-contempt sanction may never be used to punish a contemnor. "'It requires no citation of authority to say that a district court may not, even unwittingly, employ a civil contempt proceeding to impose what, in law, amounts to a criminal contempt sanction.'" *In re E.I. DuPont De Nemours & Co.-Benlate Litig.*, 99 F.3d

363, 368 (11th Cir. 1996) (citation omitted). And "'[w]hen a district court employs civil contempt procedures to punish a contemner, it necessarily deprives the contemner of his constitutional rights and renders his contempt citation a nullity.'" *Id.* (citation omitted).

That's precisely what happened here. Via its $40 million contempt judgment, the district court is punishing Hi-Tech, Wheat, and Smith by requiring the disgorgement of gross receipts (as opposed to Hi-Tech's net profits of $5,534,690). The district court is punishing them by imposing the $40 million judgment jointly and severally, disregarding the extent to which any gains might have been received individually by Wheat and Smith. The district court is punishing them by reserving the right to deposit funds not claimed by consumers into the United States Treasury. And the district court is punishing them by continuing to impose all these remedies for violating the FTC Act via contempt, when *AMG Capital* has announced that the FTC Act does not authorize such remedies except after the FTC has succeeded in an administrative action—which never occurred here.[6]

[6] The district court may not stave off this conclusion merely by characterizing its own disgorgement sanction as "compensatory," Doc. 966 at 130, or by announcing in its injunction that "[n]o portion of

The district court abused its discretion by holding that its punitive civil-contempt judgment shall remain enforceable in the future. *See* Doc. 1104. That would be inequitable. This Court should hold that the district court may no longer permit collection on the judgment. Further, the Court should require the $2.3 million already collected per the $40 million contempt judgment, which remains in the district court's registry, Doc. 1050; Doc. 1093; Doc. 1094; Doc. 1102 at 14, to be promptly paid to consumers, with any remaining amounts returned not to the United States Treasury but to Hi-Tech, subject to an accounting.

2. Because the contempt judgment is not a money judgment, nothing prevents Hi-Tech, Wheat, and Smith from seeking prospective relief from it based on *AMG Capital*

Rule 60(b)(5) authorizes relief from a judgment where "applying it prospectively is no longer equitable." The FTC argued and the district court agreed that Rule 60(b)(5) does not apply here because the $40 million civil-contempt judgment is merely a "money judgment" for past wrongdoing and so lacks any "prospective" application. Doc. 1104 at 6–8. That's wrong. The sanction, which requires disgorgement and

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any payments under the judgment herein shall be deemed a payment of any fine, penalty, or punitive assessment," Doc. 230 at 19.

consumer redress, is equitable in nature. And the judgment itself requires the district court to oversee and make decisions about the administration and distribution of collected funds, which remain in the district court's registry. Hi-Tech, Wheat, and Smith thus properly seek relief under Rule 60(b)(5) from the contempt judgment's prospective enforcement.

First, the $40 million contempt sanction, which arose from the purported violation of an injunction, is not a "money judgment." It is in all respects an equitable judgment. "Injunctions, and other coercive equitable remedies, have historically been enforceable via the court's civil contempt powers," which are equitable in nature. *U.S. Commodity Futures Trading Comm'n v. Escobio*, 946 F.3d 1242, 1251 (11th Cir. 2020); *see McGregor*, 206 F.3d at 1385 n.5.

More specifically, disgorgement—whether viewed as a court's inherent equitable power or as implicitly permitted under § 13(b) of the FTC Act—is by nature equitable. "Disgorgement is an equitable remedy intended to prevent unjust enrichment from ill-gotten gains and must not be used punitively." *U.S. Commodity Futures Trading Comm'n v. Tayeh*, 848 F. App'x 827, 828 (11th Cir. 2021) (citing *CFTC v. Sidoti*, 178

F.3d 1132, 1138 (11th Cir. 1999)); *accord SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005). Similarly, restitution "is an equitable remedy designed to restore to a plaintiff something of value that is wrongfully in the possession of another." *First Nat'l Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F.2d 1546, 1553 (11th Cir. 1992); *see Gem Merch.*, 87 F.3d at 469 ("Among the equitable powers of a court is the power to grant restitution and disgorgement.").

The contempt judgment imposing disgorgement and consumer redress here, Doc. 966, is thus by nature equitable and differs in character from the legal remedy of a money judgment. *FTC v. Leshin*, 719 F.3d 1227, 1231–32 (11th Cir. 2013) (contrasting money judgment with equitable judgment involving disgorgement).

Second, contrary to the district court's supposition that the contempt judgment is merely a typical money judgment that may not be attacked retroactively, the equitable contempt judgment at issue "operate[s] 'prospectively' within the meaning of Rule 60(b)(5) [because it] 'involve[s] the supervision of changing conduct or conditions.'" *See Griffin v. Sec'y, Fla. Dep't of Corr.*, 787 F.3d 1086, 1091 (11th Cir. 2015). All monies paid or collected per the contempt judgment must go into the

district court's registry and be held there pending further order by the district court. Approximately $2.3 million is on deposit now. Doc. 1050; Doc. 1093; Doc. 1094; Doc. 1102 at 14. And the "FTC may access the funds *only with an order by the court* granting permission to access and distribute the funds to the affected consumers." Doc. 966 at 130 (emphasis added). That requires the district court's continuing supervision.

The ultimate distribution of funds likewise requires the district court to supervise changing circumstances and to exercise its equitable discretion concerning the disposition of funds. The sanction order says the "FTC may use a reasonable portion of the compensatory sanction award to cover the costs of reimbursement, including locating the affected consumers and other expenses." Doc. 966 at 130. The FTC may reimburse itself with funds in the district court's registry only per a court order determining that the amount sought is "reasonable." *Id*. The amount will depend on the details of the FTC collection and redress efforts. Finally, once consumer-redress efforts have been exhausted, the district court will have to decide what to do with any funds remaining in its registry: "[I]f any funds remain after proper distribution to the

affected consumers, the court will then make a determination of the appropriate distribution of those funds." *Id.* at 130–31.[7]

Because the civil-contempt judgment, unlike an ordinary money judgment enforceable via a writ of execution, inherently contemplates and requires the district court's continuing supervision of changing circumstances, Rule 60(b)(5) properly applies here. The FTC's contention that Hi-Tech, Wheat, and Smith are improperly trying to apply *AMG Capital* retroactively is thus both inapposite and incorrect. *See* Doc. 1102 at 7–9. By agreeing with the FTC, the district court erred as a matter of law. Doc. 1104 at 5–10.

3. The FTC may not escape *AMG Capital*'s holding by obtaining a prohibited statutory remedy under the label of contempt

Nor may the FTC evade equity in light of *AMG Capital* by conflating equitable relief under § 13(b) of the FTC Act with the district court's inherent equitable powers. *See* Doc. 1102 at 9–12. The district

[7] In stating that the civil-contempt judgment at issue here is merely a money judgment, the district court relied on inapposite cases. Doc. 1104 at 8; *see Gibbs v. Maxwell House, A Division of Gen. Foods Corp.*, 738 F.2d 1153, 1156 (11th Cir. 1984) (holding that an order of dismissal is "final and permanent" and not prospective); *Tapper v. Hearn*, 833 F.3d 166, 171 (2d Cir. 2016) (holding that an order denying injunctive relief is not prospective).

court lacks the power to award a remedy that the FTC lacks the authority to obtain.

As an initial matter, when the district court was enforcing the injunction at issue here, it was effectively enforcing the FTC Act. As explained above, the injunction's relevant operative command was prohibiting Hi-Tech, Wheat, and Smith from violating the FTC Act by making unsubstantiated efficacy claims. Doc. 230 at 16–17 (prohibiting Defendants from making efficacy claims about any dietary supplement without competent and reliable scientific evidence that substantiates the representation); *see* 15 U.S.C. § 45(a) (prohibiting unfair and deceptive acts and practices); 15 U.S.C. § 52 (prohibiting false advertising); 21 U.S.C. § 343(r)(6)(B) (prohibiting efficacy claims without "substantiation" that renders the statement truthful and not misleading).

In fact, the FTC Act alone gave the district court the power to enter the injunction, which by statute could issue only for violation of the FTC Act itself:

> Whenever the Commission has reason to believe--
> (1) that any person, partnership, or corporation is violating, or is about to violate, *any provision of law enforced by the Federal Trade Commission*,

> and (2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public--the Commission by any of its attorneys designated by it for such purpose *may bring suit in a district court of the United States to enjoin any such act or practice*.... Provided further, That in proper cases the Commission may seek, and after proper proof, the court may issue, a *permanent injunction*.

15 U.S.C. § 53(b) (emphasis added).

Under *AMG Capital*'s reasoning, the FTC could not have obtained an injunction directly in district court absent this express grant of power by Congress. The FTC's contempt action was thus but another means of enforcing the FTC Act.[8]

[8] Both the FTC's papers seeking a permanent injunction and the district court's orders granting one relied on § 13(b) without ever mentioning Federal Rule of Civil Procedure 65. *See, e.g.*, Doc. 1 at 29 ¶ 41 ("Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), empowers this Court to grant injunctive and other such relief … to halt and redress violations of the FTC Act."); Doc. 172-1 at 50 ("The Commission brings this action under the second proviso of Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which allows the Court to issue a permanent injunction against violations of the FTC Act."); Doc. 219 at 5, 82–88, 98; Doc. 230.

The FTC and courts should not be permitted to accomplish indirectly through contempt what the Supreme Court has held in *AMG Capital* they cannot accomplish directly under the FTC Act. In other words, it is inequitable and inconsistent with congressional intent for the FTC to do an end-run around *AMG Capital* by disguising disgorgement and consumer redress in the uniform of contempt.

Even more fundamentally, the district court lacked the power to award disgorgement and consumer redress here as a sanction for contempt because the FTC never sought underlying administrative relief. *AMG Capital* held that district courts may not impose equitable remedies such as disgorgement under the FTC Act unless the FTC has first completed an administrative proceeding, as the FTC Act expressly requires. *AMG Cap.*, 141 S. Ct. at 1348, 1352.

Hi-Tech, Wheat, and Smith concede that, in general, when a district court crafts sanctions for civil contempt, it exercises its inherent equitable powers. *See McGregor*, 206 F.3d at 1387. "Courts have the inherent power to police those appearing before them," and that power is "'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and

expeditious disposition of cases.'" *Purchasing Power, LLC v. Bluestem Brands, Inc.*, 851 F.3d 1218, 1223 (11th Cir. 2017) (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 46 (1991)). The district court's inherent power to impose traditional equitable remedies incident to injunctions, for example, is "not altered" by Rule 65. *See Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 318–19 (1999).

Nonetheless, "'the judiciary [lacks the] discretionary power to disregard the considered limitations of the law it is charged with enforcing'"—the Constitution and the laws passed by Congress. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 254 (1988) (citation omitted). Here, "'by a necessary and inescapable inference,'" the district court's inherent powers to craft remedies for contempt are both altered and restricted by the FTC Act. *See AMG Cap.*, 141 S. Ct. at 1350 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Congress prohibits the FTC—which has no inherent authority of any kind—from obtaining monetary equitable remedies, such as disgorgement and consumer redress, except where the FTC has first conducted an administrative proceeding. *See AMG Cap.*, 141 S. Ct. at 1348–52; *Liu*, 140 S. Ct. at 1946–47 (stating that federal agencies lack

inherent powers); 73 C.J.S. *Public Administrative Law & Procedure* § 147 (Feb. 2022) (similar).

The Supreme Court thus concluded "that § 13(b) as currently written *does not grant the Commission authority to obtain equitable monetary relief*." *AMG Cap.*, 141 S. Ct. at 1352 (emphasis added). And if Congress has not given the FTC the authority to obtain equitable monetary relief, then the district court cannot provide it, even by virtue of its inherent equitable powers. "'Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law.'" *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327–28 (2015) (citation omitted); *cf. Axon Enter., Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021) (holding that Congress intended the structure of the FTC Act to narrow district-court jurisdiction and powers). Although a district court undoubtedly retains various powers to remedy contempt of a permanent injunction entered under § 13(b), disgorgement and redress are not among them.

To hold otherwise would blatantly contradict Congress's intent that the FTC be able to obtain equitable monetary remedies *only* after it has conducted an administrative proceeding. Because that did not

happen here, the district court lacked the power to give the FTC that relief. It follows that the contempt judgment is a "nullity" that should no longer be enforced. *See In re E.I. DuPont De Nemours & Co.-Benlate Litig.*, 99 F.3d at 368 (citation omitted).

4. Monies collected per the 2008 summary judgment that are not paid to consumers should be returned to Hi-Tech

AMG Capital also affects the disposition of monies collected per the 2008 summary judgment. At a minimum, according to the FTC itself, over $4 million of the initial $15.9 million summary judgment remains in the government's hands. *Supra* at 9–10. To the extent that such money cannot be used to compensate consumers, it should be returned to Hi-Tech.

In its 2008 summary judgment, the district court imposed $15,882,436 in disgorgement and consumer redress, which represented Hi-Tech's gross sales of the supplements, against Hi-Tech, Wheat, Smith, and others jointly and severally. Doc. 219 at 89–95; Doc. 230 at 18–19. The FTC has fully collected that judgment, and has paid consumer redress of some unverified amount, said to total around $12 million; but around $4 million remains on deposit with the government. Doc. 1097 at 10 n.8.

Under the summary judgment, the FTC is given the discretion to use collected funds for equitable relief other than consumer redress, and "[a]ny funds not used for such equitable relief shall be deposited to the United States Treasury as disgorgement." Doc. 230 at 119 ¶ D. In light of *Kokesh*, *Liu*, and *AMG Capital*, we now know that that such disposition of equitable monetary relief (along with its imposition) constitutes an improper penalty that finds no support in the FTC Act. *Supra* at 18–22, 31–35.

For all the reasons explained above concerning the civil-contempt judgment, *supra* at 28–47, it is inequitable and an abuse of discretion to permit the government to retain funds collected per the 2008 summary judgment that are not distributed to consumers as redress. Hi-Tech, Wheat, and Smith thus request not only an accounting of all funds collected by the FTC, *see infra* at 52–53, but also that the Court order the return to Hi-Tech of any monies collected per the 2008 summary judgment that are not used for consumer redress.

B. This Court should grant Hi-Tech, Wheat, and Smith relief from the contempt judgment under Rule 60(b)(6)

Rule 60(b)(6) is a catch-all provision, warranting relief from a judgment for "any other reason that justifies relief." Fed. R. Civ. P.

60(b)(6). "This clause is a broadly drafted umbrella provision which has been described as a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses." *Griffin*, 722 F.2d at 680.

Hi-Tech, Wheat, and Smith also deserve relief from the judgment under this subsection in light of *AMG Capital*. In *AMG Capital*, the Supreme Court clarified that courts lack the power to grant disgorgement and other equitable monetary remedies under the FTC Act unless the FTC has first obtained relief through the administrative process. *AMG Cap.*, 141 S. Ct. at 1347–49. That didn't happen here. Continued enforcement of the contempt judgment would be unjust because it would contradict Congress's intent in § 13(b) of the FTC Act.

Merely relabeling disgorgement and consumer redress as matters of the district court's inherent authority, as the district court has done, should make no difference. *See* Doc. 1104 at 11–12. As explained above, the district court may not give the FTC relief that Congress says the FTC lacks the "authority to obtain." *AMG Cap.*, 141 S. Ct. at 1352. To find that missing authority somewhere in the district court's inherent equitable powers to sanction contempt would be tantamount, as the

Supreme Court has disapprovingly observed, to interpreting the United States Code as if Congress intended to "hide elephants in mouseholes." *Cf. AMG Cap.*, 141 S. Ct. at 1349.

Though "intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6)," *Agostini v. Felton*, 521 U.S. 203, 239 (1997), this is a rare case. Nearly $38 million of disgorgement to be collected continues to hang over the heads of Hi-Tech, Wheat, and Smith. That wrongly remains so despite the Supreme Court's having now eliminated, with the stroke of a pen, the entire statutory underpinning for the FTC's decades-long consumer-redress program.

Something more than such a clear-cut and dramatic change in the law should not be required for the extraordinary circumstances to exist. The bright-line rule requiring something more is inconsistent with Rule 60(b)(6) and *Agostini*. *Compare Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987) ("Our investigation … leads us to conclude that something more than a 'mere' change in the law is necessary to provide the grounds for Rule 60(b)(6) relief.") *with, e.g., Cox v. Horn*, 757 F.3d 113, 124 (3d Cir. 2014) ("[W]e do not adopt a per se rule that a change

in decisional law … is inadequate, either standing alone or in tandem with other factors, to invoke relief from a final judgment under 60(b)(6).”); *Ramirez v. United States*, 799 F.3d 845, 850–51 (7th Cir. 2015) (similar).

But even if something more must be shown, it is present here. The entire course of the FTC’s conduct in this action epitomizes the kind of agency overreach and disregard for Congressional limits on agency power that the Supreme Court has had to curb in recent years. *Supra* at 7–23, 30–35. “The administrative state ‘wields vast power and touches almost every aspect of daily life.’” *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). Yet federal agencies like the FTC don’t possess inherent equitable powers. *See Liu*, 140 S. Ct. at 1946–47; 73 C.J.S. *Public Administrative Law & Procedure* § 147. Their powers consist instead only of those expressly given to them by Congress. Courts should not enable the FTC to continue to punish persons like Hi-Tech, Wheat, and Smith in ways that Congress has never authorized.

Under Rule 60(b)(6), the Court should afford Hi-Tech, Wheat, and Smith the same relief requested above: the cessation of further

enforcement of the $40 million contempt judgment; the return of any monies already collected that are left unclaimed by consumers; and, as explained below, an accounting. The district court was wrong and abused its discretion by not granting this relief.

II. This Court should order an accounting of monies obtained from Hi-Tech

In addition to granting relief from judgment enforcement under Rule 60(b), the Court should hold that Hi-Tech, Wheat, and Smith are entitled to an accounting of all monies collected by the FTC. An accounting is a discretionary, equitable remedy, and the district court abused its discretion by not requiring it here. *See Managed Care Advisory Grp., LLC*, 939 F.3d at 1153; Doc. 1104 at 13–16.

The FTC has collected the full amount of the $15.9 million summary judgment handed down in 2008, but the government apparently retains more than $4 million that has been unclaimed by consumers. Doc. 1097 at 10 n.8. As explained above, the final disposition of those monies remains subject to district court oversight. And in light of *Kokesh*, *Liu*, and *AMG Capital*, it would be inequitable and merely a penalty for the government to pay those amounts to itself. Hi-Tech, Wheat, and Smith deserve a detailed accounting of how the

$15.9 million has been disbursed. For the same reasons, the Court should also require an accounting of all monies collected under the $40 million contempt judgment.

The accounting should include the following details: (1) the number and identity of the consumers to whom redress has issued; and (2) the total amounts collected by the FTC per the judgments, and of these totals; (a) the amounts issued in "refund checks" or otherwise provided to consumers; (b) the refund amounts that have gone unclaimed by consumers (or that have otherwise been returned to FTC as undelivered or undeliverable); (c) the costs of any consumer-redress programs, if any; and (d) the amounts that have been paid into the United States Treasury or the district court registry, all with supporting documentation.

CONCLUSION

The FTC will undoubtedly contend, just as it has many times before, that Hi-Tech, Wheat, and Smith deserve to be punished because, among other things, they sell weight-loss and erectile-dysfunction supplements and have not willingly paid the judgments. But ad hominem rhetoric cannot overcome the sea change the Supreme Court

brought about in *AMG Capital*. If it is inequitable to continue to subject Hi-Tech, Wheat, and Smith to the contempt judgment—and it is—then this Court should grant relief.

The Court should reverse the district court's denial of relief under Rule 60(b). The Court should reverse the district court's denial of an accounting. And the Court should remand for an accounting and the return to Hi-Tech of monies collected but not claimed by consumers.

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Respectfully submitted

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CERTIFICATE OF COMPLIANCE

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I further certify that this Brief was filed in electronic format through the Court's CM/ECF system on the 4th day of March 2022.

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CERTIFICATE OF SERVICE

I certify that on March 4, 2022, I served the foregoing Brief of Appellant upon all counsel of record by and through the Court's CM/ECF system.

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