

vacated, 141 S. Ct. 810 (2020), cert. denied, 141 S. Ct. 195 (2020), and cert. denied, 209 L. Ed. 2d 743 (May 3, 2021). The Seventh Circuit affirmed all other portions of the Court's opinion. After the Seventh Circuit issued its mandate, the FTC filed a motion to amend this Court's judgment. The FTC asks that the Court reimpose the prior judgment pursuant to section 19 of the FTC Act, 15 U.S.C. § 57(b). CBC opposes the FTC's motion and has filed a counter-motion to "enforce" the Seventh Circuit's mandate, which it reads as precluding the relief the FTC seeks.

For the reasons stated below, the Court grants the FTC's motion to alter or amend the judgment and denies CBC's motion.

Background

CBC, along with affiliated marketers, schemed to bilk millions of dollars from consumers. Through a deceptive marketing campaign, consumers were directed to CBC websites where they believed they could receive a free credit report. Instead, the consumers were misled into enrolling in a monthly credit monitoring service in return for a monthly fee. From 2014 to 2017, CBC defrauded over 150,000 consumers out of almost 7 million dollars.

In 2017, the FTC filed a complaint against CBC and its affiliated marketers in this court. Of the five counts, four are important for the consideration of the present motion: counts 1 and 2, which alleged the defendants violated section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and counts 3 and 4, which alleged CBC violated section 4 of ROSCA, 15 U.S.C. § 8403. Citing section 13(.)2 ((.)2]Tw 36.03)meO f

judgment. Citing section 13(b), the FTC asked for monetary relief totaling more than 5 million dollars—the amount consumers paid for CBC's credit monitoring service. CBC made numerous arguments for judgment in their favor, including that section 13(b) did not authorize monetary relief. The Court granted summary judgment on all five counts in favor of the FTC and denied summary judgment to CBC. See *Credit Bureau I*, 325 F. Supp. 3d at 870. Later, the Court entered a permanent injunction and awarded monetary relief consisting of restitution. See generally *id.* no. 239. The Court also retained jurisdiction "for purposes of construction, modification, and enforcement" of the judgment order. *Id.* at 33.

CBC appealed. In 2019, the Seventh Circuit affirmed much of the Court's opinion but vacated the restitution award after holding that section 13(b) does not authorize restitution. See *Credit Bureau II*, 937 F.3d at 771–86. In doing so, the Seventh Circuit overruled its prior decision in *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564 (7th Cir. 1989), which authorized awards of restitution under section 13(b). See *Credit Bureau II*, 937 F.3d at 782–786. The Seventh Circuit stayed its mandate pending appeal to the Supreme Court.

The Supreme Court denied CBC's petition for writ of certiorari but granted the FTC's petition. See *Credit Bureau Ctr., LLC v. FTC*, 141 S. Ct. 195 (2020); *FTC v. Credit Bureau Ctr., LLC*, 141 S. Ct. 194 (2020). The case was meant to be consolidated with *AMG Capital Management LLC v. FTC*, but the Supreme Court vacated its grant later th. (i)s 1upru5Td (; .9 (ac)4 (at)2 (e)10 (d i)6 (t)25)6 (ooa)1c -0 th0 (mB)1 (.f15-

In short, section 5(a) of ROSCA treats a violation of ROSCA as a violation of a rule promulgated under section 18 of the FTC Act. Section 5(a) goes on to say that the FTC "shall enforce this chapter in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this chapter." 15 U.S.C. § 8404(a). In other words, a violation of ROSCA—like a violation of a rule promulgated under section 18 of the FTC Act—may be enforced in the same manner, by the same means, and with the same powers enumerated in the FTC Act. If a rule promulgated under Section 18 is violated, the FTC "can seek legal and equitable remedies, including restitution, from violators," under section 19 of the FTC Act. See *Credit Bureau II*, 937 F.3d at 771 (citing 15 U.S.C. § 57b(a)(1), (b)).

With that statutory background in mind, the Court agrees with the FTC that section 5(a) of ROSCA plainly authorizes it to seek monetary relief for ROSCA violations via sections 18 and 19 of the FTC Act. This, however, is not the end of the FTC's contentions. The FTC also contends

discussed during the parties' oral argument or mentioned in the Court's opinion is not proof that the Seventh Circuit considered restitution under section 19 and precluded it. The Seventh Circuit's opinion mentions section 19, but those references are mostly limited to contrasting its language with that of section 13(b). See, e.g., *Credit Bureau II*, 937 F.3d at 774 (citation omitted) ("Moreover, Congress expressly approved restitution as a remedy under § 57b(b) two years after enacting section 13(b) If section 13(b) permitted restitution as a general matter, Congress would have had no reason to enact § 57b, which authorizes restitution under narrower circumstances."); *id.* at 775 ("As we've explained, the Commission's reading of section 13(b) effectively nullifies § 57b. We cannot read § 57b(e) to authorize that self-defeating effect.").

The same was true during the parties' oral argument before the Seventh Circuit—the discussion of section 19 was almost entirely limited to contrasting that provision with section 13(b). See *FTC v. Credit Bureau Ctr., LLC*, Oral Argument Audio, United States Court of Appeals for the Seventh Circuit, http://media.ca7.uscourts.gov/sound/2019/cm.18.2847.18-2847_04_17_2019.mp3 at 13:28–14:45; 26:13–29:06, 33:56–35:33, 35:34–36:19 (last visited Sept. 1, 2021). Given this context, CBC cannot viably maintain that by vacating the restitution, the Seventh Circuit decided not only that the FTC was not entitled to restitution under section 13(b) but also that it was not entitled to restitution under any other provision of the FTC Act or a related statute.

CBC's law of the case argument suffers the same fate as its mandate rule argument. "The law of the case doctrine is a corollary to the mandate rule and prohibits

Circuit decided that restitution was not available under section 19, CBC answered affirmatively and pointed the Court to the appellate oral argument.

a lower court from reconsidering on remand an issue expressly or impliedly decided by a higher court absent certain circumstances." Carmody, 893 F.3d at 407 (internal quotation marks omitted). The Court need not consider the exceptions to the law of the case doctrine. Because the Seventh Circuit did not decide, expressly or impliedly, that the FTC could not pursue monetary relief under section 19 of the FTC Act, CBC cannot argue that the law of the case doctrine precludes consideration of that argument now. See *id.*

CBC makes much of the fact that the Seventh Circuit did not include "remand" in its decretal language. See Hon. Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 *Brook. L. Rev.* 727 (2005) ("Decretal language" is the portion of a court's judgment or order that officially states ('decrees') what the court is ordering.") Though it's true the word "remand" does not appear in the Seventh Circuit's opinion, that omission does not restrict the Court, post-appeal, from considering post-judgment motions. Indeed, "every appellate court judgment vests jurisdiction in the district court to carry out some further proceedings." *Exxon Chem. Pats., Inc. v. Lubrizol Corp.*, 137 F.3d 1475, 1483 (Fed. Cir. 1998) (cited favorably in *Big Ridge*, 808 F.3d at 712). "[A] judgment that does not specifically provide for a remand speaks only to the issues incorporated in the mandate." *Engel Indus., Inc. v. Lockformer Co.*, 166 F.3d 1379, 1383 (Fed. Cir. 1999); see also *Indianapolis Colts v. Mayor & City Council of Baltimore*, 775 F.2d 177, 180 (7th Cir. 1985) (citation omitted) ("[T]his court's failure to rule on Baltimore's fee request in *Indianapolis Colts*, 'left the matter open for consideration by the District Court.'). Moreover, "the nature of the district court's remaining tasks is discerned not simply from the language of the judgment, but from the judgment in

5(a) of ROSCA (which incorporates section 19) in its complaint. And even if that isn't so, the FTC says, any forfeiture was excused.

Here too, the FTC has the better arguments. Waiver is the "intentional relinquishment or abandonment of a known right." *Bourgeois v. Watson*, 977 F.3d 620, 629 (7th Cir. 2020) (internal quotation marks omitted). The FTC did not waive its ability to pursue relief under section 19 before this Court because it did not intentionally relinquish or abandon its entitlement to monetary relief under section 5(a) of ROSCA. As already noted, the FTC's complaint included section 5 among the provisions that authorized the action against CBC, see Compl. ¶ 1, and among the provisions in its prayer for relief, see *id.* at 22–23. The FTC did not need to separately cite section 19 of the FTC Act because section 5(a) of ROSCA incorporates section 19.

The FTC did not waive its right to relief under section 19 on appeal either. The Seventh Circuit has said that "the failure of an appellee to have raised all possible alternative grounds for affirming the district court's original decision, unlike an appellant's failure to raise all possible grounds for reversal, should not operate as a waiver." *Schering Corp. v. Illinois Antibiotics Co.*, 89 F.3d 357, 358 (7th Cir. 1996). That is because the ability to make an alternative argument in defense of a district court's judgment "is a privilege, not an obligation." *Frank v. Walker*, 819 F.3d 384, 387

remains open in the district court." Frank, 819 F.3d at 387. Though it cited section 5(a) of ROSCA in its complaint, the parties do not dispute that the FTC did not argue at summary judgment that it was also entitled to restitution under section 19 of the FTC Act. Nor did the FTC present that argument to the Seventh Circuit. Thus, that route for restitution "remains open."² See id.

CBC's forfeiture argument doesn't wash either. "Whereas waiver is the intentional relinquishment or abandonment of a known right, forfeiture is the mere failure to raise a timely argument, due to either inadvertence, neglect, or oversight." Henry v. Hulett, 969 F.3d 769, 786 (7th Cir. 2020) (internal quotation marks omitted). CBC says the FTC forfeited its ability to pursue damages under section 19 because it "put all its eggs" in the section 13(b) "basket." CBC Reply Br. at 7. But at the time the FTC drafted its complaint, it was the law in this circuit (and throughout much of the country) that section 13(b) was a permissible route to restitution. See AMG Cap. Mgmt., 141 S. Ct. at 1351. So it can't be true that the FTC's decision not to raise an alternative ground

restitution.³

There's one additional ground that supports consideration of the FTC's motion: Rule 54(c). The Seventh Circuit has said that Rule 54(c) permits a court "to grant whatever relief is appropriate, including injunctive relief, even if the parties have not specifically requested it." *Old Republic Ins. Co. v. Employers Reins. Corp.*, 144 F.3d 1077, 1081 (7th Cir. 1998); see also *Medici v. City of Chicago*, 856 F.3d 530, 532 (7th Cir. 2017); *Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 948 (7th Cir. 2006); *Travis*, 921 F.2d at 112. That reasoning applies here. Though at summary judgment the FTC did not specifically request restitution pursuant to section 19, that relief is still appropriate.

CBC attempts to distinguish *Travis* and *Old Republic*, but in doing so makes it clear those cases aren't that distinguishable. See *CBC Reply Br.* at 14–15. It is not "clear" that had the plaintiff in *Travis* not pled the alternative statute, she would not have been awarded damages. See *CBC Resp. Br.* at 17. The court in *Travis* did not say that. But even if it did, the FTC actually cited in its complaint section 5(a) of ROSCA, which incorporates section 19. See 15 U.S.C. § 8404. Thus, *Travis* would be on point regardless. CBC's citation to *In re Rivinius, Inc.*, 977 F.2d 1171, 1177 (7th Cir. 1992), is also unavailing. There, the court said that Rule 54(c) did not allow a defendant "to obtain relief based upon a contribution theory that was not properly raised at trial." *Id.* But even if the FTC hadn't included section 5(a) of ROSCA in its complaint, the failure to

³ And even if the FTC had forfeited the issue, that forfeiture would be forgiven due to exceptional circumstances, particularly in light of the change in the law. See *Bourgeois*, 977 F.3d at 631. As the FTC notes, forfeiture in this case would harm "

include an alternative statutory provision upon which the plaintiff could seek relief is not the same as a defendant's failure to serve a crossclaim for contribution. CBC also contends that Rule 54(c) does not allow the district court to award relief "to a party that

at 11–12 (citing *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988)).

CBC's argument is unpersuasive. As the Court has explained, the law of the case doctrine does not preclude the Court's consideration of section 5(a) of ROSCA (or section 19 of the FTC Act), because the Seventh Circuit did not expressly or impliedly consider the availability of restitution under those provisions. *Christianson* does not say anything that would change that conclusion. See *Christianson*, 486 U.S. at 817 ("[T]he law-of-the-case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.'").

CBC also cites *Wright & Miller's Federal Practice and Procedure*, which is just as unconvincing here as its citation of *Christianson*. The portion CBC relies on is not nearly as supportive as it thinks. The treatise only says that "the most obvious justifications for departing from the law of the case arise when there has been an intervening change of law outside the confines of the particular case." *Law of the Case*, 18B Fed. Prac. & Proc. Juris. § 4478 (2d ed. 2021). Again, there is no "law of the case" to depart from here. But even if there was, saying that a particular situation presents the most obvious justification is not the same as saying it presents the only justification. And the treatise goes on to say that the "easiest cases occur when the law has been changed by a body with greater authority on the issue," i.e., the law has been changed by "a court higher in the hierarchy of a single court system." *Id.* That is exactly what happened here.

CBC's remaining argument

supply the appellate court with "every conceivable alternative ground for affirmance."
See Frank, 819 F.3d at 387.

Also unavailing are CBC's arguments regarding JTH Tax, Inc. v. Aime, 744 F. App'x 787, 794 (4th Cir. 2018) (Aime I) and JTH Tax, Inc. v. Aime, 984 F.3d 284 (4th Cir. 2021) (Aime II). In Aime I, the Fourth Circuit held that a district court erred when it determined that the parties agreed to a valid and enforceable extension of the deadline for a buyback provision in an agreement between the parties. Aime I, 744 F. App'x at 794. After concluding that the defendant's offer to extend lacked consideration and that the promise was therefore a gratuitous one, the court vacated the district court's judgment "to the extent it relied on the validity of the deadline extension." Id. at 793; see also id. at 794 ("But as we've explained, the court erred in finding that Liberty Tax and Aime validly extended the PSA's buyback option, and so Aime wasn't entitled to damages resulting from Liberty Tax's refusal to sell back his former franchises. On remand, the district court should enter appropriate damages consistent with those principles.")

After remand and the district court's issuance of its post-remand judgment, Aime filed a motion to reconsider

that Aime raised his disgorgement theory for the first time in his motion to reconsider—"after years of litigation, a bench trial, an appeal . . . , and a damages proceeding upon remand." *Id.* Because Aime could have raised his disgorgement theory before the district court, during his first appeal, or during the damages proceeding upon remand, the court concluded that the motion to reconsider was properly denied. *Id.*

The other reason the Fourth Circuit affirmed the district court was that the mandate rule procedurally barred Aime from pursuing disgorgement. *Id.* at 291. The court first noted that it had already determined that the "buyback deadline was not validly extended, meaning that Aime wasn't entitled to damages resulting from Liberty Tax's refusal to sell back his former franchises." *Id.* (internal quotation marks omitted). Because Aime's basis for disgorgement was based on Liberty's refusal to sell back the franchises, that argument contradicted the court's prior mandate. *Id.* The court also explained that the mandate rule bars "any issue that could have been but was not raised on appeal." *Id.* (internal quotation marks omitted). Given that "Aime raised a new legal theory to obtain the same damages that the district court and [the Fourth Circuit had] denied him on his previous theory," his argument was barred by the mandate rule which does not permit new arguments or legal theories on remand. *Id.* at 291–92.

Returning to the case before the Court, more than a few points distinguish this case from the Aime cases. First, the plaintiff in Aime sought a new remedy for the damages the Fourth Circuit denied him under a previous theory, after the Fourth Circuit had conclusively determined that he was not entitled to damages on the defendant's refusal to sell back his former franchises. See *id.* at 290–92. Here, the FTC is pursuing

damages under section 13(b). *AMG Cap. Mgmt.*, 141 S. Ct. at 1351. It cannot be true that a party who proffers arguments based on overwhelming and longstanding precedent has unclean hands once that precedent is overturned after over 30 years. The fact that other parties had been arguing against the prior interpretation of section 13(b) might be proof that wisdom comes late—even to courts—but it is not proof that the FTC is an abusive litigant.

CBC's unfair prejudice argument is similarly unpersuasive. As the FTC notes, CBC admits it "knew early in these proceedings (in 2017) that consumer redress was available under Section 19, and that the FTC was seeking to recover the full amount consumers lost to their scheme." FTC Reply Br. at 7 (citing CBC Resp. Br. at 13).

What exactly would be changed by seeking relief under section 19 (via section 5(a) of ROSCA) instead of section 13(b) of FTC Act? CBC had an opportunity to oppose, and did oppose, the requested award of restitution. The same relief is being requested for the same misconduct. CBC does not explain how it would have

1936 (2020), limits the availability of damages in this case to "net profits derived from the underlying fraud." CBC Reply Br. at 9. That conclusion can be drawn only by extrapolating. The Supreme Court in *Liu* held that courts were not permitted to enter "disgorgement awards that exceed the gains 'made upon any business or investment, when both the receipts and payments are taken into the account.'" *Liu*, 140 S. Ct. at 1950.

The present motion does not involve the remedy of disgorgement, nor does this case involve 15 U.S.C. § 78u(5), the Securities Exchange Act, or the Securities Exchange Commission and thus *Liu* is not applicable here. Other district courts have reached this same conclusion. See, e.g., *FTC v. On Point Glob. LLC*, No. 19-25046-CIV, 2020 WL 5819809, at *4 (S.D. Fla. Sept. 30, 2020) (internal quotation marks omitted) ("While the Defendants argue that *Liu* may impact this proceeding, this Court cannot extrapolate that fact when the Supreme Court's holding in *Liu* dealt with the wrong agency, the wrong statute, and the wrong remedy."); *FTC v. Noland*, No. CV-20-00047-PHX-DWL, 2020 WL 4530459, at *4 (D. Ariz. Aug. 6, 2020) ("Additionally, *Liu* addressed the disgorgement remedy the SEC may seek under its governing statute and didn't once discuss the FTC, which is governed by an entirely different statute. Given the presence of textual differences between the two statutes, it would be improper to read *Liu* as necessarily curtailing the scope of the FTC's authority.").

To the extent CBC argues that the FTC must trace particular funds, that same argument was rejected in this Court's prior opinion. See *Credit Bureau I*, 325 F. Supp. 3d at 869 ("The FTCA authorizes legal restitution, which does not impose the same tracing requirements."). Neither *Liu* (in which tracing is discussed only in the dissent)

exercise its authority.

Moreover, contrary to CBC's argument, neither section 19 nor 15 U.S.C. § 56(a)(2)(B) "condition[] relief . . . on commencing a civil action" under section 56(a)(2)(B). See CBC Reply Br. at 7. Nothing in either cited provision even hints at such a requirement. Section 56 is not even referenced in section 19. See 15 U.S.C. § 57b. And, as previously discussed, the FTC cited section 5(a) of ROSCA in its complaint, along with section 13(b), which incorporates section 19. In short, the FTC did allege its basis for enforcement.

Second, CBC also argues for the first time in its reply brief that section 18 of the FTC Act, 15 U.S.C. § 57a, does not incorporate the remedies in section 19. CBC Reply Br. 10–11 ("The FTC asks the Court to imply that Section 18 actually alleges a cause of action brought under Section 19 allowing the recovery of monetary damages and injunctive relief."). In CBC's view, section 18 of the FTC Act is not an enforcement statute and thus the FTC cannot use it to pursue restitution. Even assuming this argument is not forfeited, see *O'Neal*, 961 F.3d at 974, it is hobbled by a few misunderstandings. At the outset, section 18 is an enforcement statute. The Seventh Circuit has already said as much. *Credit Bureau II*, 937 F.3d at 771 (referring to section 18 as one of the FTC's "enforcement mechanisms" because under section 18 the FTC may promulgate rules that "preemptively resolv[e] whether certain conduct violates the FTCA" and "pursue 'quick enforcement' actions against violators.").

That aside, the FTC is not attempting to use section 18 to seek monetary relief. Again, section 5(a) of ROSCA "plainly authorizes the FTC to seek equitable monetary relief to redress consumer injury resulting from ROSCA violations." *FTC v. Cardiff*, No.

resulting from Defendants' violations of . . . ROSCA . . . including but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies." *Id.* at 22. That seems more than sufficient to meet the notice pleading requirements in Federal Rule of Civil Procedure 8(a)(2), which "requires only that a complaint plead 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" See *Bilek v. Fed. Ins. Co.*, 8 F.4th 581 (7th Cir. 2021). "[T]here is no rule requiring parties to plead legal theories or elements of a case." *Auto Driveaway Franchise Sys., LLC v. Auto Driveaway Richmond, LLC*, 928 F.3d 670, 675 (7th Cir. 2019).

As discussed earlier, the Court is unmoved by CBC's claims of unfair prejudice. Aside from the particular route to an award of restitution, nothing will materially change. The FTC seeks the same remedy, for the same reasons, and for the same victims under section 5(a) via section 19 as it did under section 13(b). And though CBC says it would have presented its case differently, as discussed earlier it does not explain how this is so.

Next, CBC argues that the FTC did not establish subject matter jurisdiction. In cursory fashion, CBC contends that the FTC's failure to allege its authority under section 19 is a "matter of subject matter jurisdiction." See CBC Reply Br. at 11 n.6. But, in the complaint, the FTC cited section 5(a) among others when alleging that it was "authorized to initiate federal district court proceedings, by its own

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