

Nos. 19-35668 & 19-35669
Argument scheduled for June 6, 2021

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

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

HOYAL & ASSOCIATES, INC., JEFFREY
HOYAL, AND LORI HOYAL
Defendants-Appellants in No. 19-35668

and

REALITY KATS, LLC AND
DENNIS SIMPSON
Defendants-Appellants in No. 19-35669

On Appeal from the
U.S. District Court for the District of Oregon,
No. 1:16-cv-00720

FTC'S SUPPLEMENTAL BRIEF

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INTRODUCTION

In the order on appeal, the district court permanently enjoined the appellants from marketing newspaper subscriptions that they were not authorized by the publishers to sell, and also ordered them to repay \$8.9 million that they took from consumers.

After the appeals were fully briefed and set for argument, this Court entered an order deferring their submission and holding them in abeyance pending the Supreme Court's decision in *AMG Capital Management, LLC v. FTC*. That case was decided April 22, 2021, and this Court then reopened the appeals and ordered the parties to file simultaneous briefs regarding the effect of the *AMG* decision. As explained below, *AMG* requires that the district court's order of monetary relief be vacated but does not support the appellants' challenges to the injunction entered against them, all of which should be rejected for the reasons discussed in the Commission's merits brief.

DISCUSSION

A. The monetary award must be vacated.

The issue presented in *AMG* was whether Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), “authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement.” *AMG Capital Mgmt., LLC v. FTC*, 593 U.S. ___, slip op. at 1 (April 22, 2021). That issue is implicated here because the district court relied on this Court's pre-*AMG* precedent that Section

13(b) *does* confer that authority when it ordered the appellants to return \$8.9 million that they took from consumers. *See* ER 152-153 & nn. 63-65. In *AMG*, however, the Supreme Court held that Section 13(b) does *not* authorize monetary relief. *See AMG*, slip op. at 1. Accordingly, the FTC concedes that the monetary relief entered in this case must be vacated.

That result moots the remainder of appellants' challenges to the monetary award. For example, the Court need not address the Hoyals' argument that they should not be held financially liable because they lacked knowledge of the underlying fraud. *See* Hoyal Br. 16-34; *see also* Hoyal Reply 3-7, 12-15. For the same reason, the Court need not consider Simpson's arguments about the calculation or propriety of the monetary award. *See* Simpson Br. 42-44; Simpson Reply 23-26.

B. *AMG* undermines Simpson's argument that a permanent injunction action may be brought only in conjunction with an administrative proceeding.

Simpson's opening brief argues that the Commission may seek a permanent injunction under Section 13(b) of the FTC Act only if it also pursues an administrative complaint. *See* Simpson Br. 27-28. As explained in the Commission's brief (p. 50), this Court has held the opposite: that Section 13(b) authorizes "permanent injunctions in proper cases even though the Commission does not contemplate any administrative proceedings." *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982). In *AMG*, the Supreme Court agreed, holding that Section 13(b) may be

read to allow the Commission to “dispense with administrative proceedings” and seek a permanent injunction directly in federal court. *AMG*, slip op at 8. It stated further that “the Commission may use §13(b) to obtain injunctive relief” not only “while administrative proceedings are foreseen or in progress,” but also “when it seeks only injunctive relief.” *Id.* at 10.

AMG thus confirms that the Commission need not commence an administrative action to obtain a permanent injunction under Section 13(b). In this case, the Commission now seeks only injunctive relief, which *AMG* expressly states the Commission may do without bringing an administrative proceeding.

C. *AMG* does not otherwise affect or support the appellants’ remaining arguments.

The only issue decided in *AMG* was whether Section 13(b) of the FTC Act “authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement.” *AMG*, slip op at 1. Accordingly, the decision does not affect this Court’s disposition of the appellants’ arguments about the propriety of *injunctive* relief, either in general (*see* Hoyal Br. 35-45; Simpson Br. 18), as applied to this specific case (*see* Hoyal Br. 47-51; Simpson Br. 18-36) or as applied to the individual defendants (*see* Hoyal Br. 10-16, 45-46; Simpson Br. 39-42). Nor does *AMG* have any effect on the appellants’ arguments regarding the scope of the injunction (*see* Simpson Br. 44-48). Those arguments, and the appel-

lants' other non-Section 13(b) arguments (*see* Simpson Br. 36-38), should be rejected for the reasons described in the Commission's brief.

CONCLUSION

In light of the Supreme Court's decision in *AMG*, the trial court's order for monetary relief should be vacated; its order should otherwise be affirmed.

Respectfully submitted,

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May 7, 2021

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing complies with the type-volume limitation (15 pages or 4200 words) set by the Court in its April 23, 2021 order requesting this brief because the brief contains 746 words.

May 7, 2021

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