IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

09-16466-GG

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

HOME ASSURE, LLC., et al.,
Defendants,

MICHAEL TRIMARCO and NICOLAS MOLINA,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR PLAINTIFF-APPELLEE FEDERAL TRADE COMMISSION

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No. 09-16466-GG

Federal Trade Commission v. Home Assure, LLC, *et al.*

Pursuant to Circuit Rules 26.1-1 and 27-1(9), this is to certify that the following is a complete list of all attorneys, persons, and entities known to have an interest in the outcome of this appeal:

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STATEMENT OF ORAL ARGUMENT

The Federal Trade Commission does not believe that oral argument will assist the Court in resolving the issues presented in this appeal.

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STATEMENT OF JURISDICTION

The Federal Trade Commission, an independent agency of the United States, brought an action in the United States District Court for the Middle District of Florida, pursuant to Sections 5 and 13(b) of the Federal Trade Commission Act, 15 U.S.C. §§ 45 and 53(b), seeking a permanent injunction against defendants' deceptive sale of foreclosure rescue services and equitable monetary relief for injured consumers. The Commission also sought interim relief, including a preliminary injunction and an asset freeze. The district court's jurisdiction is derived from 28 U.S.C. §§ 1331, 1337(a), 1345, and 15 U.S.C. § 53(b).

After appellants filed a notice of appeal from an interlocutory order freezing their assets, they filed before the district court a "Renewed Motion for a 'Nexus' Hearing and to Modify and/or Dissolve the Asset Freeze" ("Renewed Motion"). Doc. 133. On October 27, 2009, the district court entered an order denying defendants' motion, holding that, in view of the pending appeal of the interim freeze, it lacked authority to grant the requested relief under Fed. R. Civ. P. 62(c). Doc. 136, RE Tab 136. On December 23, 2009, appellants filed a notice of appeal of the district court's ruling denying their "Renewed Motion." Doc. 145. This Court has jurisdiction over the instant appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUE PRESENTED

Whether the district court properly held that it lacked jurisdiction to entertain appellants' "renewed" motion to dissolve or modify a previously-entered preliminary injunction, where the injunction they sought to modify was already the subject of an interlocutory appeal to this Court, and the relief requested could not be characterized as preserving the status quo or effectuating the purposes of that injunction.

COUNTERSTATEMENT OF THE CASE[1]

A. Nature of the Case, Course of Proceedings, and Disposition Below

This is the second interlocutory appeal arising from an action by the Federal Trade Commission ("FTC" or "Commission"), pursuant to Sections 5[2] and 13(b)(2)[3] of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45 and

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[1] Page references in documents in the district court record conform to the pagination in the headers in the Official Court Electronic Filing System. However, citations to pages in documents that are not available electronically on PACER, or that are cited in appellants' brief, are to the document's internal pagination. Also, to avoid confusion, exhibits are cited as "Exh. __," while documents appended to exhibits are cited as "Att. __."

[2] Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), prohibits "unfair or deceptive acts or practices."

[3] The second proviso of Section 13(b)(2) of the FTC Act, 15 U.S.C. § 53(b)(2), vests the district courts with authority to grant a permanent injunction and other equitable relief with respect to violations of any provision of law enforced by the FTC.

53(b)(2), seeking a permanent injunction against appellants' deceptive practices in the sale of mortgage foreclosure rescue services. The Commission also seeks monetary equitable relief for consumers who, despite the defendants' touted money back and service guarantees, in many or most cases paid for services they never received.

1. The Defendants and Their Operations

The principal defendants include Home Assure, LLC, a Florida limited liability company, and its principals, appellants Michael Trimarco and Nicolas Molina. Starting in August 2007, Home Assure marketed and sold mortgage foreclosure rescue programs to consumers nationwide, targeting consumers who, facing foreclosure, searched the Internet for help and advice.[4] At its website, Home Assure promised consumers:

> 100% SATISFACTION GUARANTEED OR YOUR MONEY BACK We firmly stand behind our promise to help you. If we are unable to negotiate a reasonable plan With [sic] your lender, to stop foreclosure, or remove your delinquency, we will refund your money.

Doc. 5, Exh. 1 at 12 & Att. S at 4 Exh. 3. Home Assure encouraged consumers to call for a "free consultation," or to complete and submit an online form with

[4] Doc. 5, Exh. 1 at 2, 4-5, 7, 12 & Atts. A.1, A.9, D, Q, T; Doc. 61-9 at 2.

contact and mortgage-related financial information.[5] Reiterating bold print guarantees from the company's website, sales representatives told consumers that they would be entitled to a "full refund" of their fees if Home Assure were unsuccessful in stopping foreclosure.[6] In many or most cases, however, Home Assure did not stop the impending foreclosures or even contact lenders, or they offered only solutions that were contrary to the promised terms, had been offered previously, or obviously were unworkable.[7]

Appellant Michael Trimarco was "the company's President and Co-Founder," and appellant Nicolas Molina was its "CEO and Co-Founder." Doc. 5, Exh. 1 at 5 & Att. C; *see also* Doc. 5, Exh. 1 at 12 & Att. Q at 1. Each played major roles in marketing and financial management. Doc. 61-9 at 3 (Trimarco "[w]ill have full time responsibility for tech-ops and financial management" and provide "[m]arketing support."); *id*. at 2-3 (Molina "[w]ill have full time responsibility for marketing and lead generation" and have responsibility "for the

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[5] Doc. 5, Exh. 4 at 1, Exh. 5 at 2, Exh. 6 at 2, Exh. 7 at 1, Exh. 8 at 1, Exh. 9 at 1, Exh. 10 at 1, Exh. 11 at 1-2, Exh. 12 at 1, Exh. 13 at 1, Exh. 14 at 1, Exh. 15 at 1, Exh. 16 at 1.

[6] Doc. 5, Exh. 1 at 10-11 & Att. M at 20-21, Exh. 7 at 1, Exh. 9 at 2, Exh. 11 at 2, Exh. 12 at 1, Exh. 14 at 2; Doc. 61-4 at 3.

[7] *See* Doc. 5, Exh. 4 at 2, Exh. 5 at 4-5, Exh. 8 at 3, Exh. 12 at 3, Exh. 15 at 6.

overall marketing of Home Assure products and services."). As of August 2007, Trimarco and Molina each owned a 40% share of the business. Doc. 61-9 at 2.

In September 2008, Home Assure began winding down the business – a process that by the end of November 2008 was largely complete. Doc. 38-3 at 4; Doc. 38-4 at 9. Home Assure left homeowners in many cases without providing the promised foreclosure rescue services and without honoring its marketing pledge of money back guarantees. Doc. 5, Exhs. 4-16; Doc. 30-5 at 1-2; Doc. 30-10. As appellants note, at the time of its wind down the company's coffers were empty. *See* App. Br. at 10.

In October 2008, as Home Assure was winding down its business, Brian Blanchard, a Home Assure member and manager,[8] opened Expert Foreclosure, hiring several Home Assure employees and taking over registration for the homeassure.com domain name.[9] At least one Home Assure customer, after paying for services, was told by a Home Assure representative that in the future she would be dealing exclusively with Expert Foreclosure. Doc. 50-3 at 1-3.

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[8] Blanchard was not a member of Home Assure after November 2008, and formally resigned as manager on January 6, 2009. Doc. 38-5 at 3; Doc. 5, Exh. 1 at 4 & Att. A.8.

[9] *Compare* Doc. 5, Exh. 1 at 11 *with* Exh. 1 at 13-14; *compare* Doc. 61-12 at 2 *with* Doc. 61-10 at 2; *see* Doc. 5, Exh. 1 at 14-15 & Atts. X-Y.

2. Proceedings Below

(a) *Home Assure I*

On March 24, 2009, the Commission, having "reason to believe" that the defendants had engaged, or were engaging in, violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), filed a complaint in the United States District Court for the Middle District of Florida pursuant to the permanent injunction proviso of Section 13(b) of the Act, 15 U.S.C. § 53(b). The complaint alleged that the defendants were engaging in deceptive acts or practices in violation of Section 5(a) by (1) misrepresenting they would stop consumers' foreclosures in all or virtually all instances; and (2) failing in most cases to honor their refund policy when foreclosure was not stopped. Doc. 1 at 9-10, RE Tab 1 at 9-10. The complaint sought a permanent injunction and multiple forms of monetary equitable relief, "including, but not limited to, rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies * * *." Doc. 1 at 11, RE Tab 1 at 11. Contemporaneously with the filing of its complaint, the Commission asked the district court to enter an *ex parte* temporary restraining order ("TRO") and asset freeze and an order appointing a temporary receiver. Docs. 4-9.

On March 26, 2009, the district court (per Hon. Steven Merryday) entered a

TRO, finding that the FTC had demonstrated a likelihood of success on the merits and good cause to believe that immediate and irreparable injury to the court's ability to grant final monetary relief would occur in the absence of an asset freeze and other interim relief. Doc. 13 at 2-3, RE Tab 13 at 2-3. In addition to restraining and enjoining false and deceptive representations regarding the defendants' foreclosure rescue program (Doc. 13 at 6, RE Tab 13 at 6), the district court appointed a temporary receiver for the corporate defendants and froze the defendants' assets. Doc. 13 at 7-9, 18, RE Tab 13 at 7-9, 18. The district court, *inter alia*, also directed the defendants to complete financial reports (Doc. 13 at 16, RE Tab 13 at 16), and to appear and show cause why a preliminary injunction should not issue (1) enjoining the defendants from any further violations and (2) continuing the interim freeze pending a decision on the ultimate merits of the Commission's complaint. Doc. 13 at 32-33, RE Tab 13 at 32-33.

On March 31, 2009, having been served with the TRO, appellants filed a "Motion for a Nexus Hearing and to Modify or Dissolve the Asset Freeze." In support of their motion, appellants asserted that (1) the FTC must demonstrate a specific "nexus" between the frozen assets and the alleged claim for relief; (2) with the possible exception of appellants' purportedly modest salary, such a nexus did not exist; and (3) consequently, that the freeze was tantamount to an

unauthorized prejudgment attachment and must be dissolved or modified.[10] Doc. 23. The district court did not reach the merits of that motion, but on April 3, 2009, in opposing the Commission's motion for a preliminary injunction, appellants again asserted that monetary equitable relief must be limited to "property in [their] possession that could 'clearly be traced' to money or property belonging in good conscience to the plaintiff." Doc. 38 at 20-21.

The district court referred the Commission's request for a preliminary injunction to Magistrate Judge Thomas B. McCoun III for preparation of a report and recommendation. Doc. 40. After considering the record and hearing oral argument, Magistrate Judge McCoun concluded that there was a "substantial likelihood" that, even taking into account some "evidence of customer satisfaction," the Commission would prevail in establishing that the defendants had made material misrepresentations to consumers that Home Assure would stop foreclosure of consumers' homes and that, in the event that foreclosure could not be stopped, Home Assure would return their service fees. Doc. 54 at 10, RE Tab 54 at 10.

As for the individual defendants, appellants Trimarco and Molina, Magistrate Judge McCoun found that "their involvement in the formation and

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[10] The district court subsequently denied the motion as moot because the TRO expired by its terms on April 8, 2009.

initial development of the company, including its financing, IT structure, business, and marketing strategies," and "[their] authority within the corporate structure" demonstrated that they knew about Home Assure's practices, including enforcement actions in which two states had alleged their practices violated state law. Doc. 54 at 11, RE Tab 54 at 11. Accordingly, applying established standards for finding individuals liable for violations of the FTC Act, the Magistrate Judge concluded that "the evidence [was] adequate to demonstrate the likelihood of success on this element of the FTC's proof as against these individuals." *Id*.

Magistrate Judge McCoun concluded that it was a "close issue" whether the equities weighed in favor of issuing a preliminary injunction against appellants' conduct. *Id*. He noted that Home Assure had wound down its business and that the FTC had not shown that the business history of the individual defendants was "contrary to that represented in their affidavits." Doc. 54 at 11-12, RE Tab 54 at 11-12.[11] Based on these findings, Magistrate Judge McCoun found there was "no clear showing that [the defendants] intend to re-enter this type business" and, accordingly, concluded that, with respect to an injunction against conduct, a balancing of the equities "[did] not favor the FTC * * *." Doc. 54 at 12, 13, RE

[11] Also, he noted, the individual defendants "appear[ed] to be sophisticated businessmen" who, in opposing the FTC's motion, attempted to establish they had suffered "a sizable loss on their investment." Doc. 54 at 12, RE Tab 54 at 12.

Tab 54 at 12, 13. He reasoned that "a preliminary injunction [against conduct] can not properly issue [when] the FTC is unable to demonstrate that [the defendants] are currently violating, or are apt to violate, any provision of law enforced by the FTC." Doc. 54 at 13, RE Tab 54 at 13. Based on this analysis, Magistrate Judge McCoun recommended to the district court that it deny the Commission's motion to the extent it requested a preliminary injunction against continuation of the alleged practices. But, in view of the Commission's likelihood of success on the merits of its allegations of deceptive acts and practices, he also recommended that the court grant the requested interim freeze, pursuant to its inherent equitable authority. Doc. 54 at 15, RE Tab 54 at 15.

Both parties filed objections to Magistrate Judge McCoun's report and Recommendation. Docs. 61-62. The Commission objected to the report and recommendation to the extent it recommended denying a preliminary injunction as to Expert Foreclosure and Home Assure, who had not appeared or opposed the Commission's motion. Doc. 61 at 4-9. The Commission also objected that, given the individual defendants' refusal to comply with the disclosure provisions of the TRO,[12] the pervasive nature of their deceptive practices, and the ease of their re-entry into the mortgage modification business, a preliminary injunction against the

[12] Appellants complied with these requirements after the district court issued a preliminary injunction.

individuals' alleged practices was warranted. Doc. 61 at 10-18. Appellants, for their part, reiterated that there must be a demonstrable nexus between the frozen assets and the FTC's alleged claim for relief, and that, in the absence of such a showing, the interim freeze must be dissolved. Doc. 62 at 17-23.

On April 16, 2009, the district court overruled the parties' objections, and issued an order granting in part and denying in part the FTC's motion for preliminary relief. Doc. 65, RE Tab 65. Specifically, the district court denied the Commission's motion to the extent that it requested a preliminary injunction against the deceptive acts and practices alleged in the complaint. Doc. 65 at 10, RE Tab 65 at 10. However, the court granted the Commission's motion for an interim freeze of appellants' assets, holding, *inter alia*, that the evidence amassed by the Commission demonstrated that it was likely to prevail on the merits of its allegations of deceptive practices, and that immediate and irreparable injury to the court's ability to grant effective final monetary relief for consumers would likely occur in the absence of an order immediately enjoining and restraining appellants from transferring their assets. Doc. 65 at 10-11, RE Tab 65 at 10-11.

The district court specifically rejected appellants' notion that its authority to order an interim freeze turned on the FTC's ability to demonstrate a likelihood of recurrence of the alleged unlawful conduct. Rather, the court agreed with

Magistrate Judge McCoun that, under Section 13(b), the district courts are authorized to grant the full range of equitable remedies, including a stand-alone asset freeze. Doc. 65 at 4-5, RE Tab 65 at 4-5.

As for the *scope* of the freeze, the court agreed with the Magistrate Judge that it "depends on the equitable relief *ultimately* available if the FTC prevails on the merits." *Id.* (emphasis added). Doc. 65 at 4, RE Tab 65 at 4. The district court then rejected appellants' contention that, at most, final relief must be limited to Home Assure's net profit, or the individual defendants' salaries. Doc. 65 at 4-5, RE Tab 65 at 4-5. The court also rejected appellants' contention that such a limitation was compelled by this Court's decision in *CFTC v. Wilshire Inv. Management Corp*., 531 F.3d 1339, 1345 (11th Cir. 2008). The district court distinguished Section 13(b) of the FTC Act, noting that, in an action under Section 13(b) of the FTC Act, "'the amount that [the defendants] wrongfully gained' *may equal* the amount consumers paid the defendants." Doc. 65 at 6, RE Tab 65 at 6 (emphasis added). Thus, by contrast to *Wilshire*, the court concluded that final relief "may include a refund to the consumer of the full amount paid by the consumer to the defendants." Doc. 65 at 5, RE Tab 65 at 5.

As for appellants' notion that monetary equitable relief must take into account defendants' expenditures for marketing and labor, the district court

concluded that such offsets would undermine the deterrent purpose of Section 13(b). Doc. 65 at 7-8, RE Tab 65 at 7-8. Finally, the court rejected appellants' argument that the Supreme Court's decision in *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 122 S. Ct. 708 (2002) – a private action involving a company's contractual subrogation rights under the Employee Retirement Income Security Act ("ERISA") – imposed a requirement, in a public enforcement action, that the FTC trace the individuals' assets directly back to the alleged violations before it may obtain an interim asset freeze. Doc. 65 at 8-9, RE Tab 65 at 8-9. The district court explained that it should not be assumed that *Great-West* fundamentally altered federal equity jurisprudence in statutory enforcement actions involving the public interest, as established years earlier in *Porter v. Warner Holding Co*., 328 U.S. 395, 66 S. Ct. 1086 (1946). *Id*. Furthermore, the court held, appellants' tracing argument "ignore[d] the availability of individual liability for corporate violations of the FTC Act * * *." Doc. 65 at 8, RE Tab 65 at 8.

Based on this analysis, the district court entered an order preliminarily freezing appellants' assets to the extent of $3.7 million each[13] – an amount the

[13] If the court finds that the individuals participated in, or, alternatively, both controlled and had knowledge of Home Assure's alleged practices, they are jointly and severally liable under governing law. *See, e.g., FTC v. Gem Merchandising Corp*., 87 F.3d 466, 470 (11th Cir. 1996); *FTC v. Amy Travel Service, Inc*., 875

court determined was a "reasonable approximation" of Home Assure's gross sales less refunds.[14] Doc. 65 at 9, RE Tab 65 at 9. The court, however, provided appellants with several avenues of relief from the freeze order. First, noting that appellants' failure to make financial disclosures earlier (as required by the TRO) had prevented the FTC from determining whether appellants owned "exempt assets" (Doc. 65 at 9 (citing Doc. 61 at 21); RE Tab 65 at 9 (citing Doc. 61 at 21)), the court granted them leave to "move to exclude or exempt additional assets" after complying with the disclosure provisions of the asset freeze order. *Id*. Second, the court provided that appellants could seek immediate relief from "extraordinary hardship" by filing an "emergency motion" for "selective relief." *Id*. Third, the court held, appellants could move to substitute a surety bond for the frozen assets. Doc. 65 at 9, RE Tab 65 at 9.

F.2d 564, 573-74 (7th Cir. 1989). Hence, to ensure that consumers would be fully protected during the pendency of the proceedings, it was necessary to freeze each appellant's assets for the full amount that was estimated would fully recompense consumers for Home Assure's unlawful practices.

[14] As explained in the FTC's opposition to the Renewed Motion, Home Assure's own records were not sufficient to show how many consumers actually received a viable workout plan. It therefore was necessary for the FTC to expend substantial efforts in discovery to make this determination. Specifically, the FTC retained a Columbia University marketing professor to conduct a customer survey and assigned an FTC economist to audit records the Commission had subpoenaed from lenders. *See* Doc. 134 at 3 n.1. Both experts prepared reports in which they concluded that approximately 80% did not receive the promised services. *Id*. The Commission produced the expert reports to appellants in September 2009.

Appellants did not pursue any of these avenues of relief. Nor did appellants seek reconsideration of the freeze order.[15] *See* Fed. R. Civ. P. 59(e). Instead, on June 15, 2009, they filed an interlocutory appeal.[16] Doc. 103 (*Home Assure I*). That appeal – which is fully briefed and calendared for oral argument – squarely presents the question whether, in seeking an interim freeze, the FTC must bear the burden of demonstrating a "nexus" between the claims for relief and the frozen assets. *See* App. Br., *Home Assure I*, at 22-29.

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[15] Given appellants' failure to seek reconsideration of the asset freeze, they have no reasonable basis for complaining about the need to await this Court's disposition of the issues they raised in the pending interlocutory appeal.

[16] After the Clerk docketed their appeal, appellants filed a Civil Appeal Statement in which they proposed raising the following three issues, each of which they briefed in the pending appeal in *Home Assure I*.

I. Whether the FTC was required to satisfy Rule 65 and statutory requirements for a preliminary injunction in order to obtain an asset freeze;

II. Whether the asset freeze imposed on defendants was appropriate absent any timely showing of a nexus between funds frozen and the alleged claim for relief;

III. Whether the FTC can obtain an asset freeze over Defendants' future assets/earnings.

(b) Continued efforts to obtain a "nexus" hearing

Not content to await this Court's ruling in *Home Assure I*, appellants persisted in efforts to obtain a "nexus" hearing in the district court. On October 5, 2009 – nearly four months after taking an appeal from the asset freeze order – appellants filed a "Renewed Motion for a 'Nexus' Hearing and to Modify and/or Dissolve the Asset Freeze" before the district court. Doc. 133. Appellants' motion was premised on the same proposition that the district court had considered and rejected earlier – namely, that a district court is not authorized to enter an interim freeze without, after first conducting an evidentiary hearing, finding a demonstrable "nexus" between the Commission's claims and the frozen assets. Doc. 133 at 4-7, 8-9.

The district court denied the "Renewed Motion" on October 27, 2009, concluding that, in light of the pending appeal from the asset freeze, it lacked jurisdiction to entertain the motion. Doc. 136, RE Tab 136. Given that the Renewed Motion raised the same issues that appellants have raised in their appeal in *Home Assure I*, the district court concluded that "an adjudication of each issue presented in the defendants' renewed motion would moot the defendants' appeal and divest the appellate court of jurisdiction." Doc. 136 at 2-3, RE Tab 136 at 2-3.

The court specifically noted that Fed. R. Civ. P. 62(c) allows modification of an injunction that is pending appeal. It recognized, however, that such a modification is allowed only to the extent that the requested modification does not modify the status quo. Doc. 136 at 2; RE Tab 136 at 2. Because, the court reasoned, it was apparent that "an adjudication of each issue presented in the defendants' renewed motion would moot [appellants'] appeal and divest the appellate court of jurisdiction," it concluded that it lacked jurisdiction to entertain the motion. Doc. 136 at 2-3, RE Tab 136 at 2-3.

(c) *Home Assure II*

Having failed in their efforts to persuade the district court to entertain their Renewed Motion, appellants asked this Court to remand the "nexus" issue. After this Court denied that motion, appellants filed a second interlocutory appeal. The sole issue before the Court in the current appeal ("*Home Assure II*) is whether the district court erred in concluding that, in view of the pending appeal in *Home Assure I*, it lacked jurisdiction to entertain appellants' Renewed Motion. Doc. 145.

SUMMARY OF ARGUMENT

The instant appeal is a continuation of appellants' efforts to litigate on two fronts the issues they have raised about the district court's authority to freeze their assets. The district court, in its order of October 27, 2009, squarely rejected their notion that the FTC, in applying for preliminary injunctive relief in a public enforcement action, must bear the burden of tracing frozen assets to the alleged practices before the court may impose an interim freeze. Appellants decided to pursue an interlocutory appeal in lieu of reconsideration. Nonetheless, they have used a variety of procedural ploys, including seeking a remand of the so-called "nexus issue," in an effort to repackage their arguments before the district court.

It is axiomatic that litigants are not entitled to challenge the same order in two courts at the same time. Having decided to forego reconsideration in favor of an appeal of the interim freeze order, appellants must await a resolution of the issues they have raised by this Court. Although a district court may modify an injunction that is pending appeal, the district court may not disturb the status quo as the case sits before the Court of Appeals. In the present case, that is precisely the kind of relief that appellants seek in their "Renewed Motion for a 'Nexus' Hearing and to Modify and/or Dissolve the Asset Freeze." The district court properly refused to entertain it.

ARGUMENT

I. The District Court Did Not Err in Declining to Entertain Appellants' Renewed Motion

A. Standard of Review

A district court's determination of its jurisdiction is reviewed by this Court *de novo*. *See, e.g.*, *United States v. McPhee*, 336 F.3d 1269, 1271 (11th Cir. 2003) ("[W]e review de novo the district court's interpretation and application of the statutory provisions concerning the court's subject matter jurisdiction * * *."); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 577 (5th Cir. 1996) (same).

B. The District Court Was Divested of Jurisdiction by the Pending Appeal

The instant appeal involves a single issue – namely, whether the district court erred in concluding that it was divested of jurisdiction to entertain appellants' Renewed Motion for a "Nexus" Hearing and to Modify and/or Dissolve the Asset Freeze ("Renewed Motion") by virtue of the pending appeal from the freeze order. The district court concluded properly that, as a consequence of the pending appeal, it lacked jurisdiction to entertain the motion.

1. A notice of appeal divests the district court of jurisdiction to relitigate issues that have been raised on appeal

As this Court has explained, the general rule is "the filing of a timely and sufficient notice of appeal acts to divest the trial court of jurisdiction over the matters at issue in the appeal, except to the extent that the trial court must act in aid of the appeal." *Shewchun v. United States*, 797 F.2d 941, 942 (11th Cir. 1986) (per curiam); *accord, Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402 (1982) (per curiam); *Pacific Ins. Co. v. General Development Corp*., 28 F.3d 1093, 1096 n.7 (11th Cir. 1994). The purpose of the rule is to promote judicial economy and avoid the confusion and inefficiency that would result from two courts considering the same issues at the same time. *See* 20 J. Moore *et al*., Moore's Federal Practice § 303.32[1] (3d ed. 2009).

Fed. R. Civ. P. 62(c) codifies this rule. *See*, *e.g*., *McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982). Under Rule 62(c), while an appeal is pending, a district court may in its discretion "suspend, modify, restore, or grant an injunction on terms for bond or other terms" as circumstances and justice may require. Rule 62(c), however, is not a source of authority for a district court to change the status quo before an appellate

court has reached a decision.[17] *See, e.g., Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989); *accord, Baum v. Blue Moon Ventures, LLC,* 513 F.3d 181, 190 n.2 (5th Cir. 2008); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co*., 73 F.3d 546, 578 (5th Cir. 1996). Appellants' Renewed Motion does not satisfy these standards. Rather, it is a thinly veiled attempt to relitigate issues they presented to the district court repeatedly, and that the district court addressed and resolved in ruling on the Commission's motion for a preliminary injunction.[18]

2. Appellants' distinction between "core" and "noncore" issues is specious

Appellants contend, in the alternative, that the "core issue" in the pending appeal in *Home Assure I* is whether the asset freeze comported with the requirements of Fed. R. Civ. P. 65, while the question whether a "nexus" hearing is

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[17] Rule 62(c) provides in pertinent part as follows:

> While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

[18] By contrast, the purpose of a motion under Fed. R. Civ. P. 59(e) is to relitigate issues. A motion for reconsideration under the aegis of former Rule 59(e) was due no later than 10 days after entry of the judgment. Appellants, however, did not seek reconsideration of the asset freeze order at all. Instead, they filed a notice of appeal. Doc. 103.

necessary prior to issuance of an asset freeze is a noncore issue that was just another "aspect" of the case. App. Br. at 25-26.

Appellants' attempt to reduce the "nexus" issue to an afterthought in *Home Assure I* is at odds with the attention they devoted to it in their briefs.[19] In their opening brief in *Home Assure I*, appellants described the "nexus" argument as an "alternative" to their contentions relating to Rule 65 (*see* App. Br., *Home Assure I*, at 16), and devoted eight full pages of their opening brief – over 50% of their Argument section – to that issue. *See* App. Br., *Home Assure I*, at 22-29.

In any event, their reliance on the dubious distinction between "core" and "noncore" issues is unavailing. The relevant issue, for purposes of Rule 62(c), is not whether an issue is "core" or "noncore." Rather, under governing law, the question is whether the requested relief – dissolution or modification of the asset freeze – would disturb the status quo. As the district court properly acknowledged (Doc. 136 at 3, RE Tab 136 at 3), the relief requested by appellants would not only upset the status quo, it would "moot the defendants' appeal and divest the appellate court of jurisdiction."

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[19] The specious distinction between "core" and "noncore" issues is also inconsistent with appellants' own, varying description of the issues. Indeed, in their brief in the instant appeal, appellants state that the question whether the district court erred in issuing the asset freeze without having been presented any evidence of a 'nexus' is a "central question" in *Home Assure I*." App. Br. 27.

Contrary to appellants' contention (App. Br. at 25, 27-28), nothing in the Ninth Circuit's decision in *Natural Res. Def. Council v. Southwest Marine, Inc.*, 242 F.3d 1163 (9th Cir. 2001) supports the proposition that the question under Rule 62(c) "boils down to whether the modification 'materially alters' the status of the appeal or leaves 'unchanged the core questions before the appellate panel.'" App. Br. at 25. The decision in that case addressed an unusual situation in which the "district court's post-judgment modifications to the injunction were minor adjustments in text that effectuated the underlying purposes of the original requirements." *Southwest Marine*, 242 F.3d at 1167. Specifically, the injunction had required Southwest Marine to conduct water column testing "at the surface" to measure pollution contribution levels in the San Diego Bay. *Id.* But because the phrase 'at the surface' was too vague to provide any assurance that testing would accomplish the intended purpose – *i.e.*, "finding the source of the degraded condition around the piers" (*id.*) – the district court modified the injunction by replacing the term "at the surface" with a more precise term, "surface microlayer." *Id.* Thus, the requested modification merely "effectuated the underlying purposes of the original requirements." *Id.* at 1167; *accord*, *Sierra Club, Lone Star Chapter*, 73 F.3d at 579 ("[A] court should only modify an injunction to achieve the original purposes of the injunction, if those purposes have not been fully achieved.").

By contrast to *Southwest Marine*, the relief requested by appellants in their Renewed Motion was not clarifying and did not effectuate the purposes of the "original requirements." To the contrary, the requested relief undermined completely the underlying purpose of the freeze – that is, to ensure that appellants' assets are available after an adjudication on the merits, in recognition of the "availability of individual liability for corporate violations of the FTC Act * * *." Doc. 65 at 8, RE Tab 65 at 8.

3. The district court's authority to entertain the Renewed Motion does not turn on the existence of new issues

Appellants also contend that their Renewed Motion presented a "new issue" for the district court – specifically, "whether the excessive asset freeze should *continue*, without any limitation or reduction, and in light of Appellants' substantial personal financial disclosures * * *." App. Br. at 27 (emphasis in original). In actuality, appellants' Renewed Motion did not request relief on the basis of their decision to complete the financial reports, as required, initially, by the TRO,[20] *See* Doc. 133. Rather, appellants argued that the asset freeze was tantamount to a prejudgment attachment; the Commission must show a nexus between its claim for relief and the frozen assets; and, consequently, that the court must release any assets

[20] The TRO (Doc. 13) also contained disclosure requirements, but appellants did not comply with them.

acquired prior to the alleged practices and after the date the asset freeze order was entered. *Id*. These are virtually the same arguments that appellants made in opposing the Commission's motion for a preliminary injunction (Doc. 38 at 20-21), and that were rejected by the district court. Doc. 65 at 8-11, RE Tab 65 at 8-11. Thus, the distinction that appellants attempt to draw between appellants' challenge to the *existence* of the freeze and its *extent* is specious. In the end, both turn on the unsupported contention that it is the FTC's burden in seeking an interim freeze to demonstrate a nexus between the assets and its claim for relief.

In any event, for purposes of Rule 62(c), the overarching issue is not whether the Renewed Motion presents a new issue, but whether the relief requested preserves the status quo pending appeal. *See, e.g.*, *Coastal Corp.*, 869 F.2d at 820. In the present case, the purpose of the freeze was to ensure that sufficient funds would remain after an adjudication of the merits for a final judgment of monetary equitable relief. Doc. 65 at 9, RE Tab 65 at 9. The court, of course, contemplated the possibility of a limited invasion of frozen assets in order to relieve immediate hardship, or to carve out assets that were "exempt" from collection.[21] Doc. 65 at 9,

[21] Thus, had appellants made such requests, the district court would have been able to entertain them without exceeding its narrow authority under Rule 62(c).

RE Tab 65 at 9 (citing Doc. 61 at 21).[22] But the district court plainly did not contemplate that the asset freeze would remain in place only until the FTC, once it obtained completed financial statements, "could perform its tracing obligations." App. Br. at 27. Indeed, in the same order in which the district court ordered appellants to produce "sworn personal financial statements" (Doc. 65 at 11, RE Tab 65 at 11), the court also held that appellants' "nexus" argument had "fail[ed] to persuade." Doc. 65 at 8, RE Tab 65 at 8. Thus, this is not a case in which the requested relief, because it "effectuated the underlying purposes of the original requirements" (*Southwest Marine*, 242 F.3d at 1167), would have the effect of maintaining the status quo during the pendency of the appeal. Given this circumstance, the district court was correct in declining to entertain the motion.

[22] In granting appellants leave to apply for release of "exempt assets," the district court relied on the Commission's frank acknowledgement that, without more information from appellants about the nature of their personal assets, it was possible that the freeze included assets that otherwise would be exempt. *See* Doc. 61 at 21. For example, some assets are "exempt" from collection – primarily pursuant to state statutory and constitutional provisions that allow a debtor to keep property that otherwise would be subject to sale to satisfy his obligations. *See, e.g.*, *In re Hodes*, 308 B.R. 61, 65 (10th Cir. 2004).

CONCLUSION

For all the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). It is proportionally spaced and contains 6,296 words, as counted by the WordPerfect word processing program.

April 28, 2010 /s/ Leslie Rice Melman
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2010, I electronically filed the foregoing Brief for Plaintiff-Appellee Federal Trade Commission at the EDF website for the United States Court of Appeals for the Eleventh Circuit. Also on this day, an original and six paper copies were sent by overnight delivery to the Court and, using the same manner of service, two paper copies were sent to the following individuals:

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