Nos. 18-2621, 18-2748, 18-2758

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellant,

v.

ABBVIE INC. *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
No. 2:14-cv-05151
Hon. Harvey Bartle III

OPPOSITION OF THE FEDERAL TRADE COMMISSION TO MOTION TO AMEND THE JUDGMENT

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The Court should deny the motion of AbbVie and Besins to amend the September 30, 2020, judgment to allow them to seek recovery of the cost of their supersedeas bonds. The motion is futile because Congress has not waived the federal government's sovereign immunity with regard to the cost of a bond. Even if such costs were allowable, however, such relief here would inappropriately charge the government with the avoidable costs of AbbVie's and Besins's *voluntary* choice to post the bond as a means of securing a stay pending appeal. AbbVie and Besins could have pursued other, *cost-free* options to secure a stay of judgment pending appeal. Their voluntary choice does not justify putting taxpayers on the hook for the costs of their avoidable expenditure—particularly after AbbVie has been found liable for filing sham litigation.

BACKGROUND

The FTC sued AbbVie and other drug companies for engaging in unfair methods of competition in violation of 15 U.S.C. § 45(a). *FTC v. AbbVie Inc.*, __ F.3d __, No. 18-2621 et al., 2020 WL 5807873, *1 (3rd Cir. Sept. 30, 2020) (hereinafter "Op."). The complaint alleged that AbbVie and Besins engaged in a course of anticompetitive conduct that included filing sham litigation and entering into an anticompetitive reverse-payment agreement with Teva Pharmaceuticals USA, Inc. *Id*. The FTC sought an injunction to prevent future violations and equitable monetary relief to redress the harm to consumers. The district court

dismissed the reverse-payment claim, but concluded after a bench trial that AbbVie and Besins had engaged in sham litigation. *Id*. It ordered the defendants to disgorge $448 million in ill-gotten profits, but declined to impose a behavioral injunction. *Id*.

After the district court announced its findings and conclusions, but before entry of judgment, AbbVie and Besins sought to secure a stay of the court's judgment pending appeal by posting supersedeas bonds pursuant to Fed. R. Civ. P. 62(d).[1] ECF_446 at 1-3 (AbbVie and Besins representing to court their intention to invoke Rule 62(d)). AbbVie and Besins did not invoke any other option to suspend execution of the district court's monetary judgment, including such *cost-free* alternatives as seeking an injunction pending appeal, either in the district court, *see* Fed. R. Civ. P. 62(c), or in this Court, *see* Fed. R. App. P. 8(a).

On July 18, 2018, the district court entered its judgment order. ECF_448. It required the defendants to turn over the judgment amount to the FTC within 30 days. *Id*. at 2. The court ordered the money to be "held in escrow," as "a trust fund for equitable relief," and commanded that the money "shall not be disbursed until

[1] Rule 62 was amended in 2018 to reorganize its subdivisions and revise its provisions for staying a judgment. *See* Fed. R. Civ. P. 62, *Committee Notes on Rules—2018 Amendment* (2020). The current "Subdivision 62(b) carries forward in modified form the supersedeas bond provisions of former Rule 62(d)." *Id*. The changes to Rule 62 do not affect the substantive law at issue in this case. Because the record below, as well as the instant motion itself, refers to the older version of the rule, we will continue to refer to the older Rule 62 to avoid any confusion.

this action has been finally resolved, including any appeals." *Id*. Instead of producing the money as ordered, AbbVie and Besins moved under Rule 62(d) for court approval of supersedeas bonds that would stay the judgment pending appeal as of right. ECF_456, 457. On August 27, 2018, the district court granted the motions, approved the supersedeas bonds, and stayed its judgment pending appeal. ECF_459, 460.

On appeal, this Court reversed the district court's dismissal of the FTC's reverse-payment claim, and affirmed-in-part its decision that AbbVie and Besins engaged in sham litigation, holding that one suit was a sham but another was not. Op. at *1. As to the remedies, the Court affirmed the district court's denial of a behavioral injunction, but reversed the equitable monetary award—because, it held, that remedy was not available under Section 13(b) of the FTC Act. *Id*. It thus remanded the case to the district court for further proceedings. *Id*. at *39. The Court's judgment specified that "[n]o costs shall be taxed."

AbbVie and Besins now move this Court to alter its judgment to allow them to seek the costs of obtaining the supersedeas bonds. Because those costs are not taxable to the federal government as a matter of law, and would be inappropriate in this case anyway, their motion should be denied.

ARGUMENT

I. THE COSTS OF SUPERSEDEAS BONDS CANNOT BE TAXED AGAINST THE FEDERAL GOVERNMENT

AbbVie's and Besins's motion fails right off the bat because the costs of supersedeas bonds can be taxed against the United States or any of its agencies *only if* Congress waived sovereign immunity and allowed the recovery of such costs. But Congress has not done so, which renders the district court without jurisdiction to hear AbbVie's and Besins's claims for those costs. The motion therefore is futile and should be denied outright.

"The United States as sovereign is immune from suit save as it consents to be sued * * *, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *accord United States v. Mitchell*, 445 U.S. 535, 538 (1980). This principle applies with equal force to the taxation of costs against the government. "In the absence of any express waiver of sovereign immunity, costs and expenses of litigation are not recoverable from the United States." *Cunningham v. Federal Bureau of Investigation*, 664 F.2d 383, 384 (3rd Cir. 1981); *see also United States v. Chem. Foundation, Inc.*, 272 U.S. 1, 20 (1926) ("in the absence of a statute directly authorizing it, courts will not give judgments against the United States for costs or expenses").

The FTC Act does not contain any waiver of immunity as to litigation costs, and AbbVie and Besins do not contend otherwise. And although the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412, authorizes taxing certain enumerated costs against the government, none apply here. *See* Mo. at 5 n.1 (acknowledging applicability of EAJA). The EAJA provides, in relevant part:

> Except as otherwise specifically provided by statute, a judgment for costs, *as enumerated in section 1920 of this title*, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action.

28 U.S.C. § 2412(a)(1) (emphasis added).[2] Thus, unless a cost item is one of those "enumerated in section 1920," Congress has not waived immunity for its recovery.[3]

[2] Subsection (b) of the EAJA, which pertains to "fees and expenses of attorneys," does not furnish a ground for the award of *costs*. It specifically distinguishes those "fees and expenses" categories from "the costs which may be awarded pursuant to subsection (a)." 28 U.S.C. § 2412(b).

[3] Those enumerated taxable costs are: "(1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts *necessarily obtained* for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are *necessarily obtained* for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title." 28 U.S.C. § 1920 (emphasis added).

The EAJA "amounts to a partial waiver of sovereign immunity" and, as such, "must be strictly construed in favor of the United States." *Ardestani v. INS*, 502 U.S. 129, 137 (1991); *accord Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983) ("Waivers of immunity must be construed strictly in favor of the sovereign" and not "enlarge[d] beyond what the language requires.") (internal quotation marks and citations omitted). Moreover, a waiver of sovereign immunity "cannot be implied, but must be unequivocally expressed." *Mitchell*, 445 U.S. at 538 (quoting *United States v. King*, 395 U.S. 1, 4 (1969)); *accord Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) ("any waiver of the National Government's sovereign immunity must be unequivocal"); *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 659 (1947) ("there can be no consent by implication.").

As we show below, the EAJA does not waive immunity as to the award of premiums paid on a supersedeas bond because that item of costs is not one of the enumerated categories of costs in 28 U.S.C. § 1920. *See supra* note 3. Rule 39 of the Federal Rules of Appellate Procedure, which AbbVie and Besins invoke, has no bearing here. That rule is not an independent waiver of sovereign immunity and cannot alone authorize an award of costs against the government.

A. Whether the Costs of Supersedeas Bonds Are Taxable Against the Government Is A Question of Law Which This Court Should Decide in the First Instance.

AbbVie and Besins assert that they "do not ask the Court to opine on the sovereign-immunity issue," but merely ask the Court to amend its judgment to allow them "to demonstrate in the district court that an award of bond costs would be permissible and appropriate." Mo. at 5-6. But waiver of sovereign immunity is a condition precedent to any determination of whether they can recover such costs in this case—and is a pure question of law subject to de novo review in this Court. *Gentile v. SEC*, 974 F.3d 311, 313 (3rd Cir. 2020); *see also id*. at 316 ("statutory waiver of sovereign immunity thus defines the scope of 'a court's jurisdiction to entertain the suit.'") (quoting *Sherwood*, 312 U.S. at 586); *Bachner v. Comm'r of I.R.S.*, 81 F.3d 1274, 1277 (3d Cir. 1996) ("questions of statutory construction and application" reviewed de novo). Specifically, "whether a particular expense falls within the purview of section 1920, and thus may be taxed in the first place, is an issue of statutory construction, subject to de novo review." *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 164 (3rd Cir. 2012). Thus, before AbbVie and Besins can even ask the district court to award their bond costs, such costs must be adjudged taxable against the government. The Court should decide this question of law now, without putting the parties through yet another proceeding.

B. The EAJA Does Not Waive Sovereign Immunity As to the Costs of Supersedeas Bonds.

Congress has not waived sovereign immunity as to bond costs, and therefore those costs are not taxable against the government as a matter of law. AbbVie's and Besins's motion fails for that reason alone. When a statute places limitations or conditions on the government's consent to be sued, those conditions must be "strictly observed and exceptions thereto are not to be implied." *Wiltshire v. Gov't of the Virgin Islands*, 893 F.2d 629, 633–34 (3rd Cir. 1990) (quoting *Soriano v. United States*, 352 U.S. 270, 276 (1957)). Thus, any authorization for the award of costs against the federal government "must derive directly from the language employed by Congress in providing for the award * * *, or the plain meaning of the statute will bar recovery regardless of other concerns." *Cunningham*, 664 F.2d at 384 (citing *United States v. Rutherford*, 442 U.S. 544, 551-55 (1979)).

In the EAJA, Congress did not make the federal government generally liable for every item of costs traditionally borne by private parties. Rather, it waived sovereign immunity only as to a specified list of costs. As this Court emphasized in this very case, "[w]e start with the text, for where 'the words of the statute are unambiguous, the judicial inquiry is complete'." Op. at *33 (quoting *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 91 (2003)). The EAJA provides that "a judgment for costs, *as enumerated in section 1920 of this title*, * * * may be awarded * * *." 28 U.S.C. § 2412(a)(1) (emphasis added). The statute thus clearly

limits taxable "costs" to those "enumerated in" 28 U.S.C. § 1920. *See supra* note 3. The plain meaning of "enumerate" as pertinent here is "to specify one after another," or "list." *Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/enumerate. Taxable costs under Section 2412(a) are, therefore, those specified in Section 1920—which lists the categories of costs by number—and nothing else. As the Tenth Circuit concluded in nearly identical circumstances, "the very terms of section 2412(a) indicate that the limits contained in section[ ] 1920 … apply to any award of costs made pursuant to that statute." *FTC v. Kuykendall*, 466 F.3d 1149, 1154 (10th Cir. 2006) (alteration original) (quoting *Hull by Hull v. United States*, 978 F.2d 570, 573 (10th Cir. 1992)). As that court determined, "[t]here is no question that costs associated with staying a civil judgment on appeal are not among those listed in § 1920." *Id*. *See supra* note 3.

Interpreting Section 2412(a) to add categories of costs not listed in Section 1920 would contravene the Supreme Court's oft-repeated tenet that waivers of sovereign immunity "must be strictly construed in favor of the United States," *Ardestani*, 502 U.S. at 137, and "cannot be implied but must be unequivocally expressed," *Mitchell*, 445 U.S. at 538. Moreover, an expansive reading would effectively write the phrase "as enumerated in section 1920" out of the statute. *See Ardestani*, 502 U.S. at 136 ("the EAJA's unqualified reference to a specific statutory provision mandating specific procedural protections is more than a

general indication of the types of proceedings that the EAJA was intended to cover.").

Had Congress intended to waive the immunity of the federal government with respect to all costs traditionally borne by private parties, including the costs of a supersedeas bond or its equivalent, it could easily have done that, either by stating so *explicitly* in Section 2412 or by specifically adding those costs to the items listed in Section 1920. That is why the courts that have directly addressed the taxability of supersedeas bond costs have concluded that such costs are not taxable against the government. *See Kuykendall*, 466 F.3d at 1154-56 (refusing to read into Section 1920 the cost of a letter of credit demanded by the district court as a guarantee for a stay of judgment pending appeal); *Freesen v. Comm'r of Internal Revenue*, 89 T.C. 1123, 1130 (1987) (declining "to add another category" to Section 1920 to award the cost of supersedeas bonds); *Wells Marine v. United States*, 1 Cl. Ct. 327, 328 (1983) ("By no stretch of the imagination may the items enumerated in section 1920 be construed to include the bond premiums.").

The only case that AbbVie and Besins cite as directly supporting their position is of no relevance here. Mo. at 5 n.1 (citing *BCPeabody Constr. Svcs., Inc. v. United States*, 117 Fed. Cl. 408, 418 (2014)). First, that case concerned "fees and other expenses" pursuant to Section 2412(d), which applies to only certain eligible parties, of which neither AbbVie nor Besins is one. *See* 28 U.S.C. § 2412(d)(2)(B)

(defining "party" to include only individuals with less than $2 million net worth, entities with less than $7 million net worth, and 501(c)(3) non-profit organizations). The only EAJA provision under which AbbVie and Besins could be awarded any costs in this case is Section 2412(a), *not* 2412(d). Moreover, unlike Section 2412(a), which allows only those costs listed in Section 1920, Section 2412(d) contains no such limitation-by-reference on the award of "fees and other expenses." That was the sole basis for the *BCPeabody* court's "awarding the bond premium as an expense pursuant to 28 U.S.C. § 2412(d)(1)(A)." 117 Fed. Cl. at 418. The court did not purport to hold that bond premiums would qualify as a "cost" under Section 1920, nor within the meaning of Section 2412(a), so its ruling is of no help to AbbVie and Besins.

AbbVie and Besins also rely on Ninth Circuit cases that held certain categories of costs—special master fees and receivership expenses—taxable against the United States, notwithstanding that such costs are not listed in Section 1920. Mo. at 5 n.1. *See National Org. for the Reform of Marijuana Laws v. Mullen*, 828 F.2d 536, 545-46 (9th Cir. 1987) (*NORML*) (special master fees); *CFTC v. Frankwell Bullion Ltd.*, 99 F.3d 299, 305-06 (9th Cir. 1996) (receivership expenses). This Court should decline to extend the reasoning of those cases to the taxing of bond premiums against the government. The Ninth Circuit's reading of Section 2412(a) is contrary to well-established principles of sovereign immunity

and statutory construction, from both the Supreme Court and this Court. *See supra* at 4-6, 8-10. The Ninth Circuit reasoned that its broad construction of 2412(a) is justified because the language referring to Section 1920 "is not explicitly exclusive." *NORML*, 828 F.2d at 546. But that reasoning gets the sovereign immunity rule exactly backwards. The rule is not that claims against the sovereign are allowed unless explicitly excluded; rather, they are barred if not "unequivocally expressed." *Mitchell*, 445 U.S. at 538; *Dep't of Energy v. Ohio*, 503 U.S. at 615. As this Court reiterated just earlier this year, "absent congressional authorization – through an unequivocal statutory waiver – it is 'unquestioned' that the federal government retains sovereign immunity." *Gentile*, 974 F.3d at 315 (quoting *Alden v. Maine*, 527 U.S. 706, 749 (1999)).

The Ninth Circuit also reasoned that the legislative history of Section 2412(a) indicates that it was meant to place the United States and private litigants on an equal footing with regard to the award of costs. *NORML*, 828 F.2d at 546 (citing S. Rep. No. 1329, 89th Cong., 2d Sess., *reprinted in* 1966 U.S.C.C.A.N. 2527, 2528). But while legislative history may be helpful to resolve statutory ambiguity, when the terms of a statute are unambiguous, "judicial inquiry is complete." *Rubin v. United States*, 449 U.S. 424, 430 (1981); *see Ardestani*, 502 U.S. at 135-136 ("The 'strong presumption' that the plain language of the statute expresses congressional intent is rebutted only in 'rare and exceptional

circumstances,' * * * when a contrary legislative intent is clearly expressed.") (citations omitted). The terms of Section 2412(a) are plainly unambiguous. "In context, the most natural reading of the phrase 'as enumerated in section 1920 of this title' is that those costs taxable to the prevailing party are those listed in § 1920." *Kuykendall*, 466 F.3d at 1154.

Even if the Court considered legislative history, it sheds little light here. Congress intended to correct the "disparity of treatment between private litigants and the United States," S. Rep. 89-1329, 1966 U.S.C.C.A.N. at 2528, but the very same Senate Report specifies that "[t]he costs which are referred to in this bill are listed in section 1920 of title 28." *Id*. at 2529. Such, at most ambiguous, legislative history is "insufficient to undercut the ordinary understanding of the statutory language." *Ardestani*, 502 U.S. at 137. The legislative history certainly does not conclusively show that Congress intended to make the government liable for *every* item of costs taxable in private litigation. *See Ardestani*, 502 U.S. at 136 (rejecting broad interpretation of another EAJA provision because the Court was "unable to identify *any* conclusive statement in the legislative history" to undermine the ordinary meaning of the phrase "under section 554"). That conclusion, equally valid here, "is reinforced in this case by the limited nature of waivers of sovereign immunity." *Id*. at 137.

In sum, the language of section 2412(a) is plain and unambiguous. Only costs "as enumerated in section 1920" may be taxed against the United States or any of its agencies. Because the costs of supersedeas bonds are unquestionably not among the costs listed in section 1920, Congress did not waive sovereign immunity for such costs, and AbbVie and Besins cannot recover them as a matter of law. Their motion is therefore futile.

C. Federal Rule of Appellate Procedure 39 Does Not Grant Independent Authority for Taxing Costs Against the Government.

Federal Rule of Appellate Procedure 39(e)(3) provides that "premiums paid for a bond or other security to preserve rights pending appeal" are taxable in the district court, and AbbVie and Besins rely on that rule in support of their motion. Mo. at 3-4. Their reliance is misplaced because "that rule confers no independent authority to award costs against the Government." *In re Grand Jury Subpoena Duces Tecum*, 775 F.2d 499, 501 (2nd Cir. 1985). The Supreme Court has made clear, in the analogous context of the Federal Rules of Civil Procedure, that those rules "prescribe the methods by which the jurisdiction of the federal courts is to be exercised, but do not enlarge the jurisdiction." *Sherwood*, 312 U.S. at 591. Likewise, the Rules Enabling Act provides that the rules of practice and procedure in the district courts and courts of appeals "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

In context, the provision of Rule 39(e)(3) is best read not to authorize the costs of bond premiums in every case, but simply to assign to the district court the task of determining whether they are appropriate in the particular case—assuming they are authorized by law and thus taxable in the first place. Indeed, Rule 39 expressly states that costs for or against the United States or one of its agencies will be assessed in the court of appeals "only if authorized by law." Fed. R. App. P. 39(b). This provision underscores that there must be a *separate* express statutory waiver of sovereign immunity regarding the costs at issue. As demonstrated above, no such waiver exists here.

II. ABBVIE'S AND BESINS'S COSTS OF SUPERSEDEAS BONDS WERE AVOIDABLE AND SHOULD NOT BE TAXED AGAINST THE FTC

Aside from the legal prohibition against taxing the cost of supersedeas bonds against the federal government, the circumstances of this case show that those costs were incurred by AbbVie and Besins *voluntarily* and were entirely *avoidable*. Voluntary and avoidable costs are not taxable under Section 2412(a) of the EAJA because the cost items authorized by that provision (and listed under Section 1920) are all either mandatory expenditures or costs "necessarily obtained for use in the case." 28 U.S.C. § 1920; *see supra* note 3. *See also Sun Ship, Inc. v. Lehman*, 655 F.2d 1311, 1318 (D.C. Cir. 1981) (whether costs allowed under Section 1920 are taxable in the case at issue depends on whether they were "necessarily obtained"); *accord Marcoin, Inc. v. Edwin K. Williams & Co., Inc.*, 88 F.R.D. 588, 590 (E.D.

Va. 1980). Thus, even if this Court were to expand the coverage of Sections 2412(a) and 1920 to include bond costs, such costs can only be taxable against the FTC if they were necessarily obtained for use in this case. They were not: AbbVie and Besins had various options *other than* costly supersedeas bonds to effectively secure a stay pending appeal.[4]

Federal Rule of Civil Procedure 62 provides a number of mechanisms to secure a stay-pending-appeal of an adverse judgment. AbbVie and Besins chose to employ Rule 62(d), which provided at the time that an appellant "may obtain a stay by supersedeas bond * * *." Fed. R. Civ. P. 62(d) (2018); *see supra* note 1. But the posting of a bond is neither mandatory nor a prerequisite to obtaining a stay pending appeal under Rule 62. *Federal Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 757-760 (D.C. Cir. 1980); *accord Niemi v. Lasshofer*, 770 F.3d 1331, 1343 (10th Cir. 2014); *Olympia Equip. Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 796 (7th Cir. 1986). "Reading Rule 62(d) to make filing a supersedeas bond an indispensable prerequisite to a stay on appeal creates a potential conflict with the language of Rule 8(b) [of the Federal Rules of Appellate Procedure], which implicitly recognizes the discretion of the appellate courts to

[4] Because the voluntary and avoidable nature of AbbVie's and Besins's choice to post supersedeas bonds is evident from the face of the federal rules and the district court's judgment order, and thus does not present a factual issue, this Court can rule on this issue without the need for further proceedings in the district court.

issue stays not conditioned on bond." *Federal Prescription Service*, 636 F.2d at 760. AbbVie and Besins could have sought a stay in the district court without incurring the costs of a bond. *See* Fed. R. Civ. P. 62(c) (2018). To be sure, AbbVie and Besins in that case would have had to persuade the court that such a stay was appropriate, as opposed to securing the stay as of right,[5] but that does not negate the fact that AbbVie and Besins had that *cost-free* choice.

Likewise, AbbVie and Besins could have moved for a stay in this Court, pursuant to Rule 8 of the Federal Rules of Appellate Procedure. As the D.C. Circuit has observed, that Rule "implicitly recognizes the discretion of the appellate courts to issue stays not conditioned on bond." *Federal Prescription Service*, 636 F.2d at 760. That choice too would have required AbbVie and Besins to show that such a stay was warranted, but it would have been *cost-free*.

Finally, AbbVie and Besins had the option of complying with the court's judgment by turning over the judgment monies to the FTC—without risking dissipation of that money. As AbbVie itself acknowledged, the district court's judgment order commanded "that—regardless of any stay—the FTC shall not disburse any money 'until this action has been finally resolved, including any

[5] Rule 62 "provides for stays pending appeal as of right when a bond is posted in damages actions or where the judgment is sufficiently comparable to a money judgment so that payment on a supersedeas bond would provide a satisfactory alternative to the appellee." *In re Tribune Media Co.*, 799 F.3d 272, 281-82 (3rd Cir. 2015).

appeals'." ECF_456 (Memorandum in Support of AbbVie's Motion for Approval of Supersedeas Bond), at 9 (quoting ECF_448 (District Court Judgment), at 2). The district court's judgment also ordered the FTC to hold "in escrow" any monies it receives from AbbVie and Besins for consumer redress, "as a trust fund for equitable relief." ECF_448, at 2. Thus, AbbVie and Besins had ample assurance that the money would remain untouched until all appellate proceedings have been concluded. *Id*.

Notwithstanding the availability of those alternatives, AbbVie and Besins opted to post supersedeas bonds to secure a stay pending appeal. Because that choice was *not* "necessarily obtained," AbbVie and Besins cannot shift that cost to the government.

CONCLUSION

For the reasons set forth above, the motion to amend this Court's judgment should be denied.

Respectfully submitted,

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COMBINED CERTIFICATIONS

COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This opposition complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because it contains 4,456 words (excluding the parts exempted by Fed. R. App. P. 27(a)(2)(B)).

2. Pursuant to Fed. R. App. P. 27(d)(1)(E), this opposition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010, in 14 point Times New Roman.

SERVICE

I certify that on October 26, 2020, I filed the foregoing opposition via the Court's electronic filing system. All parties will be served by the CM/ECF system.

October 26, 2020 /s/Matthew M. Hoffman
Matthew M. Hoffman