17-669

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

JOSEPH K. RENSIN,
Defendant-Appellant,

BLUEHIPPO FUNDING, LLC, BLUEHIPPO CAPITAL, LLC,
Defendants

On appeal from the United States District Court fTs.Uni 1r FINAL BRIEF FOR FED

DAVID C. SHONKA
Acting

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE

QUESTION PRESENTED

Rensin was held in contempt for violating a prior judgment and ordered to pay compensatory sanctions. When he failed to pay, the FTC sought to have him held in contempt yet again. In the midst of the second contempt proceeding, Rensin filed a bankruptcy petition.

The question presented is whether the Bankruptcy Code's automatic stay provision prevents the district court from proceeding on the contempt motion.

INTRODUCTION

BlueHippo, a company controlled by appellant Joseph Rensin, entered into a consent order in 2008 that prohibited it from deceiving consumers in the sale of computer equipment. Rensin and his company later violated the consent order. The district court held Rensin in contempt and, in April 2016, ordered him to pay $13.4 million to compensate the tens of thousands of consumers injured by his deceptive practices. When Rensin failed to pay any of that sanction (yet continued to spend lavishly on himself), the Federal Trade Commission asked the district court TJ 5(t)-8.92(J)8.4(

Bankruptcy Code, 11 U.S.C. § 362(a), prevented the district court from considering the matter any further.

In the order on review, the district court rejected Rensin's attempt to evade all scrutiny of his pre-bankruptcy order violations. It ruled that this contempt proceeding is a government regulatory action excepted from the automatic stay under 11 U.S.C. § 362(b)(4). In a subsequent ruling, the court also made clear that it would decide only whether Rensin should be held in contempt but would take no steps toward requiring compliance with any contempt judgment for the duration of the bankruptcy proceeding.

JURISDICTION

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proceeding. On March 7, 2017, Rensin filed a timely notice of appeal. This Court has jurisdiction under 28 U.S.C. § 1291. *See In re Sonnax Indus., Inc.*, 907 F.2d 1280 (2d Cir. 1990).

STATEMENT OF THE CASE

A. The FTC's Law Enforcement Action and Initial Contempt Proceedings.

Rensin was CEO of BlueHippo, a company that sold computers, mostly to consumers with poor credit. In 2008, the FTC sued the company, alleging that it violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and other consumer protection laws by misleading consumers about the material terms and conditions of their purchases. Dkt. 1. BlueHippo did not contest the charges and agreed to a consent order that forbade it from engaging in these unlawful practices and required it to pay equitable monetary relief for consumer injury. Dkt. 2.

Despite the consent decree, BlueHippo, under Rensin's direction, continued to sell computers using deceptive tactics.

severally with BlueHippo. Dkt. 76 at 11-12 (A. 0045-46).[1] (By that time,

Accordingly, in November 2016, the FTC moved yet again to hold Rensin in contempt. Dkt. 146. This time, to ensure compliance, the FTC asked the court to have Rensin incarcerated until he paid the money. *Id*.

At an evidentiary hearing held on January 4, 2017, the FTC produced evidence showing that Rensin had assets at his disposal with which he could have paid the contempt sanction, including a mortgage-free house valued at approximately $1 million, FTC Ex. 6 at 1 (A. 0192), Jan. 4, 2017 Tr. 29:1-12 (A. 0122), and $2 million worth of annuities (from which he receives $15,000 each month) held by a trust of which Rensin is both the settlor and sole beneficiary to receive payments, Jan. 4, 2017 Tr. 24:18-25:16, 27:11-15, 57:8-9, 60:18-24 (A. 0117, 0120, 0149, 0152). The FTC also showed that, even as he failed to pay any portion of the compensatory contempt order that prohibited him from benefiting from the use of these funds, Rensin maintained an extravagant lifestyle, including dining at pricey restaurants, taking vacations, and leasing a series of expensive cars. *E.g.*, FTC Ex. 30 at 1-19 (A. 0209-227); Jan. 4, 2017 Tr. 38:14-39:11, 50:6-51:25 (A. 0131-132, 0143-144).

The FTC showed, moreover, that Rensin had taken deliberate steps to place his assets beyond reach of the FTC. For instance, immediately after this Court issued its decision in favor of the FTC in the first appeal, Rensin consulted with a law firm that specializes in asset protection, Jan. 4, 2017 Tr. at 34:23-35:15, 36:1-

$13 million, I don't have $13 million, but I do receive $15,000 a month, and I'm willing to pay five, ten, twelve thousand dollars a month towards the judgment that I concededly owe?"); *id*. at 82:16-19 (A. 0174) ("Why does he have to live in a 5,000 square foot house that's worth somewhere between 750,000 and a million dollars? Couldn't he live just as well in a $500,000 house or a $300,000 house?"). The court directed the parties to submit post-hearing briefs. *Id*. at 87:3-20 (A. 0179).

On February 15, 2017, two days before Rensin's brief was due, he filed a

On March 6, 2017, in the order on review, the district court ruled that "the bankruptcy automatic stay is not applicable to the proceedings in this matter," which "fall within the government regulatory exception to the automatic stay, 11 U.S.C. § 362(b)(4)." Dkt 166 at 1 (A. 0311). Rensin appeals that order.

C. Subsequent Proceedings.

Rensin filed a notice of appeal and moved for a stay pending appeal in both the district court and this Court. On March 20, the district court denied the motion. Dkt. 171. On March 27, this Court temporarily stayed the March 6 order pending the determination of Rensin's motion by a three-judge panel.

Apparently unaware of the temporary stay, the district court on March 28 decided the merits.9(m)2149 0 Td 5ic04 Tc -08 -2 thrge58 T3(e)p1t0iTid [uu21.3(n2(,)6.2( )1

In the same order, the district court held Rensin in contempt for failing to pay the compensatory contempt sanction, but denied the FTC's request for an order of incarceration to coerce his compliance. *Id*. at 12, 14 (A. 0428, 0430). Instead, the court ordered only that Rensin "meet in good faith with the FTC and negotiate a payment schedule, pursuant to which he shall pay the FTC a portion of the April

language because the proceeding seeks to enforce the FTC's "police or regulatory power" but does not seek "the enforcement of . . . a money judgment" while the bankruptcy proceeding is ongoing. 11 U.S.C § 362(b)(4).

a. *SEC v. Brennan*, 230 F.3d 65 (2d Cir. 2000), does not support Rensin. There, the Court held only that a post-judgment order requiring the repatriation of assets violated the automatic stay. Other aspects of the order such as an asset freeze remained in effect, however, and the Court nowhere suggested that the district court was prohibited from taking those actions. Thus, if anything, *Brennan* supports the decision below. Nor did *Brennan* establish a bright-line timing rule that prohibited any further action after judgment. To the contrary, in *SEC v. Miller*, 808 F.3d 623 (2d Cir. 2015), this Court squarely rejected the notion that the bankruptcy stay categorically prohibits post-judgment proceedings in a government regulatory action.

b. Rensin is wrong that any further contempt proceedings will have the effect of collecting or enforcing the April 19, 2016 judgment. The FTC has asked only that the district court find Rensin in contempt and then stay any coercive sanction pending resolution of the bankruptcy proceeding. Such an order—requiring *nothing* from Rensin at this time—would not impermissibly enforce a money judgment.

c. The policies behind both the automatic stay and the governmental unit exception favor allowing the district court to decide the FTC's contempt motion. Because the order sought by the FTC would stay any coercive sanction, the district court's decision of the contempt motion will not interfere one bit with the administration of the bankruptcy estate. On the other side of the coin, allowing the contempt proceeding to go forward would directly further governmental functions. Rensin defied a court order prohibiting deceptive practices, defied another court order requiring him to compensate consumers for their losses, and sought to hide and dissipate his assets. Rensin should not be allowed to use a strategically-timed bankruptcy filing to frustrate the FTC's efforts to hold him accountable for his wrongdoing. That is precisely what Congress sought to avoid when it enacted the governmental unit exception to the automatic stay.

d. Independent of the FTC's interests in this case, the district court has its own strong interest in vindicating its authority. Rensin's argument to the contrary is patently wrong; indeed, this Court has recognized preservation of judicial authority as a core purpose of the contempt power. Even though the court cannot require compliance with the compensatory contempt sanction until the bankruptcy proceeding is over, it has the right to determine now whether Rensin violated its order.

A. The Automatic Stay Does Not Apply To A Governmental Regulatory Action Unless It Enforces A Money Judgment.

Under Section 362(a) of the Bankruptcy Code, 11 U.S.C. 362(a), the filing of a petition for bankruptcy generally "operates as a stay" of proceedings against a debtor.[4] This automatic stay provision is designed to centralize in the bankruptcy court

Accordingly, an action by the government to enforce its regulatory power is not stayed unless the government's action seeks to enforce a money judgment (a provision commonly referred to as the "exception to the exception").

U.S.C. § 362(b)(4). Courts have consistently held that FTC actions to stop unlawful practices and redress the harm to consumers fall within this exception to the automatic stay.[5] And Rensin has conceded that his bankruptcy petition did not bar the continuation of appellate proceedings on the underlying contempt proceeding because it, too, was an action to enforce the FTC's "police or regulatory power." He filed a suggestion of bankruptcy in that appeal, but later agreed that the appeal was excepted from the automatic stay under Section 362(b)(4). See Letter to the Court of Feb. 27, 2017 in *FTC v. Rensin*, No. 16-1599 (2d Cir).

The present contempt proceeding against Rensin likewise represents an exercise of the FTC's regulatory power. This action is not separate from the underlying

disgorgement of the money bilked from consumers. *Id.* at 245. As such, the district court correctly concluded that the present contempt proceeding "fall[s] within the government regulatory exception to the automatic stay." Dkt. 166 at 1 (A. 0311). *Accord FTC v. Trudeau*, No. 1:03-cv-3904 (N.D. Ill. Apr. 26, 2013) (FTC contempt action for failure to pay a compensatory contempt sanction fell under § 362(b)(4) because its principal purpose was to redress the economic harm to consumers caused by the defendant's fraudulent practices).[6]

Decisions in the analogous context of securities fraud actions also consistently hold that contempt proceedings in support of disgorgement orders in preexisting enforcement actions fall within Section 362(b)(4). *See, e.g.*, *SEC v. Bilzerian*, 131 F. Supp. 2d 10, 14-15 (D.D.C. 2001) (civil contempt proceeding to address defendant's violation of a securities-fraud disgorgement order);[7] *SEC v. Kenton Capital, Ltd.*, 983 F. Supp. 13, 14-15 (D.D.C. 1997) (same). Notably, in

[6] This opinion was submitted to the district court and can be found at Dkt. 160-1 (A. 0273-280).

[7] In *Bilzerian*, the defendant—like Rensin here—had "not complied even minimally" with the court's prior orders. The court held that the contempt proceeding was exempted from the automatic stay in 11 U.S.C. § 362(b)(4). This opinion can be found at 131 F. Supp. 2d 10 (D.D.C. 2001).

Brennan —a contempt action for violations of an SEC disgorgement order—this Court accepted without question that the proceeding was an exercise of the agency's "police and regulatory power." 230 F.3d at 71 (noting defendant's concession of that point). The only question was whether a particular order in that proceeding fell within the "exception to the exception." *Id.* an08.2(e)-4.T1 1 TJ -0.008Tc -0Trts-

repatriation itself. The Court nowhere suggested that the contempt proceeding was stayed *in its entirety* as a result of the defendant's bankruptcy filing. Indeed, o

In other words, he argues that *Brennan* established a bright line that allows proceedings only up to entry of the judgment, but not beyond that point. Any other proceeding, Rensin asserts, is categorically subject to the automatic stay.

To the degree that *Brennan* suggested such a bright-line rule,[9] this Court later rejected it in *SEC v. Miller*, 808 F.3d 623 (2d Cir. 2015). There, the Court explained that it "did not intend in *Brennan* to impose a one-factor timing test whereby orders entered pre-judgment are always exempt from the automatic stay provision while orders entered (or with continuing force) post-judgment are always subject to the stay." *Id*. at 633. Instead, application of the automatic stay requires consideration of the particular relief sought, the procedural posture of the case, and the policy concerns behind the stay and the regulatory exception. *See id*. at 632-35. Of those criteria, the only one this case has in common with *Brennan* is its procedural posture as a post-judgment contempt proceeding. As shown above, *Brennan* did not rule out contempt proceedings, and as discussed below, all the other factors strongly support denying application of the automatic stay.

[9] To be sure, *Brennan* stated that "once liability is fixed and a money judgment has been entered, the government necessarily acts only to vindicate its own interest in collecting its judgment." 230 F.3d at 73. Whether that is true of SEC matters, it does not accurately characterize the FTC's continued efforts through this contempt proceeding to secure redress for the consumer injury caused by Rensin's wrongful conduct. *See supra* pp. 15-16.

Rensin's other cases also fail to support his position. Br. 14, 17-19. His reliance on *Trudeau* and *Bilzerian* is baffling. Both of those cases held that the government's post-judgment contempt actions in aid of eventual collection were *not* subject to the automatic stay. *See supra* p. 16. The remaining cases on which Rensin relies are likewise unavailing. Some address whether the regulatory exception allows entry of a money judgment in the first place. They have little bearing on the application of the bankruptcy stay to post-judgment proceedings.

that post-judgment contempt proceedings are categorically stayed.[12]

2. An order that stays the relief granted is not "the enforcement of . . . a money judgment."

Rensin asserts that any action taken by the district court on the FTC's contempt motion would have "the effect of . . . collect[ing] or enforc[ing]" the April 19, 2016 judgment in violation of the automatic stay. Br. 13. In fact, the FTC asked only that the district court declare Rensin to be in contempt but to stay any coercive sanction pending resolution of the bankruptcy proceeding. Dkt. 160 at 2. An order that does not require Rensin (or any other person)

"enforcement" of a money judgment, not merely its "execution." Br. 20-21. He claims that in *EEOC v. Rath Packing Co*., 787 F.2d 318 (8th Cir.1986), the Eighth Circuit "rejected outright" the notion that "so long as the lower court does not enforce its enforcement order," the matter can proceed. Br. 20. That is not what the Eighth Circuit ruled. It held that, although the entry of a monetary judgment did not violate the automatic stay, the district court "established a detailed payment plan" that "went beyond the entry of a money judgment and therefore violated 11 U.S.C. § 362(a)." *Rath Packing*, 787 F.2d at 326. The only assurance the court had that the EEOC would not "attempt to actually obtain execution of the judgment," *id*., during the pendency of the bankruptcy proceedings was its own promise. Here, by contrast, the FTC has asked the district court to itself stay any enforcement of its contempt sanction. Because the district court's requested order will on its own terms limit the agency's ability to "actually obtain execution of the judgment," *id*., there is no risk of coercing payment during the bankruptcy proceeding.

3. The policies underlying the automatic stay provision and the governmental unit exception favor allowing the district court to decide the contempt motion.

The policies behind both the automatic stay and the governmental unit exception disfavor applying the automatic stay here. The automatic stay "allow[s] the bankruptcy court to centralize all disputes concerning property of the debtor's estate so that reorganization can proceed efficiently, unimpeded by uncoordinated

proceedings in other arenas." *Brennan*, 230 F.3d at 75 (quoting *In re U.S. Lines, Inc.*, 197 F.3d 631, 640 (2d Cir. 1999)). Because the order sought by the FTC would stay any coercive sanction, the district court's determination of Rensin's contempt liability will have no effect on the administration of the bankruptcy estate. Indeed, the bankruptcy court in this matter recognized as much when it stated at a hearing that, under the contempt order the FTC seeks, "there [will] be no collection at all, even potentially by attempting to force the debtor to pay from exempt assets." Mar. 1, 2017 Bankr. Tr. 23:22-24 (A. 0316). The bankruptcy court thus recognized that the requested order would have "no impact on administration [of the bankruptcy estate] at this point." *Id*. at 25:10-11 (A. 0318). *See Miller*, 808 F.3d at 634 (approving asset freeze where "the Bankruptcy Court itself endorsed" the freeze). Thus, allowing the district court to decide whether Rensin is in contempt does not contravene the policy of ensuring that the bankruptcy "reorganization can proceed efficiently, unimpeded by uncoordinated proceedings in other arenas." *Brennan*, 230 F.3d at 75 (quoting *In re U.S. Lines*, 197 F.3d at 640).

The governmental unit exception is intended to "prevent a debtor from frustrating necessaiines

fully consistent with that policy as well. Rensin's manifest purpose in filing his bankruptcy petition—just two days before his response to the FTC's post-hearing submission was due and after the district court expressed skepticism of Rensin's arguments at the show cause hearing—was to impede the FTC's efforts to hold him accountable for defrauding consumers. As this Court noted in *Miller*, "[t]he timing [of the bankruptcy filing] speaks loudly for itself." 808 F.3d at 634.

Allowing the contempt proceeding to go forward would directly further governmental functions. Rensin defrauded consumers in defiance of a court order and he refused to compensate those consumers for their losses, again in defiance of a court order. Instead, he used his ample assets to fund a lavish lifestyle, spending down thousands of dollars each month on fancy cars, travel, hotels, and restaurants. *See supra* p. 5. Rather than downsizing, he continued to occupy a 5,000 square foot mansion, paid for in cash that rightfully belongs to his defrauded victims. Jan. 4, 2017 Tr. 29:7-10; 31:18-19 (A. 0122, 0124). And the contempt proceeding did not curb Rensin's. Alp,Tc 0.004 T5 [(.)-1..006 T 491.9(hot)R3(i).7(o-5own)-89(

Brennan, 230 F.3d at 71, would undermine Congress's purpose in enacting the exception to the automatic stay, *id*. (quoting *Exxon Corp.*, 932 F.2d at 1024); *see also CFTC v. Co Petro Mktg. Grp, Inc.*, 700 F.2d 1279, 1283 (9th Cir. 1983) (exception "prevent[s] the bankruptcy court from becoming a haven for wrongdoers").

4. The district court should be allowed to decide Rensin's contempt liability to vindicate its own authority.

The district court has its own strong interest in vindicating its authority. Even when a court cannot require compliance with an order to pay money, it "has the right to determine whether or not [a] defendant . . . has defrauded the Court by not paying the disgorgement due well before the bankruptcy stay." *Kenton Capital, c 0.002 Tw 0*

"[v]indication of [the court's] authority through enforcement of its decree."

McComb v. Jacksonville Paper Co

The possibility that Rensin's ability—or obligation—to pay the judgment will change as a result of his bankruptcy petition does not, as Rensin contends, make the district court's contempt ruling an advisory opinion. The district court will be deciding "concrete legal issues, presented in [an] actual case[], not abstractions." *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947). If Rensin succeeds in discharging the judgment in bankruptcy, the contempt proceeding would become moot. The FTC, however, is seeking a determination that the judgment is excepted from discharge. At this point, Rensin is not entitled to a presumption that discharge will occur. Until it does, the proceeding below presents justiciable questions: (1) whether Rensin's actions since the entry of the April 19, 2016 Order constitute contempt, and (2) if so, what the appropriate sanction for that contempt is. That a later event *might* render a contempt ruling moot does not make a present ruling on the motion advisory.

CONCLUSION

The decision 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. 32 (a)(7)(B), in that it contains 7,057 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and 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 Times New Roman 14-point font.

/s/ Michele Arington