[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-13116

FEDERAL TRADE COMMISSION,

Plaintiff-Appellee,

versus

SIMPLE HEALTH PLANS LLC,
a Florida Limited Liability Company, et al.,

Defendants,

STEVEN J. DORFMAN,
individually and as an officer, member or manager of Simple Health Plans LLC, Health Benefits One LLC, Health Center Management LLC, Innovative Customer Care LLC, Simple

Insurance Leads LLC, and Senior Benefits One LLC,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 0:18-cv-62593-DPG

Before WILLIAM PRYOR, Chief Judge, JILL PRYOR, and GRANT, Circuit Judges.

GRANT, Circuit Judge:

The Federal Trade Commission alleges that Steven J. Dorfman and his six companies engaged in unfair or deceptive business practices in violation of § 5(a) of the Federal Trade Commission Act and the Telemarketing Sales Rule. 15 U.S.C. § 45(a); 16 C.F.R. Part 310. Relying on its authority under § 13(b) of the FTC Act, the Commission obtained a preliminary injunction that included an asset freeze and the imposition of a receiver. Dorfman now argues that the preliminary injunction must be dissolved because a recent Supreme Court decision undermines the Commission's § 13(b) authority. *See AMG Cap. Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1344 (2021).

He is right that the decision limits the Commission's § 13(b) authority, but wrong about what that means here. The Commission's updated complaint also invokes § 19 against Dorfman, and that provision authorizes the asset freeze and receivership. We therefore affirm the order denying Dorfman's emergency motion to dissolve the preliminary injunction.

I.

A.

For over four years—starting in 2013 and continuing until the Commission began this action in October 2018—Dorfman and the companies under his control engaged in a "bait and switch" scheme to sell underinclusive health insurance plans to unwitting consumers.[1] The technical term for these plans is "limited indemnity plans and medical discount memberships." But as the district court put it, they are more like grocery store savers cards than health insurance. They allow consumers to purchase medical services at pre-negotiated discount rates, but the consumer retains the risk of catastrophic medical bills. And if that risk becomes a reality? The plans are "practically worthless."

[1] Because Dorfman does not challenge the district court's findings of fact, we draw our recitation of the facts from the facts as they existed at the preliminary injunction stage. The parties have engaged in substantial discovery since the preliminary injunction was entered, and at summary judgment specific facts may be different. The facts recited here are for the purposes of this appeal only.

The Commission says that Dorfman led consumers to believe they were purchasing comprehensive insurance plans that would shift the risk of catastrophic bills to insurers and cover "a large portion of the expense for doctor's visits, emergency room visits, hospital stays, laboratory services, and prescription medicine." Dorfman's companies also wrongly assured consumers that the plans they purchased would allow them to avoid the Affordable Care Act's tax penalty for non-compliant plans.

The alleged misrepresentations did not end there. According to the Commission, the companies falsely represented that they were experts on, and providers of, government-sponsored health insurance policies. On their websites, they claimed—again, falsely—that they were affiliated with the AARP and the Blue Cross Blue Shield Association. The companies' lead generation tactics were also less than straightforward. For example, when consumers searched Google for "Obama Care Insurance" the top results included "obamacarequotes.org." This website—which was designed to give the impression that it offered comprehensive health insurance—prompted consumers to provide their contact information. A salesperson would then initiate contact, following a script that Dorfman himself "wrote, reviewed, and approved." Like the websites, these scripts contained misrepresentations designed to push consumers into Dorfman's inferior plans.

Only after payment was collected was it (sometimes) revealed to consumers that they had purchased limited benefit plans. At the end of their calls, consumers were transferred to a new salesperson to hear a series of densely worded and difficult-to-comprehend disclosures. But before this "verification process," consumers were warned not to ask any questions and were told by their initial sales representative that only some of the information they were about to hear would apply to them—a caveat designed to suggest that anything inconsistent with the salesperson's earlier representations did not apply. Verification scripts also varied depending on whether the call was being recorded. If it was, the sales reps were directed to give honest answers to consumers' questions. But if it was not, they were instructed to continue to mislead consumers into believing that they had purchased comprehensive health insurance.

The Commission alleges that these sales were as profitable as they were dishonest: Dorfman and his companies received over $180 million in commissions from the plans. Their customers, meanwhile, were stuck with surprise medical bills. In one example cited by the district court, a consumer was led to believe that his copays would be limited to $50 and his out-of-pocket expenses capped at $2,000. But by the time he passed away (about four months after purchasing his plan) he had incurred around $300,000 in uncovered medical bills. This was only one example—extensive evidence detailed other injuries Dorfman's scheme inflicted on consumers.

B.

In October 2018, the Commission filed a complaint against Dorfman and six companies he owned and controlled.[2] The complaint alleged violations of § 5(a) of the FTC Act, which broadly prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a).[3] It also alleged violations of the Telemarketing Sales Rule, which prohibits sellers and telemarketers from misrepresenting, whether directly or by implication, any "material aspect of the performance, efficacy, nature, or central characteristics of goods or services that are the subject of a sales offer." 16 C.F.R. § 310.3(a)(2)(iii). In addition, the rule bars sellers and telemarketers from misrepresenting, whether directly or by implication, a "seller's or telemarketer's affiliation with, or endorsement or sponsorship by, any person or government entity." *Id.* § 310.3(a)(2)(vii). And it prohibits sellers and telemarketers from making false or misleading statements to induce a person to pay for goods or services. *Id.* § 310.3(a)(4).

Immediately after suing, the Commission obtained an ex parte temporary restraining order. Among other things, the order

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[2] Dorfman's companies are Simple Health Plans LLC, Health Benefits One LLC, Health Center Management LLC, Innovative Customer Care LLC, Simple Insurance Leads LLC, and Senior Benefits One LLC.

[3] Throughout this opinion, we refer to the provisions of the FTC Act as it was enacted. For clarity, we note that § 5(a) of the FTC Act is codified at 15 U.S.C. § 45(a); § 13(b) is codified at 15 U.S.C. § 53(b); and § 19 is codified at 15 U.S.C. § 57b.

froze the companies' assets and imposed a temporary receivership. It also prohibited Dorfman and his companies from continuing to make material misrepresentations and from disclosing or using customer information.

Dorfman consented multiple times to an extension of the order, but he eventually moved to strike it. The district court denied his motion, and when he appealed to this Court we dismissed for lack of jurisdiction. *FTC v. Simple Health Plans, LLC*, No. 19-10840 (11th Cir. Apr. 16, 2019).

The district court later granted a preliminary injunction continuing the measures imposed by the temporary restraining order, including the asset freeze and receivership. The court found that the Commission was likely to succeed on the merits of both the § 5(a) claim and the Telemarketing Sales Rule claim. The authority to issue the injunction was grounded exclusively in § 13(b) of the FTC Act—a provision that, at that time, was broadly thought to authorize the Commission to seek monetary awards for consumer redress whenever it had reason to believe that any law it enforced was being violated. *See* 15 U.S.C. § 53(b).

Dorfman directly appealed the order granting the preliminary injunction on grounds not relevant here. *FTC v. Simple Health Plans, LLC*, 801 F. App'x 685, 687 (11th Cir. 2020) (unpublished). We held that our then-binding precedent compelled us to affirm. *Id.* at 688. With that appeal still pending, Dorfman filed his first motion to dissolve the preliminary injunction, again on grounds not relevant here. The district court denied that motion. On appeal, we again held that then-binding precedent compelled us to affirm the district court. *FTC v. Simple Health Plans, LLC*, 792 F. App'x 761, 762 (11th Cir. 2020) (unpublished).

The Commission filed its first amended complaint in November 2019, a little more than a year after its original filing. Besides adding a new defendant, the Commission added one more basis for relief—§ 19 of the FTC Act. The district court dismissed parts of the amended § 5(a) claim for failure to allege sufficient facts detailing the individual involvement of Dorfman and the other defendant. Shortly after that dismissal, the Commission remedied this deficiency in the now-operative Second Amended Complaint.

In 2021, three years into this litigation, the Supreme Court narrowed the relief available under § 13(b) of the FTC Act—monetary awards are no longer an option under that provision. *AMG Cap. Mgmt.*, 141 S. Ct. at 1344. Dorfman immediately filed an emergency motion to dissolve the preliminary injunction, arguing that because § 13(b) could no longer support claims for monetary relief, the preliminary injunction freezing his assets and imposing a receivership was unlawful.

The district court denied his motion, but not in reliance on § 13(b). It instead grounded its authority to issue the preliminary injunction in § 19 of the FTC Act. Dorfman now appeals, and we affirm.

II.

We review a district court's denial of a motion to dissolve a preliminary injunction for abuse of discretion. *Jones v. Governor of Florida*, 950 F.3d 795, 806 (11th Cir. 2020). Findings of fact are reviewed for clear error and questions of law are reviewed de novo. *Id.*

III.

A.

Section 13(b) of the FTC Act authorizes the district court to issue a "permanent injunction." 15 U.S.C. § 53(b). Many courts, including this one, long interpreted that language to invoke the full scope of the district courts' equitable powers. *See, e.g.*, *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432–34 (11th Cir. 1984); *AMG Cap. Mgmt.*, 141 S. Ct. at 1346–47. This included the power to grant monetary awards such as restitution and disgorgement (or so-called "equitable monetary relief"). *AMG Cap. Mgmt.*, 141 S. Ct. at 1346–47. Using that authority, the Commission routinely obtained monetary awards from defendants who violated various consumer protection and antitrust laws. *See id.* But in *AMG Capital*, the Supreme Court changed that understanding—it held that the text and structure of the FTC Act limit the meaning of the term "permanent injunction" to forward-looking *injunctive* relief, rather than retrospective monetary measures. *Id.* at 1347–48. Injunctive relief, the Court clarified, "typically offers prospective relief against ongoing or future harm." *Id.* at 1347 (citing *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952)).

We agree with Dorfman that after *AMG Capital* the Commission cannot rely solely on § 13(b) to support the preliminary injunction here because it includes measures preserving assets for monetary relief. Now that "monetary relief is no longer available" under § 13(b), "there is no need to preserve resources for a future judgment." *FTC v. On Point Cap. Partners LLC*, 17 F.4th 1066, 1078 (11th Cir. 2021). The "imposition of an asset freeze or receivership" is thus inappropriate when premised solely on § 13(b). *Id.*

But the injunction here is not premised solely on § 13(b); the Commission also points to § 19, the FTC Act's consumer redress provision. That provision authorizes the district court to grant "such relief as the court finds necessary to redress injury to consumers." 15 U.S.C. § 57b(b). Unlike § 13(b), which applies to violations of "any provision of law enforced by the Federal Trade Commission," *id.* § 53(b), § 19 authorizes the Commission to commence a civil action only if the defendant violates a "rule under this subchapter respecting unfair or deceptive acts or practices" or if the Commission obtains a final cease-and-desist order respecting an unfair or deceptive act or practice, *id.* § 57b(a)(1)–(2).[4]

[4] Certain additional limitations apply when the Commission is seeking relief after obtaining a final cease and desist order. *See* 15 U.S.C. § 57b(a)(2). But it is undisputed that the Commission has not obtained a cease-and-desist order.

Section 19 thus "comes with certain important limitations that are absent in § 13(b)." *AMG Cap. Mgmt.*, 141 S. Ct. at 1349. But its potential remedies are broader, or at least different. Section 13(b), as we have said, allows for prospective injunctive relief. 15 U.S.C. § 53(b). Section 19, on the other hand, allows for relief "necessary to redress injury to consumers." *Id.* § 57b(b).

This case, then, presents two questions. First, does § 19 apply to the Telemarketing Sales Rule? And second, if so, does it authorize the preliminary measures Dorfman challenges?

On the first question, Dorfman argues that § 19 does not cover his alleged violation of the Telemarketing Sales Rule because that rule falls within a different subchapter than § 19. And § 19 is explicitly limited to the violation of a "rule under this subchapter"—that is, subchapter 1 of Title 15, Chapter 2. *Id.* § 57b(a)(1). In short, Dorfman says, the Telemarketing Sales Rule was promulgated under the Telemarketing Act, which is not found in the same subchapter as § 19.

True enough, but this analysis is incomplete. A more thorough review shows that rules prescribed under the Telemarketing Act—including the Telemarketing Sales Rule at issue here—*are* enforceable under § 19. *See FTC v. Wash. Data Res., Inc.*, 704 F.3d 1323, 1326 (11th Cir. 2013). The Act states that a violation of one of its rules "shall be treated as a violation of a rule under section 57a of this title regarding unfair or deceptive acts or practices." 15 U.S.C. § 6102(c)(1). And § 57a *is* in subchapter 1 of Title 15, Chapter 2. *See id.* § 57a.

The statutes at large make the point even more straightforward.[5] As enacted by Congress, the Telemarketing Act states that "[a]ny violation of any rule" prescribed under the Act "shall be treated as a violation of a rule under section 18 of the Federal Trade Commission Act (15 U.S.C. 57a) regarding unfair or deceptive acts or practices." Telemarketing and Consumer Fraud and Abuse Prevention Act, Pub. L. 103-297, § 3(c), 108 Stat. 1545, 1546 (1994). So—for purposes of triggering § 19—by expressly identifying the FTC Act, Congress has unambiguously commanded us to treat the Telemarketing Sales Rule as a rule enforceable under § 19.

Still, the question remains whether § 19 authorizes the specific asset freeze and receivership imposed against Dorfman and his companies. Section 19(b) provides the district court jurisdiction to grant "such relief as the court finds necessary to redress injury to consumers," which "may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification." 15 U.S.C. § 57b(b). Consistent with the requirement that the relief be necessary to redress injury to consumers, the district court cannot impose "any exemplary or punitive damages." *Id.*

[5] Although the U.S. Code is prima facie evidence of the law, the statutes at large represent the ultimate authority on what the law is. *In re Bayou Shores SNF, LLC*, 828 F.3d 1297, 1306 n.13 (11th Cir. 2016).

The Commission seeks rescission or reformation of contracts and the refund of money—forms of relief expressly authorized by § 19(b).[6] *Id.* And though the statute does not explicitly authorize preliminary measures of relief, like the asset freeze and receivership sought here, it does give the district courts broad authority to grant remedies that are "necessary to redress injury to consumers." *Id.* It also specifies that relief "shall not be limited to" the enumerated measures. *Id.* That language renders the list nonexhaustive "[b]y its own terms," so the omission of preliminary measures does not mean they are not authorized. *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 63 n.5 (2011). Instead, the question is whether they are "necessary to redress injury to consumers." 15 U.S.C. § 57b(b).

Asset freeze and receivership are forms of relief that can be, and often are, "necessary to redress injury to consumers." *Id.* Our law has long recognized the need for the appointment of a receiver in appropriate cases to "preserve and protect" property at issue

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[6] The Commission's Second Amended Complaint seeks "rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies." The Commission clarified in a July 5, 2022 letter—and again at oral argument—that it will not seek disgorgement to the Treasury. So for purposes of this appeal, we accept that any requested relief will be used for consumer redress and attendant expenses. *Cf. FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 607 (9th Cir. 1993). We emphasize, however, that the exact contours of the relief ultimately granted are not before us in this appeal; we look to the final relief sought only to the extent necessary to assess whether the asset freeze and receivership are allowed.

pending its final disposition. *See, e.g.*, *Gordon v. Washington*, 295 U.S. 30, 37 (1935). And we have considered a "temporary freeze of defendant's assets" to be "reasonably necessary to assure that the court's jurisdiction would not be defeated by the defendant's disposition of assets in the event the court should ultimately order disgorgement of the allegedly misappropriated funds." *CFTC v. Muller*, 570 F.2d 1296, 1301 (5th Cir. 1978).[7] In other words, the point is to ensure that if the court awards final monetary relief, assets will still be available to redress consumers' injuries. Otherwise, the district court would be unable to provide any meaningful relief.

All that to say, if preliminary measures like an asset freeze or a receivership are necessary to preserve funds for a future monetary judgment, they are authorized by § 19(b). Here, the district court found just that: "a preliminary injunction and asset freeze are necessary to protect consumers, protect assets for consumer redress, and preserve the status quo." Dorfman does not challenge that conclusion. We therefore affirm the portions of the preliminary injunction imposing the asset freeze and receivership.

B.

Dorfman also seeks to vacate the parts of the injunction prohibiting future misrepresentations and the use or disclosure of

[7] This Court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

customer information. But Dorfman does not make an argument that this is compelled by *AMG Capital*, and that argument would misunderstand the extent of *AMG Capital*'s holding in any event. As we have already explained, when the Commission enforces § 5(a), "[p]rospective injunctive relief is still allowed" after *AMG Capital*. *On Point Cap.*, 17 F.4th at 1079 (citing *AMG Cap. Mgmt.*, 141 S. Ct. at 1347–48). So injunctive relief relating to *actions* is still allowed under § 13(b), while injunctive relief relating to *money* is not. Accordingly, we affirm the district court's order with respect to the portions of the preliminary injunction enjoining future misrepresentations and the disclosure or use of customer information.

IV.

Dorfman raises several other issues, but they are either outside the scope of this appeal or have been abandoned. Because this appeal comes to us on a second successive motion to dissolve the preliminary injunction, our review is limited to whether *AMG Capital* requires dissolution or modification of the preliminary injunction order. *See Birmingham Fire Fighters Ass'n 117 v. Jefferson Cnty.*, 290 F.3d 1250, 1254 (11th Cir. 2002) (an appeal "should be permitted only to the extent necessary to consider whether the changed circumstances, evidence, or law requires modification of the order which is presumed to have been correct when issued"). Dorfman's arguments on due process and the likelihood of success on the merits are unrelated to *AMG Capital* and therefore outside the scope of this appeal; he should have brought them in his initial appeal of the preliminary injunction. And his arguments about the final form of relief, including whether the Commission will obtain punitive relief, are premature at this stage.

Finally, Dorfman abandoned any argument that the Commission was required to renew its motion for a preliminary injunction after filing its Second Amended Complaint. Though he raises this issue in the introduction of his opening brief, he does not otherwise develop the argument in his briefs. "We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014); *see also Cote v. Philip Morris USA, Inc.*, 985 F.3d 840, 846 (11th Cir. 2021) (a party abandons an issue when it is raised only in the introduction of a brief); *United States v. Mathis*, 767 F.3d 1264, 1275 n.2 (11th Cir. 2014) (appellant cannot resurrect an abandoned issue by raising it at oral argument).

* * *

Dorfman urges us to read *AMG Capital* as a signal to interpret the FTC Act with a view to "reigning in the FTC's power." But we take a different lesson. *AMG Capital* teaches us to read the FTC Act to "mean what it says." 141 S. Ct. at 1349. In *AMG Capital*, that meant limiting § 13(b)'s provision for a "permanent injunction" to injunctive relief. *Id.* Here, that means recognizing the broad scope of relief available under § 19. When the Commission enforces a rule, § 19 grants the district court jurisdiction to offer relief "necessary to redress injury to consumers." 15 U.S.C. § 57b(a)–(b). To preserve funds for consumers, the Commission sought to freeze Dorfman's assets and impose a receivership over his companies. Because § 19 allows such relief here, we **AFFIRM**.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

U.S. BANK NATIONAL ASSOCIATION AS TRUSTEE FOR RAMP 2006EFC2,

Appellant,

v.

Case No. 5D21-2528
LT Case No. 2008-CA-002727

KENNETH BELL, SR., AND ALENA BELL,

Appellees.

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Opinion filed January 27, 2023

Appeal from the Circuit Court for Flagler County,
Terence R. Perkins, Judge.

Kimberly S. Mello and Arda Goker, of Greenberg Traurig, P.A., Orlando, for Appellant.

Patricia K. Herman, of Law Office of Patricia K. Herman, P.A., Apopka, for Appellee.

LAMBERT, C.J.

U.S. Bank National Association, as Trustee for RAMP 2006EFC2, ("Trustee") appeals the final judgment entered against it and in favor of the appellees—Kenneth Bell, Sr., and Alena Bell ("Borrowers")—after a nonjury trial on its mortgage foreclosure action. The trial court found that Trustee had failed to establish that it had standing to foreclose on the date when it filed the complaint.

Trustee raises several arguments here for reversal, including that the trial court erred by excluding from evidence a Pooling and Servicing Agreement ("PSA") based on Borrowers' hearsay objection. Trustee argues that, due to its independent legal significance, the PSA was admissible as a non-hearsay document. We agree with Trustee.[1]

ANALYSIS—

In a foreclosure proceeding, it is axiomatic that the party seeking to foreclose must demonstrate that it has standing. *McLean v. JP Morgan Chase Bank Nat'l Ass'n*, 79 So. 3d 170, 173 (Fla. 4th DCA 2012). "Standing," which means that the person bringing suit must have "a sufficient stake in an otherwise justiciable controversy" such that the person can "obtain judicial resolution of that controversy," *see C.H. v. Adoption of N.K.*, 322 So. 3d 177,

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[1] Based upon our decision today, we find it unnecessary to address Trustee's remaining arguments.

180 (Fla. 2d DCA 2021) (quoting *Jamlynn Invs. Corp. v. San Marco Residences of Marco Condo. Ass'n*, 544 So. 2d 1080, 1082 (Fla. 2d DCA 1989)), must be established when the complaint was filed, as well as at the time of trial. *See Bowmar v. SunTrust Mortg., Inc.*, 188 So. 3d 986, 988 (Fla. 5th DCA 2016) (citing *Pennington v. Ocwen Loan Servicing, LLC*, 151 So. 3d 52, 53 (Fla. 1st DCA 2014)).

The crux of the dispute is whether Trustee proved that it had standing when it first filed its foreclosure complaint. *See Schmidt v. Deutsche Bank*, 170 So. 3d 938, 940 (Fla. 5th DCA 2015) ("[T]he burden is on the party seeking foreclosure to prove by substantial competent evidence that it has standing." (citing *Boyd v. Wells Fargo Bank, N.A.*, 143 So. 3d 1128, 1129 (Fla. 4th DCA 2014))). To prove standing, a party must show that it is "(1) [t]he holder of the instrument; (2) [a] nonholder in possession of the instrument who has the rights of a holder; or (3) [a] person not in possession of the instrument who is entitled to enforce the instrument pursuant to s. 673.3091 or s. 673.4181(4)." *See* § 673.3011, Fla. Stat. (2008); *Deutsche Bank Nat'l Tr. Co. v. Marciano*, 190 So. 3d 166, 168 (Fla. 5th DCA 2016).

Trustee sought to establish its standing by showing that it was the holder of the note. Admittedly, Trustee was not the lender and thus was not the named payee on the promissory note at issue executed by Borrowers. However, approximately sixteen months after filing suit, Trustee filed the original note, together with the original mortgage, in the court file. Attached to the note was an original document titled "Note Endorsements" that had two undated endorsements—one from the original lender to an entity named Residential Funding Company, LLC ("Residential Funding"), and the other from Residential Funding to Trustee. The note and the mortgage would later be admitted into evidence at trial. Resultingly, the endorsed note established that Trustee was the holder of the note at the time of trial. However, because a copy of the note with endorsements was not attached to its initial complaint, Trustee's task at trial was to prove by substantial competent evidence that it was also the holder of this note when it filed suit.

Trustee attempted to do so though the PSA. As correctly recognized by the trial court in its final judgment, a party's standing to foreclose can be shown through a PSA where the note is part of the trust established by the PSA prior to suit being filed. *See Marciano*, 190 So. 3d at 168; *Bolous v. U.S. Bank Nat'l Ass'n*, 210 So. 3d 691, 693–94 (Fla. 4th DCA 2016). Trustee was one of the parties that executed the subject PSA, as was Residential Funding, as the master servicer. The PSA was in existence and contained a closing date that predated the foreclosure complaint. Paragraph 2.01 of the PSA required that, concurrent with its execution, all mortgage loans be assigned and delivered to Trustee. The PSA also contained a Master Loan Schedule ("MLS") that, according to our record, suggested that Borrowers' mortgage loan was one of the loans transferred and assigned into the trust established by the PSA.

When Trustee attempted to admit the PSA into evidence at trial, it was met with a hearsay objection and that Trustee had not established that this document was admissible under the business records exception to the hearsay rule, codified at section 90.803(6), Florida Statutes. The trial court sustained Borrowers' objection. Trustee then unsuccessfully sought to admit the PSA into evidence as a non-hearsay document, admissible for its independent legal significance. For the following reasons, we conclude that the trial court erred in again sustaining Borrowers' objection.[2]

This court has recognized that words of a contract are not hearsay because they characterize verbal acts and thus have independent legal significance. *See Deutsche Bank Nat'l Tr. Co. v. Alaqua Prop.*, 190 So. 3d 662, 665 (Fla. 5th DCA 2016); *see also A.J. v. State*, 677 So. 2d 935, 937 (Fla. 4th DCA 1996) ("Words of a contract, often characterized as verbal acts, are non hearsay because they have independent legal significance—the law attaches duties and liabilities to their utterance." (citing 2 McCormick

[2] Our review as to whether the challenged evidence constitutes hearsay is de novo. *See Deutsche Bank Nat'l Tr. Co. v. Sheward*, 245 So. 3d 890, 892 (Fla. 2d DCA 2018) ("[T]he question of whether evidence meets the statutory definition of hearsay is a matter of law and thus subject to de novo review." (citing *Burkey v. State*, 922 So. 2d 1033, 1035 (Fla. 4th DCA 2006))).

on Evidence § 249 (4th ed. 1992))); *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 540 (5th Cir. 1994) ("Signed instruments such as wills, contracts, and promissory notes are writings that have independent legal significance, and are nonhearsay." (quoting Thomas A. Mauet, *Fundamentals of Trial Techniques* 180 (2d ed. 1988))).

In *Alaqua Property*, we held that a party seeking to admit a promissory note into evidence at trial need not establish that the note is admissible under the business records exception to the hearsay rule because the note is not hearsay but instead is admissible for its independent legal significance. 190 So. 3d at 665. The Fourth District Court has separately determined that an assignment of mortgage is admissible into evidence for its independent legal significance as a verbal act, *Holt v. Calchas, LLC*, 155 So. 3d 499, 502 n.2 (Fla. 4th DCA 2015), as is a mortgage modification agreement. *Citigroup Mortg. Loan Tr. Inc. v. Scialabba*, 238 So. 3d 317, 320 (Fla. 4th DCA 2018) (citing *Alaqua Prop.*, 190 So. 3d at 665; *Holt*, 155 So. 3d at 502 n.2). We hold today that the PSA in this case was similarly admissible for its independent legal significance and that the trial court erred in excluding its admissibility based on the hearsay objection raised by Borrowers. *See Bigsby v. Barclays Cap. Real Est., Inc.*, 298 F. Supp. 3d 708, 718 n.2 (S.D.N.Y. 2018) ("The hearsay argument would also be incorrect because the PSAs, like other contracts, have evidentiary significance by virtue of their binding effect and not because of the truth of what they say." (citation omitted)).

In its final judgment, the trial court found that Trustee's witness was not able to authenticate the PSA and thus it was not admitted into evidence. Admittedly, while authentication is a prerequisite to the admissibility of a PSA, Borrowers' counsel did not object to its admissibility on this ground; thus, Borrowers waived this objection. *See Johnston v. Hudlett*, 32 So. 3d 700, 704 (Fla. 4th DCA 2010) (holding that an objection to the authenticity of a loan document was waived due to the lack of contemporaneous objection). Additionally, when sustaining the objection, the trial court did not indicate that the PSA was also being excluded because it was not authenticated. We therefore conclude that, under these circumstances, the trial court erred in its final judgment that the PSA was not admissible due to the lack of authentication by Trustee's witness. *See Bank of N.Y. Mellon v. Barber*, 295 So. 3d 1223, 1225 (Fla. 1st DCA 2020) (noting that a court is not authorized to raise a legal issue sua sponte and errs when ruling on the basis of an argument never raised by the defendants).

Accordingly, the final judgment is reversed, and the matter is remanded to the trial court for further proceedings.

REVERSED and REMANDED.

EVANDER and EDWARDS, JJ., concur.

Third District Court of Appeal

State of Florida

Opinion filed January 25, 2023.
Not final until disposition of timely filed motion for rehearing.

No. 3D22-0852
Lower Tribunal No. 20-27601

Publix Super Markets, Inc.,
Petitioner,

vs.

Ernesto Blanco,
Respondent.

A Writ of Certiorari to the Circuit Court for Miami-Dade County, William Thomas, Judge.

Weiss Serota Helfman Cole & Bierman, P.L., and Edward G. Guedes, for petitioner.

Morgan & Morgan, and Brian J. Lee (Jacksonville), for respondent.

Before LINDSEY, LOBREE, and BOKOR, JJ.

LINDSEY, J.

Petitioner Publix Super Markets, Inc. (Defendant below) seeks certiorari review of a Discovery Order that partially grants and partially denies its motion for protective order. For the reasons set forth below, we grant the Petition and quash the discovery order to the extent it permits corporate-wide discovery.

This is a garden variety slip-and-fall case. According to the Complaint, Respondent Ernesto Blanco (Plaintiff below) was visiting a Publix supermarket "when suddenly he slipped and fell due to a wet and slippery substance on the floor in the customer bathroom." Blanco filed a 15-page notice of deposition of Publix's corporate representative, which listed 52 main areas of inquiry.[1]

Publix sought a protective order as to some of the areas of inquiry. Following a two-day hearing, the trial court partially granted and partially denied Publix's motion. Publix seeks to quash the Discovery Order with respect to the following four main areas of inquiry: (1) flooring materials, (2) safety committee meetings, (3) root cause analysis and development of risk management policies and procedures, and (4) workers' compensation claims.

[1] Many primary areas of inquiry contain numerous subsections. There are over 150 areas of inquiry including the subsections.

Certiorari is an extraordinary remedy that is only available in very limited circumstances. Coral Gables Chiropractic PLLC v. United Auto. Ins. Co., 199 So. 3d 292, 294 (Fla. 3d DCA 2016). To be entitled to relief, a petitioner must demonstrate "(1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a 'depart[ure] from the essential requirements of the law.'" Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012) (quoting Belair v. Drew, 770 So. 2d 1164, 1166 (Fla. 2000)).

Publix argues the underlying Discovery Order causes irreparable harm because it grants carte blanche to irrelevant discovery. It is well-established that an overbroad discovery order is not a sufficient basis for certiorari relief. See Coral Gables Chiropractic, 199 So. 3d at 294. Similarly, "irrelevant discovery alone is not a basis for granting certiorari unless disclosure of materials may reasonably cause material injury of an irreparable nature . . . ." Allstate Ins. Co. v. Langston, 655 So. 2d 91, 94 (Fla. 1995); see also Allstate Ins. Co. v. Boecher, 733 So. 2d 993, 995 (Fla. 1999) ("Our rules of civil procedure broadly allow parties to obtain discovery of 'any matter, not privileged, that is relevant to the subject matter of the pending action,' whether the discovery would be admissible at trial, or is merely 'reasonably calculated to lead to the discovery of admissible evidence.'" (quoting Fla. R. Civ. P. 1.280(b)(1))).

Although discovery of irrelevant information does not generally cause irreparable harm, "a litigant is not entitled *carte blanche* to irrelevant discovery." Langston, 655 So. 2d at 95. "[W]hen it has been affirmatively established that such discovery is neither relevant nor will lead to the discovery of relevant information[,]" certiorari relief may be warranted. Id.

In Publix Supermarkets, Inc. v. Santos, 118 So. 3d 317 (Fla. 3d DCA 2013), this Court held that a discovery order requiring Publix to produce slip and fall incident reports from all Publix stores within the State of Florida amounted to impermissible carte blanche discovery of irrelevant information. This is because section 768.0755, Florida Statutes,[2] requires a plaintiff to

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[2] Section 768.0755, Florida Statutes (2022), provides as follows:

> (1) If a person slips and falls on a transitory foreign substance in a business establishment, the injured person must prove that the business establishment had actual or constructive knowledge of the dangerous condition and should have taken action to remedy it. Constructive knowledge may be proven by circumstantial evidence showing that:
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> (a) The dangerous condition existed for such a length of time that, in the exercise of ordinary care, the business establishment should have known of the condition; or

"prove that the particular 'business establishment' where the injury occurred had actual or constructive knowledge of the dangerous condition and discovery should be restricted to information on the particular establishment." Santos, 118 So. 3d at 319 (quoting § 768.0755(1)).

Here, the Discovery Order is far broader than in Santos because it requires Publix's corporate representative to address areas of inquiry related to Publix's corporate-wide operations, which include not only the operations in the store where the alleged incident occurred but operations in over 1,300 stores throughout the country. Blanco acknowledges the inquiries are corporate-wide but insists that such information is discoverable because it is relevant to show negligent mode of operation.[3] We disagree because under

> (b) The condition occurred with regularity and was therefore foreseeable.
>
> (2) This section does not affect any common-law duty of care owed by a person or entity in possession or control of a business premises.

[3] "The 'mode of operation theory' allows a slip-and-fall plaintiff to recover by showing that a defendant failed to exercise reasonable care in selecting a mode of operation, without showing that the defendant had actual or constructive knowledge of the hazardous condition." Woodman v. Bravo Brio Rest. Grp., Inc., No. 6:14-CV-2025-ORL-40, 2015 WL 1836941, at *1 (M.D. Fla. Apr. 21, 2015); see also Owens v. Publix Supermarkets, Inc., 802 So. 2d 315, 323 (Fla. 2001) ("In contrast to cases that address whether the defendant had constructive notice of the specific transitory foreign substance, we have on a limited basis recognized that, by virtue of the nature

section 768.0755, negligent mode of operation is not a viable theory of recovery in slip-and-fall cases.

The Florida Legislature enacted section 768.0755 in 2010 to replace section 768.0710, which was enacted in 2002. As explained in Pembroke Lakes Mall Ltd. v. McGruder, 137 So. 3d 418, 424-26 (Fla. 4th DCA 2014), this was done to require proof of actual or constructive notice and to remove language regarding negligent maintenance, inspection, repair, warning, or mode of operation:

> The most significant change between sections 768.0710 and 768.0755 concerned prior notice of a dangerous condition. The older 2002 statute expressly stated actual or constructive notice was not "a required element of proof to this claim," but the new 2010 statute expressly stated the plaintiff "must prove that the business establishment had actual or constructive knowledge of the dangerous condition." Additionally, the new statute does not contain any language regarding the owner's negligent maintenance, inspection, repair, warning, or mode of operation.
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> . . . .
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> Under the 2002 statute, a plaintiff could succeed in a slip and fall case by showing "the business premises acted negligently by failing to exercise reasonable care in the maintenance, inspection, repair, warning, or mode of operation of the business premises," without showing the business had actual or

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of the business or its mode of operation, the requirement of establishing constructive knowledge is altered or eliminated.").

> constructive knowledge of the transitory foreign substance. Under the 2010 statute, however, the same plaintiff would be unable to successfully assert such a cause of action, no matter how persuasive or compelling the evidence the plaintiff had in support of the claim.

See also Bensalah v. Whole Foods Mkt. Grp., Inc., 338 So. 3d 1067, 1068 (Fla. 3d DCA 2022) (approving of Pembroke Lakes Mall); Khorran v. Harbor Freight Tools USA, Inc., 251 So. 3d 962, 966 n.2 (Fla. 3d DCA 2018) (recognizing that the negligent mode of operation theory is not applicable "in premises liability cases involving a slip and fall on a transitory foreign substance").

Because section 768.0755 does not permit proof of liability under the negligent mode of operation theory, the Discovery Order departs from the essential requirements of the law. See Santos, 118 So. 3d at 319 ("[T]he trial court departed from the essential requirements of law and misconstrued section 786.0755 when it required Publix to provide incident information relating to all Publix stores located in Florida."). Accordingly, we quash the Discovery Order to the extent it grants corporate-wide discovery because this amounts to impermissible carte blanche discovery that results in irreparable harm and departs from the essential requirements of the law.

Petition granted; order quashed to the extent it grants corporate-wide discovery.