[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 22-11232

DAVID WILLIAMS,
Individually and on behalf of all others similarly situated,
CAROLL ANGLADE,
Individually and on behalf of all others similarly situated,
HOWARD CLARK,
THOMAS MATTHEWS,
MARTIZA ANGELES,

Plaintiffs-Appellees,

versus

RECKITT BENCKISER LLC,
RB HEALTH (US) LLC,

Defendants-Appellees,

THEODORE H. FRANK,

Interested Party-Appellant.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:20-cv-23564-MGC

Before WILLIAM PRYOR, Chief Judge, MARCUS, Circuit Judge, and MIZELLE,* District Judge.

MARCUS, Circuit Judge:

This is an appeal from a district court order approving a class-action settlement that purports to provide injunctive relief and up to $8 million in monetary relief to a class of individuals (the "Class") who purchased one or more "brain performance supplements" manufactured and sold by Defendants Reckitt Benckiser LLC and RB Health (US) LLC (together, "RB") under the brand name "Neuriva." Five Plaintiffs (together, the "Named Plaintiffs") who had previously purchased Neuriva brought this putative class action, alleging that RB used false and misleading statements to

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* Honorable Kathryn Kimball Mizelle, United States District Judge for the Middle District of Florida, sitting by designation.

give consumers the impression that Neuriva and its "active ingredients" had been clinically tested and proven to improve brain function, in violation of Florida, California, and New York consumer protection laws. The parties promptly agreed to a global settlement (the "Settlement" or "Settlement Agreement") that sought to resolve the claims of all Plaintiffs and absent Class members, before any formal discovery or motion practice had been completed.

Obviously, the settling parties do not contend that the district court erred in approving the Settlement; rather, this appeal comes to us because one unnamed Class member, an attorney and frequent class-action objector, Theodore Frank, objected in district court and subsequently appealed the district court's approval order. In essence, Frank argues that the parties inflated the perceived value of the Settlement by touting that RB would pay up to $8 million to Neuriva purchasers -- knowing all the while that few Class members would complete the process of submitting claims to receive payment -- and imposing changes to RB's marketing that would not benefit past purchasers of Neuriva and that were meaningless in any event. This, Frank contends, allowed Plaintiffs' counsel to secure a disproportionately large fee award (some $2.9 million) while decreasing the overall payout required of RB.

Whatever the merits of Frank's claims, they will have to wait for another day because, after thorough review of the record and with the benefit of oral argument, we conclude that the Named Plaintiffs lack standing to pursue their claims for injunctive relief.

Under longstanding Supreme Court precedent, plaintiffs seeking injunctive relief must establish that they are likely to suffer an injury that is "actual or imminent," not "conjectural or hypothetical." But none of the Named Plaintiffs allege that they plan to purchase any of the Neuriva Products again in the future -- to the contrary, the operative complaint gives every indication that they will not again purchase any of the Neuriva Products because they are "worthless." The district court, therefore, lacked jurisdiction to award injunctive relief to the Named Plaintiffs or absent Class members, and its approval of the Settlement Agreement (which was based in real part on the award of injunctive relief) was an abuse of discretion. Accordingly, we **VACATE** the district court's order and **REMAND** for proceedings consistent with this opinion.

I.

A.

RB manufactures and sells a line of three "brain performance supplements" under the brand name Neuriva: Neuriva Original, Neuriva Plus, and Neuriva De-Stress (together, the "Neuriva Products"). RB advertises that the Neuriva Products have been "clinically and scientifically proven to enhance the brain health and performance of all adults in specific ways." Thus, for example, RB informs consumers that taking any of the Neuriva Products will help them "brain better" by improving "focus," "accuracy," and "concentration." Neuriva Original and Plus are also claimed to improve users' "memory" and "learning," while Neuriva De-Stress, RB promises, will aid in "stress reduction" and "relaxation." RB also

advertises that the Neuriva Products each contain several "active ingredients" that have themselves been clinically proven to improve brain physiology and function.

In 2020, three sets of Plaintiffs filed three separate putative class action complaints against RB in the Eastern District of California, the Southern District of New York, and the Southern District of Florida -- all later consolidated into a single class-action complaint in the Southern District of Florida. This consolidated class action alleges that RB's advertising for the Neuriva Products employed false and misleading statements in violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.201 *et seq.*, the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.*, the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750 *et seq.*, the California False Advertising Law, Cal. Bus. & Prof. Code § 17500 *et seq.*, and the New York General Business Law, N.Y. Gen. Bus. L. § 349. It also alleges unjust enrichment on the same theory.

The complaint identifies a number of different representations and statements made by RB as false and/or misleading. For instance, Plaintiffs allege that RB's advertising falsely leads consumers to believe that the Neuriva Products have undergone clinical and/or scientific testing to prove their efficacy, when, in fact, none of the Products have been tested. *See, e.g.*, Consol. Amended Class Action Compl. ¶ 64 ("The singular message throughout Defendants' marketing of Neuriva is that Neuriva is scientifically and clinically proven, as a matter of fact, to increase brain performance.");

id. at ¶ 66 ("Defendants' statements on their labels and in their advertising convey to reasonable consumers, and reasonable consumers would believe, that the state of the science regarding Neuriva and its ingredients has reached a level of scientific consensus such that [Neuriva's] claims of increased or enhanced brain performance are established truths and statements of fact."). And the complaint further alleges that each of the Neuriva Products "trumpet[s]" various active ingredients, such as "coffee cherry extract," as having been clinically proven to improve brain physiology and function, when in fact "scientific evidence shows that it is biochemically impossible for the ingredients to improve brain performance."

Each of the five Named Plaintiffs in the operative complaint allege that they purchased at least one Neuriva Product between 2019 and January 2020. But, notably, none of the Named Plaintiffs allege that they purchased Neuriva De-Stress specifically; they only allege that they purchased Neuriva Original, Neuriva Plus, or "Neuriva," unspecified.

B.

Before Plaintiffs consolidated the three pending actions in the Southern District of Florida, RB moved to dismiss the California and Florida actions, raising a number of defenses including a failure to sufficiently allege falsity, federal preemption, and failure to plausibly allege that a reasonable consumer would be deceived by Neuriva's labels. While these motions were pending, the parties engaged in settlement discussions, including two full-day

mediations. On January 7, 2021, before any formal discovery had been conducted, the parties filed a notice of settlement stating that they had agreed "in principle" to settle Plaintiffs' claims on a class-wide basis. The Named Plaintiffs from the New York and California actions joined to file the operative complaint in the Southern District of Florida, and, on February 8, Plaintiffs filed an unopposed motion for preliminary approval of the Settlement. The district court referred further proceedings to a magistrate judge.

The Settlement Agreement covered a Rule 23(b)(2) and (b)(3) class of "[a]ll persons who purchased for personal consumption and not for resale, one or more of the Neuriva Products . . . between the dates of January 1, 2019 and the date of Preliminary Approval of the Settlement by the Court." Class members who could provide proof of purchase would be able to recover up to $32.50 per claim, with a maximum of two claims, for a total potential recovery of $65.00. Without proof of purchase, Class members could only recover $5.00 per claim, with a maximum of four claims, for a total potential recovery of $20.00. The Settlement capped total recovery for the Class at $8 million. If the submitted claims exceeded that amount, RB could either reduce the amount paid on each claim *pro rata*, or terminate the Settlement entirely.

The Settlement also provided injunctive relief to the Class in the form of required changes to Neuriva's labeling and marketing for a period of two years, starting six months after the Settlement became final. The Settlement enjoined RB from using the terms "Clinically Proven," "Science Proved," "Clinically Tested

and Shown," "clinical studies have shown," or similar "shown" claims on Neuriva's labeling. But RB could still market Neuriva's ingredients as "Clinically Tested" and "clinically tested to help support brain health."

The Settlement Agreement also entitled six law firms representing the Plaintiffs to seek $2.9 million in attorneys' fees. RB agreed not to oppose Plaintiffs' fee request (often referred to as a "clear sailing" provision) and the parties agreed that, if the court awarded less than $2.9 million in fees, the remainder would revert to RB, rather than to the Class (a "kicker" provision). RB also agreed that it would support Plaintiffs' efforts to prove the value of the proposed injunctive relief to the court to win approval of the Settlement and their fee request.

Pursuant to the terms of the Settlement, Class members released all claims relating to misleading labeling and marketing of the Neuriva Products.

C.

On April 23, 2021, the district court granted preliminary approval of the Settlement by entering a stipulated order that had been attached to an unopposed motion filed by Plaintiffs. The order "preliminarily certifie[d]" a nationwide settlement class of

> [a]ll persons who purchased for personal consumption and not for resale, one or more of the Neuriva Products (Neuriva Original, Neuriva Plus, or

> Neuriva De-Stress), from Defendants or an authorized reseller, in the United States, between the dates of January 1, 2019 and the date of Preliminary Approval of the Settlement by the Court.

The district court concluded that "the class certification prerequisites set forth in Federal Rule of Civil Procedure 23(a), (b)(3), and 23(b)(2)" had been met.

The preliminary approval order also appointed a third party, the Angeion Group, to act as the "Settlement Administrator," approved the parties' suggested plan of notifying Class members of the Settlement by placing advertisements on websites and social media apps, set a final fairness hearing for August 17, 2021, and set a deadline of July 27 for Class members to object to the terms of the Settlement or opt out.

One Class member, Frank, timely objected to the terms of the Settlement.[1] Frank is the director of litigation at the Hamilton Lincoln Law Institute and a frequent objector to class-action settlements around the country. Frank explained (in an accompanying declaration) that he was a member of the Class because he had

[1] An independent, non-profit advertising watchdog organization, Truth in Advertising, Inc. (TINA), also filed an *amicus curiae* brief in the district court raising many of the same points as Frank.

purchased a 30-count package of Neuriva Original from Amazon on February 2, 2021 for personal use for $21.95.

In his objection, Frank argued that the Settlement's purported $8 million benefit was "illusory" because the claims process was structured so that Class members were certain to receive only a fraction of that amount, and that the Settlement's injunctive relief was not targeted at Class members like him, who had purchased Neuriva Products in the past, and was worthless in any event. Because the Settlement's value had been artificially inflated, Frank contended that the $2.9 million in fees and costs sought by Class counsel was disproportionately large -- larger, in fact, than the total amount Class members would *actually* receive under the terms of the Settlement Agreement. Frank therefore contended that the Settlement must be disapproved based on Congress' 2018 amendments to Federal Rule of Civil Procedure 23 -- which require the district court to consider "the effectiveness of any proposed method of distributing relief to the class" and "the terms of any proposed award of attorney's fees, including timing of payment," when determining whether "the relief provided for the class is adequate." Fed. R. Civ. P. 23(e)(2)(C)(ii)-(iii).

The magistrate judge held the final fairness hearing and, on December 15, 2021, issued a Report & Recommendation ("R&R") recommending that the district court approve the proposed Settlement and award the requested $2.9 million in attorneys' fees. At the time of the fairness hearing, Plaintiffs' counsel estimated that the total amount in claims submitted by Class members would be

between $1,049,797.50 and $1,181,225.00 -- or approximately 3x less than the amount requested by Plaintiffs' counsel for attorneys' fees and costs. Ultimately, Class members would submit 59,877 claims worth a total of $1,109,182.50.

The R&R never formally certified the Class that had previously been "preliminarily" certified. Relying primarily on cases decided before Congress' 2018 amendments to Rule 23, the R&R found that the Settlement's monetary relief was properly valuated at $8 million -- the amount purportedly made available for Class members to claim. As for the injunctive relief, the R&R concluded that it had "some value," but did not assign a "specific dollar range" because doing so "would be speculative." Nevertheless, the R&R recognized that the injunctive relief played an integral role in the parties' Settlement, and that it must be considered alongside the Settlement's monetary relief to determine whether all parts of the Settlement Agreement together supported court approval. *See* R. & R. Regarding Class Action Settlement at 85 ("[C]ourts rightly consider the value of injunctive *and* monetary relief in assessing whether a class action settlement provides sufficient relief to the class." (emphasis in original)). After examining "the dollar amount of the settlement . . . through the prisms of potential recovery and the value of the injunctive relief," the R&R found that the Settlement as a whole constituted an "excellent" result for the Class and, therefore, that the Settlement was "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2).

Frank objected to the R&R on December 29, 2021. On March 17, 2022, the district court overruled Frank's objection and, in a short order, adopted the R&R in full without additional analysis.

Frank's timely appeal followed.

II.

Questions of the litigants' standing may be raised at any time, and are reviewed *de novo*. *A&M Gerber Chiropractic LLC v. GEICO Gen. Ins. Co.*, 925 F.3d 1205, 1210 (11th Cir. 2019). A district court's decision to approve a class-action settlement is reviewed for abuse of discretion. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1251 n.2 (11th Cir. 2020); *Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1316 (11th Cir. 2013). "A district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Chi. Trib. Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1309 (11th Cir. 2001). "An error of law is an abuse of discretion *per se*." *Managed Care Advisory Grp., LLC v. CIGNA Healthcare, Inc.*, 939 F.3d 1145, 1153 (11th Cir. 2019) (citation omitted).

A.

We begin, as we must, with the issue of Frank's standing to bring this appeal. *See United States v. Amodeo*, 916 F.3d 967, 970 (11th Cir. 2019) ("On every writ of error or appeal, the first and

fundamental question is that of jurisdiction, *first*, of this court, and *then* of the court from which the record comes." (emphasis in original) (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884))). The Named Plaintiffs argue that Frank lacks standing for two reasons: (1) he was not actually deceived by RB's marketing, and only purchased one of the Neuriva Products after he had already heard about the lawsuit, and thus has not suffered an "injury in fact" that is "concrete and particularized"; and (2) even if Frank could establish injury-in-fact, his supposed injuries would not be redressed by a favorable decision of this Court because the Settlement Agreement will provide Frank with a full refund for his purchase of one of the Neuriva Products, thus fully compensating him.

To start, we note that the Named Plaintiffs' "redressability" argument is better understood as another flavor of their injury-in-fact argument: because the Settlement Agreement will provide Frank with a full refund for his purchase, the Named Plaintiffs essentially contend that Frank cannot show that the district court's approval injured Frank in any way -- if anything, the Settlement made Frank better off by giving him his money back. Regardless of what label is applied, however, the Named Plaintiffs' arguments that Frank lacks standing because he was not actually deceived by RB's marketing or because the Settlement allows Frank to recover the purchase price of one of the Neuriva Products are clearly foreclosed by precedent. Frank has established that he is a member of

the Class who would be bound by the judgment, so he has standing.

"Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements": (1) "an 'injury in fact'"; (2) "a causal connection between the injury and the conduct complained of"; and (3) "[a likelihood] that the injury will be 'redressed by a favorable decision.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (citations omitted). In *Devlin v. Scardelletti*, the Supreme Court held that nonnamed class members "who have objected in a timely manner to approval of the settlement at the fairness hearing" have "an interest in the settlement that creates a 'case or controversy' sufficient to satisfy the constitutional requirements of injury, causation, and redressability," and thus "have the power to bring an appeal without first intervening." 536 U.S. 1, 6-7, 14 (2002) (quoting *Lujan*, 504 U.S. at 555). In other words, an objector's status as a member of the class who is bound by the district court's judgment is itself enough to provide him or her with standing to appeal the district court's approval of a class-wide settlement over his or her objection. *See id.* "Otherwise, class members would be deprived of 'the power to preserve their own interests in a settlement that will ultimately bind them, despite their expressed objections before the trial court.'" *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1260-61 n.7 (11th Cir. 2021) (quoting *Devlin*, 536 U.S. at 10) (holding that nonnamed class members who objected to district court approval of class-action settlement and who had not opted out had Article

III standing to appeal approval), *cert. denied sub nom. Huang v. Spector*, 142 S. Ct. 431 (2021), *and cert. denied sub nom. Watkins v. Spector*, 142 S. Ct. 765 (2022).

The Named Plaintiffs do not dispute that Frank is a member of the Settlement Class -- nor could they. The Settlement defines the relevant Class as "[a]ll persons who purchased for personal consumption and not for resale, one or more of the Neuriva Products, from [RB] or an authorized reseller, in the United States, between the dates of January 1, 2019 and the date of Preliminary Approval of the Settlement by the Court." In voluminous affidavits filed with the district court, Frank explained that he purchased a 30-count bottle of Neuriva Original from Amazon for personal use for $21.95 prior to the date of preliminary approval of the Settlement, on February 2, 2021. By definition, the Settlement does not impose any requirement that a purchaser have actually or subjectively been deceived upon purchasing Neuriva products to be a member of the Class. So Frank is a "member of the [C]lass bound by the judgment," regardless of whether he was actually deceived by RB's advertising. *Devlin*, 536 U.S. at 7; *Berni v. Barilla S.p.A.*, 964 F.3d 141, 145-46 (2d Cir. 2020) (citing *Devlin*, 536 U.S. at 6-7) (holding that objector to approval of class settlement for deceptive advertising claims had standing to appeal because he was a member of the class despite admitting that he was not deceived by defendant's packaging).

Frank was injured by the district court's approval of the Settlement because the Settlement releases any potential claims he has

against RB based on misleading labeling of the Neuriva Products. Thus, he will be precluded from seeking other forms of relief, such as those that were sought in the operative complaint but not included in the Settlement Agreement (*e.g.*, pre- and post-judgment interest). And a favorable resolution of this appeal would obviously provide Frank with relief by vacating the district court's approval of the Settlement Agreement. *See Berni*, 964 F.3d at 145-46 ("Once he established that he was a member of the class, he needed to do no more in order to proceed with his objection. For the same reason, he need do no more now to proceed with his appeal before this Court."). Frank has standing to pursue this appeal.

B.

We turn now to the principal issue raised by this appeal: whether the district court abused its discretion when it approved the parties' Settlement Agreement as "fair, reasonable, and adequate" under Federal Rule of Civil Procedure 23(e)(2). Frank argues that the district court erred by overestimating the value of the Settlement's monetary and injunctive relief to Class members, thereby approving an Agreement that awarded a disproportionately high amount in attorneys' fees and costs at the expense of the Class.

We agree that the district court's assessment of whether the Settlement was fair, reasonable, and adequate was flawed, but for a different and more basic reason. The Named Plaintiffs have failed to allege any continuing or "imminent" harm in connection with their past purchases of the Neuriva Products; thus, they lack standing to pursue the injunctive relief awarded by the Settlement, and the district court lacked the power to grant that relief. The upshot of this jurisdictional defect is that the district court's approval order must be set aside: because the value of the Settlement's injunctive relief formed an integral part of the district court's calculus of its overall fairness, the court's approval of the Settlement was premised on a legal error and, as a result, was necessarily an abuse of discretion.

1.

Article III limits federal courts to deciding "Cases" and "Controversies." U.S. Const. art. III, § 2. Consequently, a plaintiff must demonstrate that he or she has "[s]tanding to sue," *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), "throughout all stages of litigation," *Amodeo*, 916 F.3d at 971 (citation omitted). This generally means that the plaintiff must satisfy the three well-established requirements discussed above: injury-in-fact, causation, and redressability. *See Lujan*, 504 U.S. at 560-61. And "because injunctions regulate future conduct, a party has standing to seek injunctive relief" only if his injury in fact is "a real and immediate -- as opposed to a merely conjectural or hypothetical -- threat of *future* injury." *Shotz v. Cates*, 256 F.3d 1077, 1081 (11th Cir. 2001) (emphasis in original) (alteration adopted) (citation omitted).

This is true even if a plaintiff also seeks monetary relief for past harm. As the Supreme Court has held, "a plaintiff must 'demonstrate standing separately for each form of relief sought.'" *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2210 (2021) (quoting *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 185 (2000)). Thus, even if a plaintiff can establish standing to pursue separate claims for monetary relief based on allegations of *past* harm, before a court may grant that plaintiff injunctive relief, the plaintiff must separately establish a threat of "real and immediate," as opposed to "conjectural or hypothetical," future injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 105 (1983); *cf. also TransUnion*, 141 S. Ct. at 2210 ("[A] plaintiff's standing to seek injunctive relief does not

necessarily mean that the plaintiff has standing to seek retrospective damages.").

These principles apply with no less force in the class-action context. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) ("That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." (quotation marks and citation omitted)). "Thus, it is well-settled that prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim." *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11th Cir. 2000).

Here, the district court did not assure itself of the Named Plaintiffs' standing to seek injunctive relief before approving the parties' Settlement Agreement, a requirement that it was obliged to satisfy before finally signing off on the case. *See Frank v. Gaos*, 139 S. Ct. 1041, 1046 (2019) (holding that federal courts' "obligation to assure [them]selves of litigants' standing under Article III. . . . extends to court approval of proposed class action settlements."). Though Frank has not raised this issue on appeal, the obligation to ensure that the Named Plaintiffs had standing in the district court remains in this Court. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999) ("[I]t is well settled that a federal court

is obligated to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking. . . . [A]n appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." (quotation marks and citation omitted)).

It is apparent that the Named Plaintiffs lack Article III standing to pursue their claims against RB for injunctive relief. The movant's burden of proof at the class-certification stage is unclear. *See* 1 William B. Rubenstein, *Newberg & Rubenstein on Class Actions* § 7:21 (6th ed. 2022). For purposes of this appeal, we assume without deciding that the applicable standard is a pleading standard. *See Lujan*, 504 U.S. at 561 ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice [to establish standing], for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." (second alteration in original) (quotation marks and citation omitted)). The Named Plaintiffs fail to satisfy even that low burden. The complaint alleges only *past* harm as a result of RB's misrepresentations; the Named Plaintiffs allege that they purchased Neuriva Products because they saw RB's misleading representations regarding the Neuriva Products and their ingredients, and suffered economic injury as a result. But "[t]he fact that [the Named Plaintiffs] may have been injured by [RB's misleading statements and omissions] in the past . . . cannot be sufficient to establish an injury in fact that would support injunctive relief." *Duty Free Ams., Inc. v. Estée Lauder Cos.*, 797 F.3d 1248,

1271-72 (11th Cir. 2015). The Named Plaintiffs also must allege some "lasting impact or likely future injury." *Id.* at 1272. On this front, all the Named Plaintiffs offer is an allegation that they "would like to purchase Defendants' products if they truly improved brain performance," but are "unable to rely on Defendants' representations regarding the effectiveness of Defendants' products in deciding whether to purchase Defendants' products in the future." This is plainly insufficient to establish a threat of imminent or actual harm.

We need look no further than the Supreme Court's seminal decision in *Lujan* to see why. There, a group of environmental organizations challenged a Department of the Interior regulation that interpreted certain provisions of the Endangered Species Act to apply only to government actions taken domestically or on the high seas. 504 U.S. at 558-59. On summary judgment, the plaintiffs attempted to establish their standing to seek injunctive relief by submitting affidavits from several of their members stating that the agency's rule would harm them prospectively because it would "increas[e] the rate of extinction of endangered and threatened species" that those members hoped to one day see. *Id.* at 562-63. For instance, one member stated that she had previously observed the habitat of the endangered Nile crocodile in Egypt, and that she "intend[ed] to do so again, and hope[d] to observe the crocodile directly." *Id.* at 563. Another member said in an affidavit and again at deposition that she had previously observed an endangered species habitat in Sri Lanka, and that she "intend[ed] to return to Sri

Lanka in the future" and "hope[d]" to spot the species then, but had no current plans to return. *Id.* at 563-64.

The Supreme Court held that the plaintiffs' averments were insufficient to confer on them standing because they "contain[ed] no facts . . . showing how damage to the species will produce 'imminent' injury to [the plaintiffs]." *Id.* at 564. The Court explained that the affiants' past visits to species' habitats were not enough because "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *Id.* (quoting *Lyons*, 461 U.S. at 102). And the members' "profession of an 'intent' to return to the places they had visited before" was insufficient because "[s]uch 'some day' intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be -- do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* (emphasis in original) (cleaned up).

The same is true in this case. The allegations that the Named Plaintiffs previously purchased Neuriva Products do not "in [themselves] show a present case or controversy regarding injunctive relief," and the complaint does not allege any "continuing, present adverse effects" associated with prior purchases of the Neuriva Products. *Id.* Nor do the Named Plaintiffs provide "any description of concrete plans" to purchase the Neuriva Products again in the future. *Id.* Allegations that the Named Plaintiffs "would like" to purchase RB's products at some undefined point in the

future, much like the *Lujan* affiants' statements that they "intend[ed]" to return to the species' habitats or "hope[d]" to spot the species themselves someday, without more, "do not support a finding of the 'actual or imminent' injury that our cases require." *Id.*

If anything, this case presents an even more remote and attenuated risk of future harm than in *Lujan*, because none of the Named Plaintiffs have even alleged that they intend to buy the Neuriva Products again. The Named Plaintiffs only state that they "would like" to purchase products from RB "if" RB develops products that "truly improve[] brain performance." The conditional nature of their allegations compels the conclusion: any alleged harm to the Named Plaintiffs is "conjectural [and] hypothetical," not "actual or imminent," as Article III demands. *Id.* at 560. Indeed, the operative complaint provides every reason to *doubt* that the Named Plaintiffs will ever purchase the Neuriva Products again. *See Berni*, 964 F.3d at 147-48 (holding that past purchaser of deceptively advertised boxes of pasta lacked standing to pursue injunctive relief on behalf of a class because "there is no reason to believe that all, or even most, of the class members -- having suffered the harm alleged -- will choose to buy [the product] in the future"). As the Named Plaintiffs themselves allege, the Neuriva Products as currently constituted are "worthless," and scientific evidence has shown that "it is biochemically impossible for the ingredients [in the Neuriva Products] to improve brain performance." And the Named Plaintiffs never allege if or when RB will be able to produce any products that actually improve brain performance in line with

their expectations. The only products that the Named Plaintiffs arguably express any interest in purchasing are products that do not yet exist, and may never exist -- a plainly insufficient expression of future harm to confer Article III standing. *See Duty Free Ams.*, 797 F.3d at 1272 (holding that duty free store's claim that it would suffer injury if it resumed purchasing products from a vendor that allegedly imposed anticompetitive display space and inventory restrictions as a precondition to purchase did not establish standing to pursue injunctive relief because plans to possibly purchase products in the future could not "be characterized as a 'concrete' or 'actual' injury in fact because, by its very terms, it has not yet occurred, and indeed may never occur"). The Named Plaintiffs therefore lack Article III standing to pursue prospective injunctive relief against RB.

Trying to resist this conclusion, the Named Plaintiffs invoke *Davidson v. Kimberly-Clark Corp.*, a case where the Ninth Circuit held that "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase." 889 F.3d 956, 969 (9th Cir. 2018). That case was also a putative consumer class action, brought by a named plaintiff who had purchased baby wipes. *Id.* at 961. The named plaintiff alleged that the defendant had falsely advertised that the wipes would be "flushable," and sought injunctive relief requiring changes in the defendant's marketing. *Id.* The Ninth Circuit concluded that the plaintiff had standing to seek

injunctive relief because she had "adequately alleged that she faces an imminent or actual threat of future harm caused by Kimberly-Clark's allegedly false advertising," pointing to allegations that the plaintiff "continues to desire to purchase wipes that are suitable for disposal in a household toilet," and "would purchase truly flushable wipes manufactured by [Kimberly-Clark] if it were possible." *Id.* at 970-71. The court reasoned that these allegations demonstrated harm in the form of an informational injury -- the plaintiff's "inability to rely on the validity of the information advertised on Kimberly-Clark's wipes despite her desire to purchase truly flushable wipes." *Id.* at 971.

We remain unpersuaded. The Ninth Circuit's reasoning rests on an assumption that the plaintiff will, in fact, try to purchase the defendant's products again in the future, at which point the plaintiff will again be deceived by the defendant's advertising, or at least doubt its veracity. *See id.* at 970. But, in this case, as we've described, the Named Plaintiffs' complaint provides us with no basis to conclude that they have "actual or imminent" plans to purchase RB's products again. Quite the opposite: all indications are that the Named Plaintiffs will not purchase the Neuriva Products again, given the plethora of false statements allegedly made in RB's advertising and the purportedly "worthless" nature of the Products. *See Berni*, 964 F.3d at 147-48. Because the Named Plaintiffs do not allege when, if ever, RB might produce a product they would be interested in purchasing, their allegations are exactly the sort of "'some day' intentions . . . without any description of

concrete plans" that the Supreme Court has instructed are insufficient to confer Article III standing. *See Lujan*, 504 U.S. at 564.

Thus, the Named Plaintiffs lack standing; the district court was without jurisdiction to grant their requested injunctive relief against RB; and, as a result, the district court's order approving the Settlement Agreement must be vacated. *See Frank*, 139 S. Ct. at 1046. This is because, as the magistrate judge himself properly recognized in his R&R, the decision whether to approve a class-action settlement is a holistic one; the various parts of a settlement must be considered in concert to determine whether the Settlement *as a whole* provides relief to the Class that is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2); *see also Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1119-20 (11th Cir. 1995) ("We are not free to delete, modify or substitute certain provisions of the settlement. The settlement must stand or fall as a whole." (citation omitted)). In other words, the district court's determination that the Settlement's injunctive relief would provide value to the class was inextricably bound up with its determination that the Settlement in its entirety was fair, reasonable, and adequate. Because the district court lacked the power to grant this injunctive relief, its determination was based on a legal error, and must be set aside as an abuse of discretion. *See Managed Care*, 939 F.3d at 1153.

2.

In a filing submitted after oral argument, Frank urges us to bypass this jurisdictional inquiry, claiming that, even if the Named Plaintiffs lack standing to pursue injunctive relief, we need not

vacate the district court's approval of the Settlement Agreement on that ground because "the Court still has appellate jurisdiction over the complaint as a whole because of the damages claims," and "[a] class settlement may include relief that plaintiffs could not win at trial." But, as we see it, neither of these contentions is convincing.

First, a plaintiff's standing to pursue claims for damages does not by itself confer the district court with jurisdiction "over the complaint as a whole." As we've noted already, the Supreme Court has instructed us that federal courts are to assess a plaintiff's standing -- and, by extension, their jurisdiction -- "separately for each form of relief sought." *TransUnion*, 141 S. Ct. at 2210 (citation omitted); *see also id.* at 2214 (reversing judgment affirming relief for plaintiffs because plaintiffs lacked standing to obtain some, but not all, of the relief granted); *see also Frank*, 139 S. Ct. at 1046 ("[F]ederal courts lack jurisdiction if no named plaintiff has standing.").

Second, to the extent Frank suggests that the district court did not need jurisdiction to approve a settlement agreement that contained injunctive relief, that argument falls short as well. Citing *Local No. 93, International Association of Firefighters v. City of Cleveland*, 478 U.S. 501 (1986), Frank says that "[a] class settlement may include relief that plaintiffs could not win at trial." But this reliance on *Firefighters* elides an important distinction between a court's *jurisdiction* to entertain a claim or to grant relief, and a plaintiff's substantive *right* to relief under the particular statute that forms the basis of his or her claim.

Firefighters involved the district court's approval of a consent decree between the City of Cleveland and a class of Black and Hispanic firefighters who were already employed with the City or who would apply to be hired by the City in the future, to resolve a Title VII suit alleging that the City had discriminated against minority firefighters in hiring and work assignments on the basis of their race and national origin. 478 U.S. at 504, 509-10. As part of the consent decree, the City agreed to use "race-conscious" designations in its hiring and promotion practices to ensure a minimum number of minority firefighters would be hired for or promoted to certain positions. *Id.* The firefighters' union objected, arguing that the consent decree should not be approved because it would benefit individuals who had not themselves actually been victims of the City's discriminatory practices. According to the union, this would run contrary to § 706(g) of Title VII's prohibition against entry of an "order of the court" requiring "hiring, reinstatement, or promotion" of an individual who had been denied employment or advancement "for any reason other than discrimination on account of race, color, religion, sex, or national origin." *Id.* at 513-14 (emphasis omitted) (quoting 42 U.S.C. § 2000e–5(g)).

The Supreme Court disagreed with the union and affirmed the district court's approval of the consent decree. *Id.* at 525. Even if § 706(g) would have prevented the plaintiff class from obtaining the relief contained in the consent decree *following a trial*, the Court held that the statute did not prohibit the district court from granting the relief as part of a *consent decree* because § 706(g)

speaks only of "order[s] of the court," and "consent decrees are not included among the 'orders' referred to in [the statute]." *Id.* at 521. Crucially for our purposes, *Firefighter*'s holding was limited to an interpretation of the statutory language of Title VII, *id.* at 513-14 n.5; nowhere did the Court purport to authorize district courts to enter consent decrees or approve class-action settlements that provide relief that the district court lacks the power to grant. To the contrary, the Court expressly noted that "a consent decree must spring from and serve to resolve a dispute *within the court's subject-matter jurisdiction*," *id.* at 525 (emphasis added), and reiterated that district courts are only empowered to enter a consent decree "to the extent that [it] is not otherwise shown to be unlawful," *id.* at 526. *Firefighters* thus has no bearing on a district court's "obligat[ion] to inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking," *Univ. of S. Ala.*, 168 F.3d at 410, which, again, "extends to court approval of proposed class action settlements." *Frank*, 139 S. Ct. at 1046; *see also Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.").

Accordingly, we are required to vacate the district court's approval of the Settlement Agreement and remand this case to the district court for further proceedings, including analysis of whether any settlement agreement entered into by the parties is "fair, reasonable, and adequate" under Federal Rule of Civil Procedure

23(e)(2). Whatever value the Settlement's injunctive relief provided, it may no longer be part of the district court's calculus -- on remand, the court should account only for relief that the Named Plaintiffs have standing to pursue and that it has jurisdiction to grant when assessing the overall fairness of any settlement (assuming, of course, that the parties reach a new settlement agreement and submit it for the district court's approval).

C.

We observe that several other considerations will be relevant to the district court on remand. We highlight three such concerns.

First, it remains our law that at least one class representative must establish that he or she has Article III standing to represent each claim brought on behalf of a class (or subclass) by showing that he or she has "suffer[ed] the same injury as the class members." *See Prado-Steiman*, 221 F.3d at 1279 (citation omitted). While this issue overlaps in some ways with the requirements of commonality, typicality, and adequacy set forth in Federal Rule of Civil Procedure 23(a), the issues are quite distinct. *See* Rubenstein, *supra*, at § 2:6 ("The concepts of standing and Rule 23(a) therefore appear related as they both aim to measure whether the proper party is before the court to tender the issues for litigation. But they are in fact independent criteria. They spring from different sources and serve different functions."). The standing requirement arises, of course, from Article III's command that federal courts resolve only "Cases" or "Controversies," and ensures that a plaintiff has "such a

personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues[.]" *Baker v. Carr*, 369 U.S. 186, 204 (1962). By extension, then, the requirement that at least one class representative have standing to raise each class claim or subclaim by showing that he or she has suffered "the same injury" ensures that the named plaintiffs possess the requisite interest in litigating all the absent class members' claims. *See Prado-Steiman*, 221 F.3d at 1279 ("[W]e have repeatedly held that a class representative must be part of the class and possess the same interest and suffer the same injury as the class members." (quoting *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 156 (1982)). This requirement must be satisfied before final judgment is entered in the form of an approval of a class-action settlement. *Frank*, 139 S. Ct. at 1046.

In *Prado-Steiman*, we considered an appeal from a district court's order granting class certification to a broad class of developmentally disabled individuals who had allegedly been deprived of benefits to which they were entitled under Florida's Home and Community Based Waiver (HCBW) program. 221 F.3d at 1280. We agreed with the defendants that the district court had abused its discretion in granting class certification because it had failed to resolve whether "at least one named representative of each class or subclass ha[d] standing for each proffered class or subclass claim." *Id.* We also observed that because the class members had not all been injured by the same violative conduct, or "bad act[s]," on the part of the defendants, the "alleged injuries may be better

addressed through several subclasses rather than one large class." *Id.* at 1280-81. The complaint alleged that the defendants had failed to provide some class members with approved services in a reasonably prompt manner, while allegedly denying other class members' claims without due process, and, for still other class members, the defendants had allegedly failed to adjudicate claims applications in a reasonably prompt manner. *Id.* at 1281-82. Because it was not clear whether any named plaintiff had individual standing to bring each of the class or subclass claims, we remanded for the district court to resolve fact-specific questions on that issue. *Id.* at 1280.

In *Fox v. Ritz-Carlton Hotel Co.*, by contrast, we held that a named plaintiff had "class representative standing" to assert claims on behalf of a class of persons who had dined at Ritz-Carlton restaurants across Florida, because his alleged injuries and those of the absent class members were identical. 977 F.3d 1039, 1047 (11th Cir. 2020). The named plaintiff had eaten at three Ritz-Carlton restaurants all located at the hotel's Key Biscayne location, and alleged that, each time, the hotel had illegally charged him an automatic gratuity and sales tax without sufficiently warning him of the charges on the menus or on the faces of the bills, in violation of Florida law. *Id.* at 1043-44. Though the named plaintiff had not visited any other Ritz-Carlton locations in Florida, he sought to represent a class of individuals who had dined at all of its 49 restaurants throughout the state. *Id.* We concluded that the named plaintiff had standing to raise the absent class members' claims because he had adequately alleged that Ritz-Carlton employed the

same deceptive practices at each of its restaurants (*i.e.*, it failed to warn customers of the extra charges on the menu or the bill in the same manner), and, thus, he and the absent class members had suffered the "same economic injury." *Id.* at 1047. It didn't matter that he and the absent class members had suffered those injuries "on different days at different restaurants." *Id.*; *see also Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1302, 1307 (11th Cir. 2008) (holding that victims of Hurricane Frances had class representative standing to represent victims of other hurricanes that had hit Florida that year in suit against insurance company for breach of contract because the absent class members' claims were "identical" to those brought by the named plaintiffs).

Here, there is some question as to whether any Named Plaintiff has standing to raise certain claims of misrepresentations regarding *one* of the three Neuriva Products: Neuriva De-Stress. None of the Named Plaintiffs alleges that he or she purchased this Product. It is true that some of RB's alleged falsehoods and misrepresentations are common to all three Neuriva Products, and the Named Plaintiffs may well have standing to assert claims based on those misrepresentations on behalf of all absent class members -- even those who only purchased Neuriva De-Stress. After all, claims of injury that are based on the same misrepresentations target the same conduct by RB, and the "injury suffered" will be identical. *Prado-Steiman*, 221 F.3d at 1281; *see also Fox*, 977 F.3d at 1047. Thus, for example, the Named Plaintiffs charge that RB falsely advertises that coffee cherry extract -- an ingredient

common to all three Neuriva Products -- has been "clinically proven to increase levels of the vital neuroprotein BDNF, known to strengthen connections between brain cells."

Other claims, however, are based on alleged misrepresentations that only apply to Neuriva De-Stress. The complaint alleges, for instance, that RB claims that Neuriva De-Stress has been proven to benefit "stress reduction" and "relaxation" -- benefits RB does not claim for Neuriva Original or Neuriva Plus -- and that one of the active ingredients unique to Neuriva De-Stress -- Melon Concentrate -- "is a common source of the potent antioxidant SOD (SuperOxide Dismutase) that is naturally found in the body to fight oxidative stress." The Named Plaintiffs may not have standing to raise these claims because they may not have suffered the same injury related to these alleged misrepresentations as absent class members who purchased Neuriva De-Stress. *See Prado-Steiman*, 221 F.3d at 1281. The district court should work its way through these issues on remand to ensure that at least one Named Plaintiff has standing to assert each claim or subclaim on behalf of the class prior to approving any class-wide settlement or granting class certification. *See id.* at 1279.

Which brings us to a second point: on remand, the district court should determine whether to certify a class and, if so, enter an appropriate certification order before deciding whether to approve class-wide relief. *See* Fed. R. Civ. P. 23(a)-(c), (e). The closest the district court came to certifying a class in this case was to "preliminarily" certify a class for the purposes of settlement in its

preliminary approval order. Conducting a meaningful analysis of whether a specifically defined class or subclass meets Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation, as well as Rule 23(b)(3)'s predominance and superiority requirements, will ensure that "the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." *Prado-Steiman*, 221 F.3d at 1279 (quoting *Baby Neal ex rel. Kanter v. Casey*, 43 F.3d 48, 57 (3d Cir. 1994)); *see also* Rubenstein, *supra*, at § 3:29. Given the disparate nature of some of the claimed misrepresentations regarding Neuriva De-Stress and the other Neuriva Products, it may be helpful to divide any eventually certified class into different subclasses based on the content of the misrepresentations by which different class representatives -- and any corresponding class members -- claim to have been injured. *See Prado-Steiman*, 221 F.3d at 1280-81 (noting that the "disparate" injuries suffered by different class members "may be better addressed through several subclasses rather than one large class"). We "leave the ultimate decision as to what kinds of appropriate subclasses to create [, if any,] to the sound discretion of the district court." *Id.* at 1282.

Finally, the district court should be sure to consider the points raised by Frank in this appeal when considering whether any settlement agreement is "fair, reasonable, and adequate" under Rule 23(e)(2). *See* Br. for Appellant at 14-37. Thus, the district court should consider the impact of Congress' 2018 amendments

to Rule 23(e)(2)(C) on its analysis of the fairness of a class-action settlement, including "the effectiveness" of the settlement's "method of distributing relief to the class," Fed. R. Civ. P. 23(e)(2)(C)(ii), and whether the proposed attorneys' fees are disproportionately large compared to the amount of relief reasonably expected to be provided to the class. *See, e.g.*, *Briseño v. Henderson*, 998 F.3d 1014, 1026-27 (9th Cir. 2021) (holding that class settlement was not "fair, reasonable, and adequate" because 2018 amendments to Rule 23 require courts to "scrutiniz[e] the fee arrangement for potential collusion or unfairness to the class," and settlement at issue gave plaintiffs' counsel a disproportionate distribution of the settlement, the parties agreed to a "clear sailing arrangement," and the agreement contained a "'kicker' or 'reverter' clause"); *cf. also Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (reversing approval of class-action settlement that provided "a meager recovery for the class but generous compensation for the lawyers" because it "s[old] out the class," prior to 2018 amendments).

In short, we vacate the Settlement approval by the district court and remand the case for further proceedings consistent with this opinion.

VACATED AND REMANDED.

[PUBLISH]

In the United States Court of Appeals
For the Eleventh Circuit

No. 21-11736

SE PROPERTY HOLDINGS, LLC,
As successor by merger with Vision Bank,

Plaintiff-Appellant,

versus

RUSTON C. WELCH, et al.,

Defendants,

NEVERVE LLC,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida
D.C. Docket No. 5:18-cv-00252-TKW-MJF

Before LAGOA and BRASHER, Circuit Judges, and BOULEE,[1] District Judge.

LAGOA, Circuit Judge:

This case presents issues of first impression to this Court regarding the application of the Florida Uniform Fraudulent Transfer Act ("FUFTA"), Fla. Stat. § 726.101 *et seq*. In 2015, SE Property Holdings, LLC ("SEPH"), obtained a deficiency judgment against Neverve LLC ("Neverve") after Neverve defaulted on loans secured by a mortgage on its property. Following this judgment, Neverve received the proceeds from an unrelated settlement. But Neverve transferred those proceeds to attorneys representing Neverve's principal, David Stewart, in payment of attorney's fees relating to Stewart's personal bankruptcy proceedings. SEPH then sued Neverve based on Neverve's allegedly fraudulent transfer of those settlement proceeds, asserting claims under FUFTA that sought compensatory damages, punitive damages, and attorney's fees, as well as asserting a claim for an equitable lien. The district

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[1] Honorable J. P. Boulee, United States District Judge for the Northern District of Georgia, sitting by designation.

court granted summary judgment in favor of Neverve, finding that FUFTA's "catch-all" provision, *see* Fla. Stat. § 726.108(1)(c)3., did not allow for (1) an award of money damages against the transferor, (2) punitive damages, or (3) attorney's fees. The court also granted summary judgment in favor of Neverve on SEPH's equitable lien claim, as Neverve no longer possessed the settlement proceeds at issue.

Neither Florida state courts nor this Court have squarely addressed the FUFTA issues presented by this appeal. Based on the narrow interpretation of FUFTA in *Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004), however, we believe the Florida Supreme Court would determine that FUFTA's catch-all provision does not allow for an award of money damages against the transferor, an award of punitive damages, or an award of attorney's fees. Thus, the district court was correct in granting summary judgment in favor of Neverve on SEPH's FUFTA claims. And we conclude that the district court did not err in granting summary judgment in favor of Neverve on SEPH's equitable lien claim. Accordingly, for the reasons discussed below, and with the benefit of oral argument, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case began with the failure of a real estate development in Bay County, Florida. Neverve defaulted on loans secured by a mortgage on the Bay County property originally given to SEPH's predecessor in interest. SEPH foreclosed on Neverve's property, and the United States District Court for the Northern District of

Florida issued a deficiency judgment in favor of SEPH against Neverve (who was then insolvent) for a total sum of over $19.6 million. *See SE Prop. Holdings, LLC v. Neverve*, No. 12-cv-292 (N.D. Fla. June 18, 2015).

In 2016, after the judgment was entered, Neverve settled a claim against BP related to the Deepwater Horizon oil spill (the "BP proceeds"). Neverve, however, did not turn over the BP proceeds to SEPH towards satisfaction of SEPH's judgment. Instead, at the direction of Neverve's principal, David Stewart, approximately $350,000 of those proceeds were wired to Ruston C. Welch and Welch Law Firm, P.C. ("WLF"), in Oklahoma to pay Stewart's personal attorney's fees in his ongoing Chapter 7 bankruptcy case. *See In re Stewart*, 970 F.3d 1255, 1260 (10th Cir. 2020).

SEPH sued Neverve, Welch, and WLF in the Northern District of Florida. In its amended complaint, SEPH asserted, among other claims, three FUFTA claims (one for actual fraud and two for constructive fraud) and an equitable lien claim against the defendants, based on the transfer of the BP proceeds from WLF's trust account to Welch and WLF. In its FUFTA claims, SEPH sought (1) compensatory and punitive damages, (2) attorney's fees and costs, (3) to set aside each fraudulent transfer and for the court to declare them null and void, and (4) any additional relief the court deemed proper.

Welch and WLF moved to dismiss the amended complaint for lack of personal jurisdiction, and Neverve sought dismissal on

the ground that Welch and WLF were indispensable parties. After jurisdictional discovery and briefing, the district court dismissed the claims against Welch and WLF for lack of personal jurisdiction.[2] Regarding Neverve's motion, the district court found that Welch and WLF were indispensable parties for certain relief sought by SEPH—avoidance of the transfers and imposition of an equitable lien—and granted that part of Neverve's motion. The district court, however, denied the motion as to SEPH's claims for money damages against Neverve. Neverve answered and later moved for summary judgment on SEPH's remaining claims.

In its order granting Neverve's motion for summary judgment, the district court explained that FUFTA's primary remedy—avoidance of a transfer or a money judgment against a transferee—was unavailable to SEPH because the court lacked personal jurisdiction over indispensable parties for that remedy, Welch and WLF. As to the other remedy sought by SEPH—an award of money damages against the transferor, Neverve—the court found it was unavailable under FUFTA's "catch-all" provision in Florida Statute § 726.108(1)(c)3., which provides that a creditor may obtain, "[s]ubject to the applicable principles of equity and in accordance with applicable rules of civil procedure[,] . . . [a]ny other relief the circumstances may require." The district court explained that while some Florida appellate decisions suggest that an award of money damages against the transferor is available under the catch-

[2] The district court's dismissal of Welch and WLF is not at issue in this appeal.

all provision, those decisions pre-dated the Florida Supreme Court's decision in *Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004), or relied solely on cases that pre-dated *Freeman*. That decision, the district court explained, narrowly interpreted the catch-all provision. Thus, the district court found that SEPH could not obtain a separate money judgment against Neverve under FUFTA based on the alleged fraudulent transfer of the BP proceeds.

As to SEPH's request for punitive damages and attorney's fees under FUFTA, the district court noted that there was no Florida case law addressing whether the catch-all provision authorized an award of those types of damages and that other federal district courts to consider the issue found that the catch-all provision did not authorize an award of attorney's fees. And the district court found it "unlikely that the Florida Supreme Court would construe the 'catch all' provision in FUFTA to authorize an award of punitive damages or attorney's fees against the transferor in light of its statements in *Freeman*."

Finally, as to SEPH's equitable lien claim, the district court explained that, for the imposition of an equitable lien under Florida law, the property in litigation must be in the defendant's possession. The district court then noted that it was undisputed that Neverve was not currently in possession of the BP proceeds. So, the district court reasoned, even if SEPH could establish the elements necessary to obtain such a lien, the court would not have the authority to impose the lien. And the court declined to stay the

case pending resolution of Stewart's bankruptcy case and a case SEPH filed against Welch and WLF in the United States District Court for the Western District of Oklahoma.

SEPH timely appealed.[3] While SEPH filed an initial brief in this case, Neverve did not file a brief in response.[4] We then appointed pro bono counsel as amicus curiae to defend the district court's judgment.[5]

II. STANDARD OF REVIEW

"We review *de novo* the district court's grant of a motion for summary judgment, considering all of the evidence and the inferences it may yield in the light most favorable to the nonmoving

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[3] After SEPH filed its notice of appeal, we issued jurisdictional questions asking: (1) whether the relevant pleadings sufficiently alleged each party's citizenship to invoke the district court's subject matter jurisdiction in the first instance; and (2) of relevance here, whether the allegations should be amended on appeal, pursuant to 28 U.S.C. § 1653, if the jurisdictional allegations were inadequate. In response, SEPH moved for leave to amend its amended complaint on appeal. We granted SEPH leave to amend its pleadings to correct the parties' citizenships and deemed the pleadings, as amended, established that the parties were diverse. SEPH then filed this second amended complaint in the district court.

[4] On December 21, 2021, we issued an order directing Neverve to file a notice stating whether it intended to file a response brief and appear at oral argument. Neverve's counsel informed this Court that Neverve would not participate in the appeal because of Neverve's insolvency.

[5] We appointed Jason T. Burnette to defend the district court's judgment in this appeal. We thank Mr. Burnette for accepting this appointment and for his service to this Court.

party." *Ellis v. England*, 432 F.3d 1321, 1325 (11th Cir. 2005). "Summary judgment is appropriate where the evidence shows 'that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Id.* (quoting *Comer v. City of Palm Bay*, 265 F.3d 1186, 1192 (11th Cir. 2001)).

"We review a district court's legal conclusions *de novo*." *Id.* at 1323; *accord United States v. Daniels*, 685 F.3d 1237, 1244 (11th Cir. 2012). And we review the denial of equitable relief for an abuse of discretion. *See Dresdner Bank AG v. M/V OLYMPIA VOYAGER*, 465 F.3d 1267, 1273 (11th Cir. 2006); *CNA Fin. Corp. v. Brown*, 162 F.3d 1334, 1337 (11th Cir. 1998).

III. ANALYSIS

On appeal, SEPH contends that the district court erred in holding that FUFTA's catch-all provision does not permit: (1) an award of money damages against a transferor; (2) an award of punitive damages; and (3) an award of attorney's fees. SEPH further contends that the district court erred in granting summary judgment in favor of Neverve on its equitable lien claim. We address these issues in turn.

A. SEPH's Claims Under FUFTA

Because SEPH's claims arise under Florida law, we apply Florida's substantive law. *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1348 (11th Cir. 2011) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). FUFTA is such a substantive

law. *See Freeman v. First Union Nat'l*, 329 F.3d 1231, 1233–34 (11th Cir. 2003). "We decide novel questions of state law 'the way it appears the state's highest court would.'" *Id.* at 1232 (quoting *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1290 (11th Cir. 2001)). Because we are interpreting Florida law, we look first for case precedent from Florida's highest court—the Florida Supreme Court. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008, 1021 (11th Cir. 2014). "Where that court has not spoken, however, we must predict how the highest court would decide this case." *Turner v. Wells*, 879 F.3d 1254, 1262 (11th Cir. 2018). In making this prediction, "we are 'bound to adhere to the decisions of the state's intermediate appellate courts absent some persuasive indication that the state's highest court would decide the issue otherwise.'" *Winn-Dixie*, 746 F.3d at 1021 (quoting *Provau v. State Farm Mut. Auto. Ins. Co.*, 772 F.2d 817, 820 (11th Cir. 1985)); *accord Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1086 (11th Cir. 2004) (requiring "a strong indication that the state supreme court would decide the matter differently"). To decide whether such an indication exists, "all other data may be considered to the extent they indicate how the Florida Supreme Court might rule on an issue." *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1133 (11th Cir. 2010).

Among such relevant data in a statutory interpretation case, of course, includes the text of the statute itself. Under Florida law, a court must "give effect to the legislative intent of the statute." *Robbins v. Garrison Prop. & Cas. Ins. Co.*, 809 F.3d 583, 586 (11th

Cir. 2015) (quoting *Belanger v. Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009)). But, as emphasized by the Florida Supreme Court, to discern such legislative intent, a court looks "to the actual language used in the statute." *Freeman*, 865 So. 2d at 1276 (quoting *BellSouth Telecomms., Inc. v. Meeks*, 863 So. 2d 287, 289 (Fla. 2003)). Thus, "[w]hen the statute is clear and unambiguous, [Florida] courts will not look behind [its] plain language for legislative intent." *Robbins*, 809 F.3d at 586 (some alterations in original) (quoting *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005)).

To that end, the Florida Supreme Court has articulated Florida law regarding statutory interpretation as follows:

> In interpreting statutory language, we of course "begin with the language of the statute." As we recently explained, we "adhere to the 'supremacy-of-text principle': 'The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.'" We thus strive to determine the text's objective meaning through "the application of the text to given facts on the basis of how a reasonable reader, fully competent in the language, would have understood the text at the time it was issued."

Page v. Deutsche Bank Tr. Co. Ams., 308 So. 3d 953, 958 (Fla. 2020) (alterations adopted) (citations omitted) (first quoting *Lieupo v. Simon's Trucking, Inc.*, 286 So. 3d 143, 145 (Fla. 2019); then quoting *Advisory Op. to Governor re Implementation of Amend. 4, the*

Voting Restoration Amend., 288 So. 3d 1070, 1078 (Fla. 2020); and then quoting Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 33 (2012)). And the Florida Supreme Court has recently held that, because "[t]he plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole," a court is to use "the traditional canons of statutory interpretation" to "aid the interpretive process from beginning to end." *Conage v. United States*, 346 So.3d 594, 598 (Fla. 2022). Moreover, Florida law does not require "interpreters to make a threshold determination of whether a term has a 'plain' or 'clear' meaning in isolation, without considering the statutory context and without the aid of whatever canons might shed light on the interpretive issues in dispute." *Id.*

We turn to the relevant statutory provisions of FUFTA, which are modeled after the Uniform Fraudulent Transfer Act ("UFTA"). *See Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d 145, 152 (Fla. Dist. Ct. App. 1994). Florida Statute § 726.105(1), in relevant part, states:

> A transfer made . . . by a debtor is fraudulent as to a creditor[] . . . if the debtor made the transfer . . . :
>
> (a) With actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer . . . , and the debtor:

> 1. Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> 2. Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Florida Statute § 726.108 provides the following creditors' remedies under FUFTA:

> (1) In an action for relief against a transfer or obligation under [§§] 726.101-726.112, a creditor, subject to the limitations in [§] 726.109 may obtain:
>
> (a) Avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim;
>
> (b) An attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with applicable law;
>
> (c) *Subject to applicable principles of equity* and in accordance with applicable rules of civil procedure:
>
> 1. An injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or of other property;
>
> 2. Appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or
>
> 3. *Any other relief the circumstances may require.*

> (2) If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds.

(Emphasis added).

And Florida Statute § 726.109, which establishes certain limitations to the remedies in section 726.108(1)(a), provides in relevant part:

> (2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under [§] 726.108(1)(a), the creditor may recover judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against:
>
> (a) The first transferee of the asset or the person for whose benefit the transfer was made; or
>
> (b) Any subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee.

Id. § 726.109(2). Thus, "FUFTA provides generally that a creditor may avoid a debtor's fraudulent transfer to the extent necessary to satisfy the creditor's claim." *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1302 (11th Cir. 2020).

With these statutory provisions in mind, we now turn to SEPH's claims.

1. Money Judgment Against a Transferor

SEPH contends that FUFTA permits a creditor to recover a monetary judgment against a transferor through the statute's "catch-all" provision in section 726.108(1)(c)3., which provides, in relevant part, that a creditor may obtain "[a]ny other relief the circumstance may require." Of course, SEPH already holds a monetary judgment against Neverve, which is what created the creditor-debtor relationship between the parties in the first place and gives rise to SEPH's claims under FUFTA. SEPH thus argues that FUFTA authorizes it to obtain a second judgment against Neverve for Neverve's violation of FUFTA. In support of this argument, SEPH cites two decisions from Florida's intermediate appellate courts holding that FUFTA's catch-all provision allows a creditor to seek an award of money damages against a transferor. *See Hansard Constr. Corp. v. Rite Aid of Fla., Inc.*, 783 So. 2d 307 (Fla. Dist. Ct. App. 2001); *McCalla v. E.C. Kenyon Constr. Co.*, 183 So. 3d 1192 (Fla. Dist. Ct. App. 2016). But we conclude that the plain language of the statute and the relevant Florida case law on FUFTA amount to a "strong indication" that the Florida Supreme Court would not find an award of money damages *against the transferor* permissible under section 726.108, including its catch-all provision. *See Chepstow*, 381 F.3d at 1086.

Beginning with section 726.108, the statute provides certain remedies to a creditor bringing a claim under FUFTA. First, the creditor can seek avoidance of the fraudulent transfer. *Id.* § 726.108(1)(a). Second, the creditor can seek an attachment

against the transferred asset (or other property of the *transferee*). *Id.* § 726.108(1)(b). And third, the creditor can seek the following remedies "[s]ubject to applicable principles of equity": (1) an injunction against further disposition of the asset by either the debtor or transferee; (2) appointment of a receiver with respect to the asset (or other property of the *transferee*); or (3) "[a]ny other relief the circumstances may require." *Id.* § 726.108(1)(c) (emphasis added).

The only part of FUFTA that expressly addresses monetary judgments and that is relevant here is section 726.109, which establishes certain limitations on the remedies provided for in section 726.108. Section 726.109(2) provides that, when a transfer is voidable by a creditor under section 726.108(1)(a), the creditor may recover a money judgment that may be entered against either (1) "[t]he first transferee of the asset or the person for whose benefit the transfer was made" or (2) "[a]ny subsequent transferee other than a good faith transferee who took for value or from any subsequent transferee."

"Under the principle of statutory construction, expressio unius est exclusio alterius, the mention of one thing implies the exclusion of another." *Young v. Progressive Se. Ins. Co.*, 753 So. 2d 80, 85 (Fla. 2000) (quoting *Moonlit Water Apartments Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996)); *accord United States v. Castro*, 837 F.2d 441, 442 (11th Cir. 1988). Thus, the Florida legislature's "express inclusion of several specific remedies in [a] statute represents an implicit exclusion of remedies not listed." *See Bishop v. Osborn Transp., Inc.*, 838 F.2d 1173, 1174 (11th Cir. 1998)

(declining to find that punitive damages were available under the Employment Retiring Income Security Act). Critically here, section 726.109(2) does not authorize a money judgment to be entered against the transferor or debtor when seeking to avoid a transfer under section 726.108(1)(a). Rather, the statute authorizes monetary judgments only against transferees.

By contrast, the only remedies against a transferor or debtor expressly authorized by section 726.108(1) are avoidance of the transfer (which the district court found was unavailable here because it lacked personal jurisdiction over Welch and WLF) and injunctive relief to prevent a debtor from further dissipating the transferred asset. *Id.* §§ 726.108(1)(a), 726.108(1)(c)1. Additionally, section 726.108(2) specifically addresses the situation where "a creditor has obtained a judgment on a claim against the debtor"[6]; the statute permits the creditor, subject to court approval, to "levy execution on the asset transferred or its proceeds." Thus, section 726.108's specific authorization of only certain forms of relief against the transferor or debtor indicates that the creditor cannot obtain those other statutory remedies that are solely authorized against the transferee. *Cf. Young*, 753 So. 2d at 85 ("By failing to permit self-insured motorist policy exclusions in the list of authorized exclusions, the Legislature has further indicated its intent in

[6] Under FUFTA, a "[c]laim" is a "right to payment, whether or not the right is reduced to judgment." Fla. Stat. § 726.102(4).

[the statute] not to permit self-insured motorist policy exclusions.").

We also conclude that the catch-all provision in section 726.108(1)(c)3. does not encompass money judgments against the transferor for several reasons. First, the other two remedies expressly provided for by section 726.108(1)(c) are equitable remedies—an injunction and the appointment of a receiver—and the catch-all provision follows these two remedies. Florida courts apply the principle of statutory construction of ejusdem generis, which "provides that where general words or phrases follow an enumeration of specific words or phrases, 'the general words are construed as applying to the same kind or class as those that are specifically mentioned.'" *In re Advisory Op. to Att'y Gen. re Use of Marijuana for Certain Med. Conditions*, 132 So. 3d 786, 801 (Fla. 2014) (quoting *Fayad v. Clarendon Nat'l Ins. Co.*, 899 So. 2d 1082, 1088–89 (Fla. 2005)). Thus, we construe the "general words" of the catch-all provision as applying only to equitable remedies.

Second, our analysis of the statute's plain text finds support in Florida case law. Although FUFTA allows for certain limited remedies against transferors and third-party beneficiaries of fraudulent transfers, Fla. Stat. § 726.108(1)(a), (1)(c)1., (2), actions under section 726.108 generally "are brought against a recipient or transferee of assets or property, *and not a transferor*." *Edwards v. Airline Support Grp., Inc.*, 138 So. 3d 1209, 1211 (Fla. Dist. Ct. App. 2014) (emphasis added).

Moreover, in *Freeman v. First Union National Bank*, 865 So. 2d 1272 (Fla. 2004), the Florida Supreme Court addressed the "narrow focus" of section 726.108(1)(c)3. In *Freeman*, the Florida Supreme Court held that "FUFTA was not intended to serve as a vehicle by which a creditor may bring a suit against a non-transferee party . . . for monetary damages arising from the non-transferee party's alleged aiding-abetting of a fraudulent money transfer." 865 So. 2d at 1277. In reaching that conclusion, the court explained that there was "no language in FUFTA that suggests an intent to create an independent tort for damages," and that the catch-all provision was intended "*to facilitate the use of the other remedies provided in the statute*, rather than creating new and independent causes of action such as aider-abettor liability." *Id.* at 1276–77 (emphasis added). The court thus declined to find such a cause of action in FUFTA's catch-all provision in section 726.108(1)(c)3. because concluding otherwise would "expand the FUFTA beyond its facial application and in a manner that is outside the purpose and plain language of the statute." *Id.* at 1277. This was because "FUFTA was intended to codify an existing but imprecise system whereby transfers that were intended to defraud creditors could be set aside." *Id.* at 1276. And the Florida Supreme Court emphasized the "narrow focus of the FUFTA and its limitations." *Id.* at 1277.

Interpreting this case law with the plain language of the statute, we do not believe the Florida Supreme Court would find that section 726.108(1) contemplates a remedy for a creditor to obtain a money judgment against the transferor. Indeed, if we concluded

otherwise, we would be creating a new cause of action under FUFTA against the transferor, which the court cautioned against in *Freeman*. We decline to, in essence, create such a new remedy under FUFTA.

On the other hand, SEPH argues that we are bound to follow two Florida district court of appeal decisions—*Hansard* and *McCalla*—that held FUFTA's catch-all provision permits claims for money damages against the transferor of a fraudulent transfer. We disagree. In *Hansard*, the Florida Fourth District Court of Appeal stated that "a plaintiff may recover money damages against the *transferor* under the so-called catchall provision." 783 So. 2d at 309 (emphasis in original). *Hansard*, however, was decided before the Florida Supreme Court's decision in *Freeman* and did not engage fully with FUFTA's statutory text, contrary to how the Florida Supreme Court construes statutory language. *See Robbins*, 809 F.3d at 586. Then, in *McCalla*, the Florida First District Court of Appeal, relying solely on the pre-*Freeman* decision of *Hansard*, reached the same conclusion, stating that FUFTA authorizes awards of money damages "against both fraudulent transferor and transferee, jointly and severally." 183 So. 3d at 1194. But, similar to *Hansard*, the court in *McCalla* did not conduct an in-depth statutory analysis as to section 726.108—the court simply quoted the statute—nor did the case discuss the principles set forth in *Freeman*.

For the reasons we have explained, the text of FUFTA, coupled with the reasoning in *Friedman* and *Freeman*, constitutes a "persuasive indication" that the Florida Supreme Court would

decide the question of whether monetary damages are available against transferors under FUFTA's catch-all provision contrary to the *Hansard* and *McCalla* decisions. *Winn-Dixie*, 746 F.3d at 1021. Accordingly, we conclude that the district court did not err in granting summary judgment on this claim.

2. Punitive Damages

We next address whether FUFTA authorizes the separate recovery of punitive damages against a transferor under the statute's catch-all provision. The district court concluded that FUFTA did not allow for recovery of punitive damages based on the Florida Supreme Court's decision in *Freeman*. SEPH contends that this was error and that punitive damages are available under FUFTA's catch-all provision. The Florida Supreme Court has not addressed this issue, nor has any Florida intermediate appellate court. Therefore, we must decide the issue the way the Florida Supreme Court would. *Ernie Haire*, 260 F.3d at 1290.

The Florida Supreme Court has stated that "a plaintiff's right to a claim for punitive damages is subject to the plenary authority of the legislature." *Alamo Rent-A-Car, Inc. v. Mancusi*, 632 So. 2d 1352, 1358 (Fla. 1994). And turning to the plain language of the statute, *see Levy v. Levy*, 326 So. 3d 678, 681 (Fla. 2021); *Freeman*, 865 So. 2d at 1276, section 726.108 does not contain any language authorizing punitive damages as a remedy available to a creditor under FUFTA.

As we have discussed above, section 726.108(1)(c)3., when read in context of subsection (c)'s listed remedies, contemplates only equitable remedies. Florida courts generally adhere to the view that "equity will not award punitive damages unless authorized by statute." *See, e.g.*, *Lanman Lithotech, Inc. v. Gurwitz*, 478 So. 2d 425, 427 (Fla. Dist. Ct. App. 1985); *see also Bishop*, 838 F.2d at 1174 ("Punitive damages are just that, damages, and are not ordinarily incorporated by the term 'equitable relief.'"); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1364 (11th Cir. 1982) (explaining that "punitive damages are legal not equitable remedies"). Additionally, the only expressly listed remedies available to a creditor against a transferor or debtor in section 726.108 are (1) an injunction against further disposition of the transferred asset or (2) to "levy execution on the asset transferred or its proceeds."

We also note that it appears that punitive damages are unavailable to creditors with regards to those money judgments that FUFTA expressly authorizes. Florida Statute § 726.102(4) defines "claim" as "a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." In turn, when a creditor is seeking avoidance of a fraudulent transfer under section 726.108(1)(a), section 726.109(2) authorizes a money judgment against a transferee but limits that judgment to "the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's *claim*, whichever is less." (emphasis added).

Thus, reviewing the relevant FUFTA provisions alone, it appears that a creditor cannot obtain punitive damages against a transferor in pursuing a claim under FUFTA. As explained before, applying the ejusdem generis principle of statutory construction, the "general" words of the catch-all provision in section 726.108(c)3. follows a list of specific equitable remedies, and we construe the catch-all provisions as applying only to equitable remedies. And punitive damages are not considered "equitable relief" under Florida law. Furthermore, section 726.108 does not otherwise authorize an award of punitive damages as a remedy against the transferor. SEPH, however, raises section 726.111, which provides that "[u]nless displaced by the provisions of [FUFTA], the principles of law and equity, including the law merchant and the law relating to principal and agent, estoppel, laches, fraud, misrepresentation, duress, coercion, mistake, insolvency, or other validating or invalidating cause, supplement those provisions." SEPH then raises several authorities to argue that "[i]f a debtor commits intentional misconduct by intentionally committing fraudulent transfers, then, consistent with common law, punitive damages should be available."

For example, SEPH points to section 768.72(2), titled "Pleading in civil actions; claim for punitive damages," which provides that a defendant can be held liable "for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." Florida Statute § 768.71 in turn states that section

768.72 "applies to any action for damages, whether in tort or in contract" but that "[i]f a provision of this part"—e.g., section 768.72—"is in conflict with any other provision of the Florida Statutes, such other provision shall apply."

Section 768.72, however, is not particularly helpful in our analysis. First, SEPH cites no case where section 768.72 has been applied to claims brought under FUFTA, although it does cite two cases in which the Florida Supreme Court stated that punitive damages are appropriate where torts are committed with fraud. *See First Interstate Dev. Corp. v. Ablanedo*, 511 So. 2d 536, 539 (Fla. 1987) ("[P]unitive damages are appropriate for any tortious conduct accomplished through fraud . . . ."); *Winn & Lovett Grocery Co. v. Archer*, 171 So. 214, 221 (Fla. 1936) (stating that punitive damages "are given solely as a punishment where torts are committed with fraud"). Second, we have held that section 768.72 is procedural, not substantive, and its pleading requirements are inapplicable to federal diversity cases. *Cohen v. Office Depot, Inc.*, 184 F.3d 1292, 1295–99 (11th Cir. 1999), *vacated in part on other grounds*, 204 F.3d 1069 (11th Cir. 2000). Although not addressing the precise issue before us in this case, our decision in *Cohen* supports the conclusion that section 768.72 does not create a substantive right to punitive damages and cannot, standing on its own, provide the basis to conclude that a creditor can seek punitive damages against a transferor under FUFTA.

SEPH also points to our decision in *Alliant Tax Credit 31, Inc v. Murphy*, 924 F.3d 1134 (11th Cir. 2019), in which this Court

held that punitive damages are authorized under Georgia's UFTA. *Id.* at 1149. In *Alliant*, we recognized that, under a separate Georgia statute, "[a] court may award punitive damages 'only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed . . . fraud.'" *Id.* (quoting O.C.G.A. § 51-12-5.1(b)). We also noted that Georgia courts had repeatedly stated that "punitive damages are available in fraudulent-transfer actions," both before and after the enactment of Georgia's UFTA. *See id.* at 1149–50 (citing Georgia cases). Finally, we recognized that "[o]ne policy of punitive damages is deterrence," as "[w]ithout punitive damages, nothing other than costs would deter a debtor from attempting to fraudulently transfer his assets." *Id.* at 1150. We acknowledge the similarities between FUFTA and Georgia's UFTA. *Compare* Fla. Stat. § 726.108, *with* O.C.G.A. § 18-2-77. But unlike in Georgia, there is no Florida case law stating that punitive damages are available in fraudulent-transfer actions under FUFTA. To the contrary, the most analogous Florida case law on the issue—*Freeman*—points in the opposite direction.

Although not cited by SEPH, in *Ault v. Lohr*, 538 So. 2d 454 (Fla. 1989), the Florida Supreme Court held that "an express finding of a breach of duty should be the critical factor in an award of punitive damages" and that, as such, "a finding of liability alone will support an award of punitive damages 'even in the absence of financial loss for which compensatory damages would be appropriate.'" *Id.* at 456 (quoting *Lassiter v. Int'l Union of Operating Eng'rs*, 349 So. 2d 622, 626 (Fla. 1976)). Subsequently, in *Engle v. Liggett*

Group, Inc., 945 So. 2d 1246 (Fla. 2006), the court clarified that the required finding of liability is "more than a breach of duty," e.g., causation and reliance. *See id.* at 1262–63. *But see Morgan Stanley & Co. v. Coleman (Parent) Holdings Inc.*, 955 So. 2d 1124, 1132 (Fla. Dist. Ct. App. 2007) (holding, post-*Engle*, that "[a]ctual damages and the measure thereof are essential as a matter of law in establishing a claim of fraud" (alteration in original) (quoting *Nat'l Equip. Rental, Ltd. v. Little It. Rest. & Delicatessen, Inc.*, 362 So. 2d 338, 339 (Fla. Dist. Ct. App. 1978))). Furthermore, in applying *Ault* to a case involving a fraud claim under Florida law, we explained that an award of punitive damages was supported by Florida law where the jury made an express finding that the defendants had defrauded the plaintiff. *See Palm Beach Atl. Coll., Inc. v. First United Fund, Ltd.*, 928 F.2d 1538, 1547 (11th Cir. 1991). However, we note that "a claim for punitive damages is not a separate, free-standing cause of action . . . , but is rather a *remedy* that can be sought based on any properly pled cause of action." *Soffer v. R.J. Reynolds Tobacco Co.*, 187 So. 3d 1219, 1229 (Fla. 2016) (emphasis added).

Here, SEPH raised one actual fraud and two constructive fraud claims under FUFTA against Neverve. To prevail on a fraudulent transfer claim under FUFTA, "a creditor must demonstrate (1) there was a creditor to be defrauded, (2) a debtor intending fraud, and (3) a conveyance—i.e., a 'transfer'—of property which could have been applicable to the payment of the debt due." *Isaiah*, 960 F.3d at 1302; *accord* § 726.105(1)(a). And for a constructive

fraud claim under FUFTA, the creditor must show that the transfer was made without receiving "reasonably equivalent value in exchange" and that the debtor either (1) was engaged in (or about to engage in) "a transaction for which the remaining assets of the debtor were unreasonably small in relation to the . . . transaction" or "[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due." Fla. Stat. § 726.105(1)(b).

Without FUFTA's specific remedy provision in section 726.108, it would appear that SEPH could obtain an award of punitive damages against Neverve if the factfinder found Neverve liable for actual or constructive fraud under section 726.105(1). *See Ault*, 538 So. 2d at 456; *Engle*, 945 So. 2d at 1263; *Palm Beach Atl.*, 928 F.2d at 1547; *see also* Fla. Stat. § 726.111. But FUFTA contains a separate provision specifically enumerating a creditor's remedies against transferors, and as previously explained, we interpret section 726.108(1)(c)3.'s catch-all provision—the provision which SEPH relies on to claim it can seek punitive damages against Neverve—to contemplate only equitable remedies, which punitive damages are not. *See Bishop*, 838 F.2d at 1174.

Therefore, because the Florida Supreme Court has declined to expand FUFTA beyond its "purpose and plain language," and has instead urged a "narrow focus" when interpreting FUFTA, *see Freeman*, 865 So. 2d at 1277, we conclude that the Florida Supreme Court would not find that FUFTA allows a creditor to obtain the remedy of punitive damages against a transferor under FUFTA's

catch-all provision.[7] Accordingly, we affirm the district court's grant of summary judgment as to this claim.

3. Attorney's Fees

We next address whether a creditor, such as SEPH, may recover attorney's fees under FUFTA—another issue of first impression for this Court. The district court concluded that FUFTA did not permit recovery of attorney's fees, noting that another federal district court in Florida had reached a similar conclusion. SEPH contends that this was error, asserting that FUFTA's catch-all provision, section 726.108(1)(c)3., and section 726.111's supplementary provisions permit a creditor to recover attorney's fees under FUFTA. Again, because neither the Florida Supreme Court nor any Florida intermediate appellate court has addressed whether FUFTA allows recovery for attorney's fees, we must decide the issue the way the Florida Supreme Court would. *Ernie Haire*, 260 F.3d at 1290.

The Florida Supreme Court has stated that attorney's fees incurred in defending or prosecuting a claim "are not recoverable in the absence of a statute or contractual agreement authorizing

[7] As both SEPH and the amicus recognize, there is a divide among the States as to whether their versions of the UFTA, including the catch-all provision, allow a creditor to recover punitive damages. Based on our analysis above and the Florida Supreme Court's narrow interpretation of FUFTA in *Freeman*, we believe that court, if it were to consider out-of-state case law on the UFTA, would likely find persuasive the decisions finding that punitive damages are not recoverable under the UFTA.

their recovery." *Price v. Tyler*, 890 So. 2d 246, 250 (Fla. 2004) (quoting *Bidon v. Dep't of Pro. Regul.*, 596 So. 2d 450, 452 (Fla. 1992)). In other words, the general rule under Florida law is that each party "bears its own attorneys' fees unless a contract or statute provides otherwise." *Id.* (quoting *Pepper's Steel & Alloys, Inc. v. United States*, 850 So. 2d 462, 465 (Fla. 2003)). And "statutory authorization for attorney fees is to be strictly construed." *Sarkis v. Allstate Ins. Co.*, 863 So. 2d 210, 223 (Fla. 2003).

Turning to FUFTA, section 726.108 does not contain an express fee-shifting provision. And given our interpretation of FUFTA's catch-all provision as only contemplating equitable remedies, as well as the Florida Supreme Court's narrow interpretation of FUFTA, *see Freeman*, 865 So. 2d at 1277, and its strict construction of statutory authorization for attorney's fees under Florida law, *see Sarkis*, 863 So. 2d at 223, we conclude that the Florida Supreme Court would find that FUFTA does not permit the recovery of attorney's fees by a creditor. While SEPH points to non-Florida case law interpreting the UFTA as allowing for the recovery of attorney's fees, we do not believe the Florida Supreme Court would find those cases persuasive given its interpretation of FUFTA and, more broadly, the Florida Supreme Court's adherence to the strict construction of statutory authorization for attorney's fees.[8]

[8] In any event, as amicus notes, there is a divide among state courts as to whether their states' versions of the UFTA contemplate recovery of attorney's fees. For example, Colorado courts have found that attorney's fees are

Accordingly, the district court did not err in granting summary judgment as to this claim.

B. SEPH's Equitable Lien Claim

Finally, we turn to SEPH's equitable lien claim. The district court granted summary judgment in favor of Neverve on this claim. Noting that it was undisputed Neverve was not in current possession of the BP proceeds, the district court determined that Neverve lacked the authority to impose an equitable lien on those proceeds, even if Neverve had established the elements necessary to obtain such a lien.

SEPH argues that the district court erred because FUFTA allows for an injunction against a debtor that prevents the debtor from further disposing of an asset—here, the BP proceeds. *See* Fla. Stat. § 726.108(1)(c)1. We reject this argument. As an initial matter, unlike its claims for actual and constructive fraud, SEPH waived any argument that it was entitled to equitable relief under FUFTA—an argument it asserts for the first time on appeal. *See Access Now, Inc. v. Sw. Airlines Co.*, 385 F.3d 1324, 1331 (11th Cir. 2004) ("This Court has 'repeatedly held that "an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court."'" (quoting *Walker v. Jones*, 10 F.3d 1569, 1572 (11th Cir. 1994))). Moreover, Florida law's "established rule for imposition of an equitable lien is that the property in

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unavailable under Colorado's version of the UFTA. *See Morris v. Askeland Enters., Inc.*, 17 P.3d 830, 833 (Colo. App. 2000).

litigation must be in the possession of the defendant." *Richard Bertram & Co. v. Barrett*, 155 So. 2d 409, 412 (Fla. Dist. Ct. App. 1963). And it is undisputed that Welch and WLF—not Neverve—are in possession of the BP proceeds. Therefore, the district court did not err in granting summary judgment on SEPH's equitable lien claim.

IV. CONCLUSION

While we do not condone the alleged conduct by Neverve, Welch, and WLF in this case, the relief SEPH seeks against Neverve is not permitted under FUFTA. Nor does Neverve currently possess the assets on which SEPH seeks an equitable lien. Thus, we affirm the district court's order granting summary judgment in favor of Neverve on SEPH's claims.

AFFIRMED.

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

SUZANNE FERRY,

Appellant,

v.

E-Z CASHING, LLC,

Appellee.

No. 2D22-1201

April 5, 2023

Appeal from the Circuit Court for Pinellas County; Cynthia J. Newton, Judge.

Joseph F. Milligan, George K. Rahdert, and George A. Thurlow of Rahdert & Mortimer, PLLC, St. Petersburg, for Appellant.

John Schank and David Neal Stern of Frank, Weinberg & Black, P.L., Plantation, for Appellee.

LaROSE, Judge.

Suzanne Ferry appeals the trial court's "Amended Final Judgment of Foreclosure," as well as its "Order Granting Creditor E-Z Cashing, LLC's Motion for Assignment of Leases and Rents." We have jurisdiction. *See* Fla. R. App. P. 9.030(b)(1)(A); 9.130(a)(3)(C)(ii). We reverse the amended final judgment. We affirm the trial court's order assigning leases and rents.

Background

In 2005, Ms. Ferry executed a note, secured by a mortgage, to finance the purchase of commercial property. InterBay Funding, LLC, was the lender. Ms. Ferry also executed a separate "Assignment of Leases and Rents" in favor of InterBay.

In 2006, InterBay transferred its interest in the note, mortgage, and assignment of leases and rents to Bayview Loan Servicing, LLC.

Ms. Ferry defaulted on her payment obligations. Bayview filed a foreclosure action in 2007. In October 2010, the trial court entered a "Consent Final Judgment of Foreclosure" in favor of Bayview. The consent foreclosure judgment is silent as to the assignment of leases and rents.

Prior to a scheduled foreclosure sale in early 2011, Ms. Ferry filed for bankruptcy protection. As a result, the foreclosure action was stayed. *See* 11 U.S.C. § 362(a). The case lay dormant for nearly a decade. The bankruptcy court lifted the stay in 2020.

In late 2019, however, Bayview assigned the mortgage to E-Z Cashing. Bayview also executed an "Assignment of Leases and Rents" in favor of E-Z Cashing. That document also transferred the note to E-Z Cashing. *See Wells Fargo, N.A. v. Cook*, 276 So. 3d 997, 1001 (Fla. 2d DCA 2019) (concluding that Wells Fargo established standing through introduction of "[t]he assignment of mortgage attached to the complaint and introduced into evidence at trial [which] assigned and transferred all interest in the mortgage—together with the note . . . to Wells Fargo").

In June 2020, E-Z Cashing sought to substitute itself as the plaintiff in the foreclosure action. *See* Fla. R. Civ. P. 1.260(c). E-Z

Cashing wanted "to enforce the Loan Documents as the holder in due course."[1] The trial court allowed substitution.

Some six months later, E-Z Cashing filed an "Amended Motion to Amend Final Judgment and Reschedule Foreclosure Sale." E-Z Cashing claimed that its "standing to enforce the loan documents and Final Judgment" sprang from Bayview's 2019 assignments. E-Z Cashing "request[ed] that the [consent foreclosure judgment] be amended to reflect the current indebtedness owed under the Loan Documents . . . and that the foreclosure sale . . . be rescheduled." After another six months, E-Z Cashing filed its "Motion to Determine Amount of Final Judgment and For Order Rescheduling Foreclosure Sale" and "Motion for Order Assigning Leases and Rents." Ms. Ferry opposed these motions, arguing that E-Z Cashing's "claim [wa]s barred by the doctrine of merger."

Following a February 2022 hearing, the trial court entered the amended final judgment and order now before us. The amended final judgment recites that E-Z Cashing "holds a first priority mortgage/lien against the real property." The trial court also granted E-Z Cashing entitlement to all leases and rents Ms. Ferry received from April 2020 through the sale of the foreclosed property.

Analysis

Our record contains no transcript of the February 2022 hearing. This deficiency often proves fatal to the appellant's case. *See, e.g.*, *1321 Whitfield, LLC v. Silverman*, 67 So. 3d 435, 437 (Fla. 2d DCA 2011) (affirming final foreclosure judgment where, due to absence of hearing

[1] E-Z Cashing used the term "loan documents" to collectively refer to the "Note, Mortgage[,] and Assignment of Leases and Rents."

transcript, this court was unable to meaningfully review the trial court's findings). But not always. *See MTGLQ Invs., L.P. v. Merrill*, 312 So. 3d 986, 993 (Fla. 1st DCA 2021).

The absence of a transcript does not hinder our review when a legal error plainly appears on the face of the record. *See Reyes v. Home Loans Servicing L.P.*, 226 So. 3d 354, 356 (Fla. 2d DCA 2017) ("Although BAC urges this court to affirm in light of the lack of a transcript, we are not constrained to do so if there is error apparent on the face of the record."). That is the case here as to the amended final judgment.

I. Amended Final Judgment

Contrary to the trial court's finding, E-Z Cashing had no enforceable interest in the note and mortgage. Any interest in those instruments had merged into the October 2010 consent foreclosure judgment. *See Nassau Realty Co. v. City of Jacksonville*, 198 So. 581, 582 (Fla. 1940) ("In judgments and decrees rendered in suits foreclosing a preexisting lien the establishment of the lien is accomplished by the judgment or decree and the lien foreclosed is by the judgment of the court merged into the judgment or decree."); *Nack Holdings, LLC v. Kalb*, 13 So. 3d 92, 94 n.2 (Fla. 3d DCA 2009) ("The mortgage . . . merged into the judgment, [wa]s thereby extinguished, and 'los[t] its identity.' " (quoting *Whitehurst v. Camp*, 699 So. 2d 679, 682 (Fla. 1997))); *Chrestensen v. Eurogest, Inc.*, 906 So. 2d 343, 345 n.4 (Fla. 4th DCA 2005) (" 'The doctrine of merger operates to extinguish a cause of action on which a judgment is based and bars a subsequent action for the same cause.' Under this doctrine, 'the debt or cause of action on which an adjudication is predicated is said to be merged into the final judgment.' " (quoting *Sunshine Utils. Equip., Inc. v. Treasure Coast Utils., Inc.*, 421 So. 2d 1096, 1097 (Fla. 4th DCA 1982))); *see also Weston Orlando Park, Inc.*

v. Fairwinds Credit Union, 86 So. 3d 1186, 1187 (Fla. 5th DCA 2012) ("The doctrine of merger provides that when a valid and final judgment is rendered in favor of a plaintiff, the original debt or cause of action upon which an adjudication is predicated merges into the final judgment, and, consequently, the cause's independent existence terminates. As such, the promissory notes and the mortgages merge[] into the final judgment." (citations omitted)). As a result, any interest E-Z Cashing held in the note and mortgage lacked legal significance. *Cf. Nullity*, Black's Law Dictionary 1236 (Deluxe 10th ed. 2014) (defining a "nullity" as "[s]omething that is legally void"). Notably, as far as our record discloses, E-Z Cashing acquired no interest in the consent foreclosure judgment from Bayview.

Under these circumstances, the trial court's finding that E-Z Cashing "holds a first priority mortgage/lien against the real property" is wrong. *See JPMorgan Chase Bank, N.A. v. Hernandez*, 99 So. 3d 508, 511 (Fla. 3d DCA 2011) ("The Promissory Note and the Mortgage merged into the final judgment upon its entry."); *One 79th St. Ests., Inc. v. Am. Inv. Servs.*, 47 So. 3d 886, 889 (Fla. 3d DCA 2010) ("When a mortgage is foreclosed, the mortgage is 'merged' into the final judgment and loses its separate identity."). The trial court erred in amending the foreclosure judgment premised upon the assignment of extinguished "loan documents." *See Diamond R. Fertilizer Co. v. Lake Packing P'ship*, 743 So. 2d 547, 548 (Fla. 5th DCA 1999) ("[A] cause of action upon which an adjudication is predicated merges into the judgment and . . . consequently, the cause of action's independent existence perishes upon entry of the judgment."); *Vernon v. Serv. Trucking, Inc.*, 565 So. 2d 905, 907 (Fla. 5th DCA 1990) ("[A] debt reduced to final judgment merges into the final judgment and loses its prejudgment identity.").

II. Order Granting Creditor E-Z Cashing's Motion for Assignment of Leases and Rents

Ms. Ferry also attacks the trial court's "Order Granting Creditor E-Z Cashing, LLC's Motion for Assignment of Leases and Rents." She insists that the October 2010 consent foreclosure judgment "extinguished any cause of action that may have arisen thereunder based upon the principle of merger." On this score, Ms. Ferry's argument stalls. She offers no cases supporting her merger theory as to the assignment of leases and rents. Our own research uncovered no support for her position.

"[A] mortgagor and mortgagee are free to contract for an assignment of rents, and enforcement of that assignment will be governed by [section 697.07, Florida Statutes (1993)]."[2] *Ginsberg v. Lennar Fla. Holdings, Inc.*, 645 So. 2d 490, 498 (Fla. 3d DCA 1994). An assignment of rents serves as added security for repayment of a debt. § 697.07(1), Fla. Stat. (2019); *e.g.*, *Seaspray Resort, Ltd. v. UCF I Tr. 1*, 260 So. 3d 333, 334 (Fla. 4th DCA 2018) ("The borrowers took out a $4.8 million loan . . . to refinance an existing loan and renovate the hotel. As additional security for the loan, they executed and recorded an 'assignment of leases and rents,' separate from the mortgage."); *Oakbrooke Assocs. v. Ins. Comm'r of Cal.*, 581 So. 2d 943, 943 (Fla. 5th DCA 1991) ("The note was secured by a mortgage and by a collateral assignment of rents and leases."); *see*

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[2] Section 697.07(3), Florida Statutes (2019), provides as follows:

> [T]he assignment of rents shall be enforceable upon the mortgagor's default and written demand for the rents made by the mortgagee to the mortgagor, whereupon the mortgagor shall turn over all rents in the possession or control of the mortgagor at the time of the written demand or collected thereafter . . . to the mortgagee less payment of any expenses authorized by the mortgagee in writing.

generally ch. 702, Fla. Stat. (2020) ("Foreclosure of Mortgages and Statutory Liens").

We recently observed that "[a]n assignment of rents creates a lien on the rents in favor of the mortgagee, and the mortgagee will have the right to foreclose that lien and collect the rents, without the necessity of foreclosing on the underlying mortgage." *Green Emerald Homes, LLC v. Residential Credit Opportunities Tr.*, 256 So. 3d 211, 214 (Fla. 2d DCA 2018) (quoting *Ginsberg*, 645 So. 2d at 498). The foreclosure of the mortgage and the foreclosure of the assignment of leases and rents are separate and independent actions; foreclosure of one neither prevents nor requires foreclosure of the other. Consequently, we cannot agree that the assignment of leases and rents merged into the judgment.

OPS Shopping Center, Inc. v. Great Southern Federal Savings Bank, 532 So. 2d 1323 (Fla. 1st DCA 1988), buttresses our conclusion. Our sister district was

> not persuaded that once the foreclosure judgment was entered, Great Southern's liens on the property and rents and profits therefrom, which the receiver was charged with collecting and accounting for, merged with the judgment and no longer had any separate existence so as to deprive the receiver of authority to continue exercising his powers and duties with respect to such property under the receivership order.

Id. at 1323-24. *OPS Shopping Center, Inc.*, cited *Cone-Otwell-Wilson Corp. v. Commodore's Point Terminal Co.*, 114 So. 232 (Fla. 1927), in which the supreme court stated that

> [i]f the mortgagor fails to redeem, and the receiver continues in the management of the property after the final decree and until the purchaser at the sale is put in possession, any additional funds arising during that interval can then be reported by the receiver and distributed under proper order of

> the court according to the equities of the case and the rights and priorities of the parties to the suit.

Id. at 234. If the receipt of leases and rents can offset any judgment debt, it follows that the collateral assignment survives the foreclosure judgment.

OPS Shopping Center, Inc., and *Cone-Otwell-Wilson Corp.* involved receiverships. However, that distinction does not alter our outcome. *Cf. Ormond Beach Assocs. v. Citation Mortg., Ltd.*, 634 So. 2d 1091, 1092 (Fla. 5th DCA 1994) ("Under the 'lien theory' of Florida law, there is no transfer of ownership in rents until there is a change in ownership of the underlying property. Before enactment of [section 697.07], a mortgagee's only way to protect rents subject to assignment on default, until title passed through foreclosure, was to obtain appointment of a receiver." (citation omitted)). As Bayview's assignee, E-Z Cashing possessed the right to leases and rents from April 2020 until the sale of the foreclosed property. *See Rhoden v. FDIC*, 619 So. 2d 480, 482 (Fla. 2d DCA 1993) ("Mortgaged property remains the property of the mortgagor until he is divested of ownership, normally by the order confirming the sale of the mortgaged property. . . . [T]he notice of sale and certificate of title here described only the real property. As a result, the purchaser 'secured no ownership interest in the rentals except those accruing subsequent to securing the title to the rental property.' " (first citing and then quoting *Tymber Skan Props. Ltd. v. Lutheran Mut. Life Ins. Co.*, 358 So. 2d 1370, 1372-73 (Fla. 2d DCA 1978))).

Conclusion

The note and mortgage held by E-Z Cashing merged into the 2010 consent foreclosure judgment. We reverse the trial court's "Amended Final Judgment of Foreclosure." Finding no merit in Ms. Ferry's

arguments challenging the "Order Granting Creditor E-Z Cashing, LLC's Motion for Assignment of Leases and Rents," we affirm that order.

Anomalously, E-Z Cashing may collect on the leases and rents from Ms. Ferry while Bayview, as the judgment creditor, may sell the foreclosed property. *See* § 45.031(1)(a), Fla. Stat. (2022). Given the purpose of the assignment and the scope of the trial court's order, Ms. Ferry will not be exposed to the specter of duplicative financial exposure, as the assignment of rents is merely security for the repayment of the indebtedness.

Affirmed, in part; reversed, in part; remanded for further proceedings consistent with this opinion.

NORTHCUTT and BLACK, JJ., Concur.

Opinion subject to revision prior to official publication.