No. 23-3757

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION, Plaintiff - Appellee, v. JAMES D. NOLAND, Jr., LINA NOLAND, SCOTT HARRIS, and THOMAS G. SACCA, Defendants - Appellants.	**No. 23-3757** D.C. No. 2:20-cv-00047-DWL U.S. District Court for Arizona, Phoenix **OPENING BRIEF**

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Corporate Disclosure Statement

In accordance with Fed. R. App. Proc. 26.1(a) and 28(a)(1), Plaintiffs-Appellants James D. Noland, Jr., Lina Noland, Scott Harris, and Thomas G. Sacca certify that neither they nor any other parties are parents, subsidiaries, or affiliates of any publicly-owned corporation.

DATED this 24th day of June, 2024.

/s/ David L. Abney, Esq.
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Black's Law Dictionary (11th ed. 2019) 28, 55

Christopher Bradley & Hannah E. Oates, *The Multi-Level Marketing Pandemic*, 89 Tenn. L. Rev. 321 (2022) 38

David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* (Paper at FTC 90th Anniversary Symposium, Sept. 23, 2004) 31-32

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Most Relevant Sections of the Federal Trade Commission Act

For this proceeding, the Federal Trade Commission Act's two most relevant sections are:

Section	United States Code
§ 13(b)	15 U.S.C. § 53(b)
§ 19	15 U.S.C. § 57b

Introduction

This appeal is about the Federal Trade Commission misusing federal law to freeze and seize assets, impose a strangling receivership, and obtain a temporary restraining order, preliminary injunction, permanent injunction, and a massive "compensatory sanction" judgment that devastated the lives and livelihoods of formerly prosperous entrepreneurs and their businesses.

The FTC first did that by using § 13(b) of the Federal Trade Commission Act ("Act") to freeze and seize almost all of the target defendants' assets, to impose a receiver who ruined the prosperity of the Individual Defendants and their businesses, and to obtain improper disgorgement and money awards and sanctions. In addition, the FTC refused to follow the protective due process procedures provided under § 19 of the Act.

In this case, the FTC started using § 13(b) instead of § 19, although it knew that the FTC had no statutory right to do use § 13(b) to freeze and seize assets and to impose a receivership.

The district court should have stopped the FTC's illegal and improper § 13(b) financial assault on the target defendants and businesses. Instead, the district court allowed the FTC's deliberate misuse of the Act to continue, even when precedent from the Supreme Court forbid what the district court was doing.

Congress passed the Act in 1914, and amended it since then, to protect the rights of consumers while also protecting the due process rights of those persons that the FTC regarded as having possibly violated the Act and the FTC's rules. This appeal asks this Court to interpret and apply the Act and the FTC's rules based on the Act in the evenhanded, protective way that Congress intended.

Jurisdictional Statement

This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

Statement of Issues Presented for Review

Section 19 action under the Merchandise Rule. Under the terms of § 19 of the Act, did the FTC have a viable cause of action for violation of the Merchandise Rule and, if so, could the FTC use that Rule to freeze, seize, and mismanage the target defendants' assets?

Section 19 action under the Cooling-Off Rule. Under the terms of § 19 of the Act, did the FTC have a viable cause of action for violation of the Cooling-Off Rule and, if so, could the FTC use that Rule to freeze, seize, and mismanage the target defendants' assets?

Failure to require receivership bond. When there was no justification under either § 13(b) or § 19 of the FTC Act for ordering the freeze, seizure, and receivership of all of the Individual Defendants' significant assets, did the trial court abuse discretion by failing to require a receivership bond?

Award of massive civil compensatory sanction. Under *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1965), and in accordance with similar legal authorities, did the district court commit an error of law and abuse discretion by awarding a civil compensatory sanction when there was never proof that the FTC or any consumer or group of consumers had sustained losses and the amount of any losses?

Abandonment. Did the Receiver abandon the Corporate Defendants by refusing to fund their defense or to cooperate in letting the Individual Defendants defend the Corporate Defendants, and instead by going along with whatever the FTC wanted the Receiver to do and by failing to use any of the frozen and seized assets to actually benefit any allegedly injured consumer.

Denial of livelihood. The district court imposed an order depriving the individual Defendants of the right to practice their chosen profession of multi-level marketing. Was that a constitutional error?

Standard of Review

Resolution of this case hinges on interpreting the Act and FTC rule created

under the Act. This Court reviews questions of statutory interpretation de novo. *Ehart v. Lahaina Divers, Inc.*, 92 F.4th 844, 849 (9th Cir. 2024). De novo is also the standard of review for the review of agency regulations. *United States v. Bohn*, 622 F.3d 1129, 1135 (2010).

Moreover, this Court reviews the legal issues underlying grant of injunctive relief de novo because a district court would necessarily abuse its discretion if it based its injunctive ruling on an erroneous view of the law. *Chamber of Commerce of the United States v. Bonta*, 62 F.4th 473, 481 (9th Cir. 2023).

Statement of the Case

Factual and Procedural History

1. The FTC's unanticipated and secret (under-seal) attack.

On January 8, 2020, the FTC filed a secret (under-seal) "Complaint for Permanent Injunction and Other Equitable Relief" against: (1) James D. Noland, Jr., (2) Lina Noland; (3) Scott A. Harris, and (4) Thomas F. Sacca, Jr.—and against (5) Success By Media Holdings, Inc., and (6) Success By Media LLC. (Doc-003).

The district court filed an under-seal Order on January 8, 2020, allowing the FTC to filed its under-seal Complaint. (Doc-002).

The under-seal Complaint asserted that the Defendants had supposedly committed deceptive acts or practices that allegedly violated 15 U.S.C. § 45(a) when they:

(1) operated, promoted, or participated in an unlawful pyramid scheme, (Doc-003-CountI-¶¶111-112) (2-ER-420-421);

(2) made income misrepresentations, (Doc-003-CountII-¶¶113-115) (2-ER-421);

(3) provided the means and instrumentalities for commission of supposedly constituted deceptive acts or practices (Doc-003-CountIII-¶¶113-117) (2-ER-421-422);

(4) violated the Merchandise Rule, by failing to seek consents or to offer cancellations (Doc-003-CountIV-¶¶123-124) (2-ER-423);

(5) failed to provide cancellations or refunds (Doc-003-CountV-¶¶125-131) (2-ER-423-425);

(6) violated the Cooling-Off Rule by allegedly failing to notify consumers about cancellation rights, (Doc-003-CountVI-¶¶132-134) (2-2-ER-425-426);

The secret (under-seal) Complaint demanded preliminary injunctive and ancillary relief, a permanent injunction, rescission, reformation, restitution, refund of monies paid, "disgorgement of ill-gotten gains," the costs of bringing the action, and whatever other relief the district court might decide was "just and proper." (Doc-003-Pages40-41) (ER-427-428).

In keeping with its under-seal tactics, also on January 8, 2020, the FTC filed an under-seal ex parte motion for a TRO seeking an asset freeze, appointment of a temporary receiver, limited expedited discovery, and other equitable relief. (Doc-007).

The FTC argued that an asset freeze was supposedly "necessary" to preserve

"illicit proceeds" for restitution to the alleged victims. (Doc-008-at46-47). At an ex parte hearing held on January 9, 2020, the FTC claimed that § 13(b) of the Act gave to the FTC the authority to seek and obtain permanent injunctions in proper cases although the FTC did not contemplate any § 19 administrative proceedings. *Transcript*10:7-11(01/09/2020)(Doc-063) (2-ER-383-384). At that secret hearing, the FTC lawyer avowed that the purpose of the asset freeze was "to preserve assets" *Transcript*15:18-19(01/09/2020)(Doc-063) (2-ER-384) emphasizing that the "primary purpose" was "to preserve whatever assets there may be and prevent dissipation." *Transcript*16:6-8(01/09/2020)(Doc-063) (2-ER-385).

In other filings, the FTC claimed that legal remedies were "inadequate given the need to protect assets for consumer redress pending the outcome of the litigation." (Doc-076at20:10-11).

On January 13, 2020, the district court filed an under-seal order (Doc-019), an amended under-seal order, (Doc-020), and an amended under-seal order (Doc-021), granting the TRO, asset freeze, and other equitable relief, and setting an order-to-show-cause hearing why a preliminary injunction should not issue against the Defendants.

In a report that the TRO Receiver filed on February 20, 2020, she reported that, on January 14, 2020, she had "served multiple bank and payment processor institutions with the TRO" and "identified and froze $440,538.27 in receivership

funds." (Doc-082-1at6).

We pause at this point to ask if any of those frozen assets went to consumer redress—which was the pretext for freezing them? Or did the frozen assets instead go to pay the Receiver, to pay the Receiver's lawyers, and to pay the Receiver's "consultants?" Here is what we know so far:

(1) Receiver's payments for period of 01/10/2020 to 02/29/2020 (Doc-136)(04/21/2020)

$ 38,737.50	Paid to Receiver
$ 63,330.92	Paid to Osborn Maledon (Receiver's lawyers)
$ 49,420.74	Paid to Receiver's consultants
$ 00.00	Amount paid for consumer redress

(2) Receiver's payments for period of 03/01/2020 to 04/30/2020 (Doc-154)(06/24/2020)

$ 19,687.50	Paid to Receiver
$ 27,538.00	Paid to Osborn Maledon (Receiver's lawyers)
$ 12,679.00	Paid to Receiver's consultants
$ 00.00	Amount paid for consumer redress

(3) Receiver's payments for period of 05/01/2020 to 07/31/2020 (Doc-199)(09/21/2020)

$ 50,450.00	Paid to Receiver
$ 39,454.25	Paid to Osborn Maledon (Receiver's lawyers)
$ 10,040.70	Paid to Receiver's consultants
$ 00.00	Amount paid for consumer redress

(4) Receiver's payments for period of 08/01/2020 to 10/31/2020 (Doc-249)(12/16/2020)

$ 11,970.00	Paid to Receiver
$ 11,950.80	Paid to Osborn Maledon (Receiver's lawyers)
$ 11,163.45	Paid to Receiver's consultants

$ 00.00	Amount paid for consumer redress

(5) Receiver's payments for period of 11/01/2020 to 01/31/2020 (Doc-320)(01/31/2021)

$ 4,995.00	Paid to Receiver
$ 18,656.97	Paid to Osborn Maledon (Receiver's lawyers)
$ 6,035.61	Paid to Receiver's consultants
$ 00.00	Amount paid for consumer redress

(6) Receiver's payments for period of 02/01/2021 to 07/31/2021 (Doc-415)(09/29/2021)

$ 6,018.76	Paid to Receiver
$ 12,864.77	Paid to Osborn Maledon (Receiver's lawyers)
$ 7,179.65	Paid to Receiver's consultants
$ 00.00	Amount paid for consumer redress

All money paid to the Receiver, to the Receiver's lawyers, and to the Receiver's consultants came out of the Defendants' frozen and seized assets. The figures are not estimates, but come from official Orders the district court filed. And so, from January 10, 2020 until July 31, 2021, the district court authorized payment to the Receiver, to the Receiver's lawyers, and to the Receiver's consultants, of the following amounts:

$ 131,858.76	Paid to Receiver
$ 173,795.71	Paid to Osborn Maledon (Receiver's lawyers)
$ 96,519.15	Paid to Receiver's consultants
$ 402,173.62	Total paid under the above six district-court Orders

In an apparently final report filed on December 18, 2023, the Receiver reported that it only had $48,539.22 in frozen and seized assets as of October 31,

2023, and intended to pay out the money as follows: $24,611.09 to the Receiver's lawyers (Osborn Maledon) and $23,928.13 to the Receiver's consultant. (Doc-607-1at3-4).

It is easy to add up the payments made for consumer redress—the pretext for freezing and seizing the Defendants' assets and imposing a costly, cumbersome, and business-destroying receivership. Those consumer redress payments add up to $ 00.00. No payments have been made to any allegedly wronged consumer for any consumer redress, although that was the pretext for freezing and seizing the Defendants' assets and imposing the expensive and unproductive receivership in the first place. Not one penny has gone to any consumer.

The Receiver, the Receiver's lawyers, and the Receiver's consultants were all handsomely enriched. But the purported beneficiaries of the efforts of the Receiver, the Receiver's lawyers, and the Receiver's consultants got nothing at all. The § 19 consumer-redress pretext for freezing and seizing the Defendants' assets and imposing a counter-productive receivership was just that—a pretext.

At the close of the case, the FTC wrote that the "asset freeze exists to protect the FTC's right to recover its judgment against the Individual Defendants and ultimately provide redress to [the] Individual Defendants' victims" (Doc-605at3:6-9), but later more honestly admitted that the FTC is "the party being protected by the asset freeze." (Doc-605at3:10-11). The FTC claimed that it sought the freeze to

preserve funds to be returned to Defendants' victim." (Doc-602at1:22-23). The facts prove otherwise.

The district court itself acknowledged that "the point of the asset freeze was, in part, to protect the *FTC's* ability to collect on a future judgment" but claimed that the "overarching purpose of the asset freeze" supposedly was "to prevent the improper dissipation of the Individual Defendants' assets." (Doc-606at5:24to6:2) (italics in original). In the end, the only dissipation of seized and frozen assets that occurred took place when the Receiver paid itself and its lawyers and consultants over $450,000 of seized and frozen assets—to the point that there were no seized and frozen money assets left even if the FTC had wanted to provide redress for any consumers—which the FTC never did.

Indeed, the FTC admitted that, "if [the] Individual Defendants *prevail* in full on their appeal, the Cour's asset freeze may be fully dissolved." (Doc-605at3—footnote2) (emphasis in original). Indeed, if this appeal prevails, the asset freeze must be dissolved and all money and other assets seized from the Defendants at the direction or instigation of the FTC and the Receiver must be promptly disgorged and returned to the Defendants—with interest.

2. The Defendants respond to the FTC attack.

To resume the story, as the FTC intended, its secret initial assault against the Defendants shocked them—both because it was secretly hatched and launched, and

because it was unjustified. Still, they responded as well as they could.

On January 14, 2020, Defendants Success by Media Holdings, Inc. and Success by Media LLC (collectively "SBM") filed a motion to modify the TRO. (Doc-022). On January 17, 2020, the district court filed an Amended Order keeping the TRO in place. (Doc-038) (2-ER-316)

On February 6, 2020, the Defendants filed their Answer (Doc-070) and a response to the TRO motion. (Doc-072).

3. The lawsuit lasted several years, resulting in a series of adverse orders and rulings.

On February 28, 2020, the district court filed a lengthy, convoluted order imposing a preliminary injunction and providing for other relief against the target Defendants. (Doc-109) (2-ER-260). The order resulted in seizing and freezing the target Defendants' assets, required highly intrusive financial disclosures, and appointed a receiver (without bond) to take over and manage everything, with the receiver and the receiver's staff to be paid from the frozen and seized assets. (Doc-109) (2-ER-260).

The lack of a bond is puzzling. Since there never was any justification under either § 13(b) or under § 19 for freezing assets, seizing assets, and imposing a receivership, the lack of a bond means that, if this Court concludes that the receivership should have never been imposed in the first place, the Receiver will be liable for the full damages that the receivership, and its related asset freeze and

asset seizure caused, without a bond for the Individual Defendants to turn to for reliable, rapid compensation for the massive losses that the asset freeze, asset seizure, and receivership caused them to suffer.

Of course, as here, any "receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof." 28 U.S.C. § 754. Here, the property over which the FTC sought appointment of a receiver was located in different districts. But despite that, the district court failed to set the amount of the mandatory bond.

Failure to require a bond under all of these circumstances represents a clear abuse of discretion on the part of the district court. That abuse of discretion is even more evident because the Individual Defendants had demanded that a bond be posted, and pointed out to the district court that the FTC had never explained why no bond was needed when such drastic financial action was being taken against the assets of the Individual Defendants. (Doc-072at33:6-22) (Doc-076at33:6-22).

The two-fold facetious explanation that the FTC threw out for not having a bond was that it was the job of the Individual Defendants "to submit evidence on likely damages" and that, since the Individual Defendants were insolvent, it was "unclear" to the FTC how the injunction would damage them. (Doc-079at19-

footnote6) (Doc081at19-footnote6).

The damage caused to a person by freezing and seizing all of that person's assets is self-evident. Moreover, if the Defendants were completely insolvent, as the FTC light-heartedly argued, there would be nothing to seize and freeze or to require the imposition of an expensive receivership. It was precisely because there were assets to freeze and seize and on which to impose an expensive, total, asset-consuming receivership that the FTC wrongfully invoked § 13(b). The failure to impose a bond when the FTC demanded the complete freezing, seizure, and all-inclusive receivership over every meaningful asset was a clear abuse of discretion.

On September 23, 2020, after months of wastage of the assets of the target Defendants and their businesses by the receiver and the receiver's staff, the FTC filed a second amended complaint that reiterated almost verbatim the FTC's previous claims and demands. (Doc-205).

On July 30, 2021, after months of inconclusive skirmishing, the Defendants filed a motion to dissolve the preliminary injunction and to stay or dismiss the § 13(b) proceedings seeking equitable monetary damages and relief. (Doc-383).

On August 30, 2021, the district court filed an Order imposing spoliation sanctions against the individual Defendants based on their supposed efforts to conceal and destroy evidence. (Doc-401) (1-ER-165). To make things bleaker, on September 9, 2021, the district court granted the FTC's motion for summary

judgment on liability for violations of various provisions of the Federal Trade Commission Act and of the "Merchandise Rule" and the "Cooling-Off Rule" (Doc-406) (1-ER-110).

There was then a short break in the proceedings while the target Defendants pursued an interlocutory appeal to the Ninth Circuit following the landmark case of *AMG Capital Management, LLC v. FTC*, 593 U.S. 67 (2021). This Court, however, did not chose to intervene and stated it would "leave it to the district court in the first instance to consider whether and to what extent the decision in *AMG* . . . bears on the preliminary injunction." *FTC v. Noland*, 854 Fed. Appx. 898 (9th Cir. 2021).

After remand from the appellate excursion, on September 23, 2021, the district court filed an Order granting the FTC's motion for a preliminary injunction with an asset freeze and denying the individual Defendants' motion to stay or dismiss the § 13(b) proceedings. (Doc-412) (1-ER-094). Oddly, the district court incorrectly rejected the point that the only claims properly before the district court were the FTC's rule-based claims under § 19. (Doc-412at11:17-21) (1-ER-104).

The district court also ruled that the alleged § 19 rule violations somehow justified the asset freeze. (Doc-412) (1-ER-094). But § 19 neither directly nor indirectly contemplates or allows for seizing or freezing assets, but only allows for such remedies as "rescission or reformation of contracts, the refund of money or

return of property, [and] the payment of damages" as is "necessary to redress injury to consumers" or other relevant entities resulting from a rule violation or from an unfair or deceptive act or practice. 15 U.S.C. § 57b(b). An asset seizure or freeze is none of those things.

On June 29, 2022, the district court filed an Order that denied the individual Defendants' motion to exclude the FTC's claim for monetary damages as a Rule 37 sanction. (Doc-509) (1-ER-061).

The district court conducted a bench trial over the course of 11 trial days in January and February 2023. (Doc-579at1:15-16). The bench trial was held on:

Jan. 25, 2023	(Doc-534)
Jan. 26, 2023	(Doc-538)
Jan. 27, 2023	(Doc-541)
Jan. 30, 2023	(Doc-544)
Jan. 31, 2023	(Doc-545)
Feb. 1, 2023	(Doc-547)
Feb. 2, 2023	(Doc-548)
Feb. 3, 2023	(Doc-559)
Feb. 6, 2023	(Doc-562)
Feb. 7, 2023	(Doc-563)
Feb. 8, 2023	(Doc-564)

In a 131-page Order filed May 11, 2023, the district court set out its resulting findings of fact and conclusions of law. (Doc-579).

On September 18, 2023, the district court granted two similar final orders of permanent injunction and monetary judgment, one for Defendants Success by Media Holdings, Inc., Success by Media LLC, and Enhanced Capital Funding

(Doc-591) (1-ER-035) and one for the "Individual Defendants"—James D. Noland, Jr., Lina Noland, Scott Harris, and Thomas G. Sacca. (Doc-592) (1-ER-010). On Sept. 18, 2023, the district court filed a final, appealable "Judgment." (Doc-596) (1-ER-006). On November 17, 2023, the Individual Defendants filed "Defendants' Notice of Appeal." (Doc-601) (2-ER-430).

Legal Argument

1. The Federal Trade Commission Act offers two ways for the FTC to proceed against suspected violations of the Act. Section 13(b) focuses on certain equitable remedies while Section 19 focuses on certain monetary remedies.

In 1914, as part of its reform program during the heyday of the Progressive Era, Congress passed the Federal Trade Commission Act ("Act"), Pub. L. No. 63-203, 38 Stat. 717 (1914) (codified and amended at 15 U.S.C. §§ 41, *et seq*.).

The Act created the Federal Trade Commission ("FTC") and gave it the power to "prevent" persons from "using unfair methods of competition in commerce." *Id*., Ch. 311, 38 Stat. at 719. Congress later broadened the FTC's mandate. Thus, the current version of the Act's § 5 "empower[s] and direct[s] [the FTC] to prevent" persons from using "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(2). This Court has construed § 5 to encompass any practices "'likely to mislead consumers acting reasonably under the circumstances.'" *FTC v. Stefanchik*, 559 F.3d 924, 928 (9th Cir. 2009).

The Act primarily gives the FTC certain administrative tools for carrying out

its mission. Section 5 authorizes the FTC to conduct an administrative adjudication if it "ha[s] reason to believe" that someone has violated or is violating the prohibition on unfair or deceptive acts or practices. 15 U.S.C. § 45(b). If, after an administrative hearing, the Commission decides that "the act or practice in question is prohibited" under § 5, it must make a written report and issue a "cease and desist" order. Id.

The Act also grants the FTC rulemaking authority to "define with specificity acts or practices which are unfair or deceptive" within the meaning of § 5, 15 U.S.C. § 57a(a)(1)(B), and provides procedures for the FTC to exercise that authority. 15 U.S.C. § 57a(b).

In the 1970s, Congress amended the Act to give to the FTC authority to enforce its orders in district court, and to seek relief in district court in the first instance. *See Trans-Alaska Pipeline Authorization Act*, Pub. L. No. 93-153, § 408(c), 87 Stat. 584, 591 (1973); *Magnuson-Moss Warranty—Federal Trade Commission Improvement Act*, Pub. L. No. 93-637, tit. II, § 206, 88 Stat. 2183, 2201-2202 (1975).

In 1973, Congress amended the Act's § 5(l) to authorize the FTC to enforce its final administrative cease-and-desist orders in district court. *See* 87 Stat. at 591 (codified as amended at 15 U.S.C. § 45(l)). Section 5(l) provides that the FTC may bring a "civil action" to recover "penalt[ies]" from anyone who "violates" a final

order of the FTC. Section 5(l) also provides that, in "such actions," district courts may "grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the [FTC]." *Id*.

Also in 1973, Congress enacted § 13(b)—one of the two key provision at issue here. Section 13(b)—entitled "Temporary restraining orders; preliminary injunctions"—gives to the FTC the limited authority to seek judicial relief to prevent acts that violate the Act or rules promulgated under it. 15 U.S.C. § 53(b).

Under § 13(b), if the FTC "has reason to believe" a person "is violating, or is about to violate" a law enforced by the FTC, and that "enjoining" such act "pending the issuance" and resolution "of a complaint by the [FTC]" is in the public interest, it may seek "a temporary restraining order or a preliminary injunction" in district court. 87 Stat. at 592 (codified, 15 U.S.C. § 53(b)).

To obtain § 13(b) injunctive relief, the FTC must show that, "weighing the equities and considering the [FTC's] likelihood of ultimate success, such action would be in the public interest." *Id*. Section 13(b) adds that, "in proper cases the [FTC] may seek, and after proper proof, the court may issue, a permanent injunction." *Id*.

But as this Court explained, § 13(b) "mentions only injunctive relief." *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016). Nothing anywhere in § 13(b) lets the FTC impose monetary remedies, seize and freeze money and other

assets, and do more than enjoin actual or potential violators of the Act from committing the threatened or actual violations.

Indeed, for the first eight years after Congress enacted § 13(b), the FTC itself rarely used § 13(b) for any purpose beyond seeking preliminary injunctions. David R. Spiegel, *Chasing the Chameleons: History and Development of the FTC's 13(b) Fraud Program*, 18 Antitrust 43 (Summer 2004).

In 1975—two years after enacting §13(b)—Congress amended the Act to grant the FTC further enforcement powers. Congress added a new provision, § 19, which authorized the FTC to seek relief in federal court "to redress injury to consumers from certain past misconduct." *See* Pub. L. No. 93-637, 88 Stat. at 2201-2202 (codified as amended at 15 U.S.C. § 57b)).

Section 13(b) is the important statute. Its meaning and scope were under heavy challenge before the present litigation started. Moreover, the very day that the Supreme Court filed *AMG*, the district court filed an Order acknowledging the Supreme Court had concluded that § 13(b) did not authorize the FTC to seek or a court to award any equitable monetary relief such as restitution or disgorgement. (Doc-325at1:15-19). The district court noted that the FTC had argued at the start of the case that the asset freeze and receivership were, under § 13(b), available forms of relief. (Doc-325at1:1:24to2:5).

The district court noted that the FTC had specified that the asset freeze and

receivership were necessary to preserve the possibility of restitution to the Defendants' supposed victims. (Doc-325at2:5-11). The district court recognized that under *AMG* it would be "unclear how the asset freeze in this action could remain in place (because its sole purpose was to preserve assets for a future section 13(b) restitution award." (Doc325at2:15-17).

The district court was justifiably concerned. After all, the original Complaint (Doc-003at¶136), the First Amended Complaint (Doc035at¶136), and the Second Amended Complaint (Doc205at¶183) all cited § 13(b) as authority for imposing the receivership and the asset freeze and seizure. The Second Amended Complaint specifically identified § 13(b) as empowering the district court to grant injunctive relief and disgorgement of supposedly "ill-gotten monies." (Doc205at¶183).

To the Defendants' position that, after *AMG*, the Receiver and the FTC could be ordered to disgorge all funds wrongfully obtained under § 13(b), the FTC blithely claimed it had sovereign immunity and that the Receiver thus had sovereign immunity—and that neither the FTC nor the Receiver could be forced to give back any of the frozen and seized assets. (Doc-330at3). The FTC took that position although freezing and seizing the assets and appointing the Receiver were illegal both under § 13(b) (because of its plain text) and under § 19 (because of the FTC's failure to follow the mandatory § 19 administrative procedures).

This is where the lack of a bond becomes critically important. If the district

court had required the receivership bond, there would have been a reliable and indisputable source for the Individual Defendants to obtain compensation for the improper freezing, seizure, and asset-destroying receivership.

In response to the possibility of the Receiver and its assorted professionals having to disgorge all money paid to them, the Receiver made the perplexing claim that: "The Receiver is a remedy, not a party." (Doc-330at7:7). A "receiver" is, of course, a human being (or a corporate entity, on occasion) and is not a "remedy." The fact that the Receiver thought that she was a "remedy" and not a person is disturbing and reflects a profound misunderstanding of the Receiver's role and responsibilities. After all, a receiver is merely a supposedly "disinterested person appointed by a court . . . for the protection or collection of property that is the subject of diverse claims." *Black's Law Dictionary* 1522 (11th ed. 2019).

The Receiver stated that she "takes no position on the appropriate scope of the remedy" but then cited to 28 U.S.C. § 959, which actually allows suit as needed against trustees, receivers, or managers of any property without leave of the court appointing them. (Doc-330at7:7-13). Having said that she had no position, the Receiver then took the position that that disgorgement of the money that had been "paid to the Receiver and the Receiver's professionals" was "not warranted." (Doc-330at7:8-10). Actually, under *AMG*, disgorgement was the proper remedy.

At a hearing on *AMG*'s effect, Defendants' counsel pointed out that the law

and the facts of this situation called for complete disgorgement under *AMG*:

> And so I think there is really nothing left of this case, and we need to fix it. It's very expensive. I think the receiver needs to disgorge every penny that they've received. They've decimated this company by what they've done. And the fact that they were proceeding under what clearly was an order entered by this Court improperly, we need to undo that. That's what equity's about. And the Court needs to fix it so that my client can return to the management of the company and proceed.

(*Transcript*-Doc-342at5:4-11) (1-ER-194)..

The district court noted that the only finding it had made at the preliminary injunction start had to do with § 13(b) claims and acknowledged that it was in fact "struggling to see how I could keep in place anything in the nature of an asset freeze for future damages awards." (*Transcript*-Doc342at17:13-22) (1-ER-197). The district court at that point admitted that, even if it "theoretically" had "the legal authority to impose an asset freeze based on those types of claims post *AMG Capital*, I just don't see how I can do it on this record." (*Transcript*-Doc342at18:3-5) (1-ER-198).

The district court specifically recalled that the FTC had in fact "agreed not to pursue the Section 19 claims for purposes of the preliminary injunction even though it was briefed because of the presentation of the Section 13 claims." (*Transcript*-Doc342at18:21-25) (1-ER-198).

The district court's recollection was correct. At the January 9, 2020 hearing, the FTC conceded and stipulated was solely proceeding under § 13(b) as opposed

to using § 19 administrative proceedings. (*Transcript*-Doc063at16:24to18:6) (2-ER-385). The FTC insisted that § 13(b) gave to the district court the needed injunctive power. (*Transcript*-Doc063at15:12-16) (2-ER-384). Of course, under *AMG*, that was the sort of incorrect analysis that the FTC used to convince the district court to order an asset freeze, seizure, and receivership although it had no legal authority to do that.

Indeed, at the hearing the FTC conceded that "if we were only here on those two rule [19] violations, the misconduct at issue would not be of the sort that warranted a receivership and ex parte TRO and preliminary injunction." (*Transcript*-Doc-342at19:13-17) (1-ER-199). But even after conceding at oral argument that what the FTC had concerning the two Rule 19 violations was not enough to warrant a receivership or an ex parte TRO or a preliminary injunction, the FTC ploughed right through that and insisted that the Rule 19 case had to go forward at the district court.

The unfortunate thing is that the FTC convinced the district court to keep going on a Rule 19 case involving the freezing and seizing or assets and the imposition of a TRO, a preliminary injunction, and a permanent injunction, and an onerous receivership that did nothing other than destroy prosperous and functional business and enrich the Receiver and the Receiver's lawyers and assorted consultants when the FTC itself conceded that the FTC did not have enough

concerning the supposed Rule 19 violations to justify doing any of that.

This is one of the purest examples of unelected administrative bureaucrats acting to deprive American citizens and businesses of their basic rights to due process of law under clear federal statutes that required actual administrative adjudication before filing a devastating lawsuit in federal district court.

The most shocking aspect of *AMG* is that the FTC knew before *AMG* was decided—and knew years before filing the present lawsuit—that it never had any legal or statutory authority to seek monetary "equitable" remedies under § 13(b)—"equitable" remedies such as freezing and seizing assets and imposing costly and destructive receiverships.

Despite that, for many years the FTC deliberately misled federal circuit and district courts, including the Ninth Circuit and the United States District Court for the District of Arizona, into wrongly granting the FTC broad equitable power to freeze and seize assets, and impose receiverships, by intentionally misrepresenting the nature, meaning, and effect of § 13(b). *See* David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act* (Paper at FTC 90th Anniversary Symposium, Sept. 23, 2004) (Doc352-1) (article filed with the district court).

In a startlingly candid and influential insider article that the FTC must wish would vanish, David M. FitzGerald, a litigation lawyer and FTC officer who

worked for the FTC from 1976 to 1990, admitted that "neither Section 13(b) itself nor its legislative history mentions any remedy other than injunctions." (Doc352-1at15). In the January 13, 2021, *AMG* oral argument, Justices Kavanaugh and Alito *both* asked the FTC to address the FitzGerald article. Indeed, Justice Alito called it "pretty damaging" to the FTC's position. That is a massive understatement.

But if "a more careful statutory analysis [had] been performed," before AMG, "the courts should have and likely would have rejected the FTC's assertion that Section 13(b) allows for consumer redress based on: (1) the express language of Section 13(b) itself, (2) the legislative history of the Act and the amendments that added Sections 13(b) and 19(b) in the mid-1970s, and (3) the decisions that first interpreted Section 13(b) after it was amended." Michael Thurman & Michael L. Mallow, *"Hid[ing] Elephants in Mouseholes": The FTC's Unwarranted Attempt to Regulate*, 14 Tex. Rev. L. & Pol. 301, 313 (Spring 2010).

Section 13(b)'s plain words *only* authorize TROs, preliminary injunctions, and permanent injunctions. They do *not* allow for legal or equitable remedies—much less for receiverships or freezing and seizing assets. Indeed, beyond § 13(b)'s plain words, independent scholarship confirms "there is no hint in the legislative history that Congress intended to grant the FTC broad authority to seek monetary relief when it enacted Section 13(b)." J. Howard Beales, III & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*,

79 Antitrust L.J. 1, 5 (2013).

The district court had a good opportunity to undo the damage caused by the asset freeze, asset seizure, and receivership. On July 30, 2021, Defendants filed a motion to dissolve the preliminary injunctive ruling and to dismiss the § 13(b) proceedings. (Doc-383). In the Reply supporting that motion, the Defendants correctly noted authority that the FTC's use of § 13(b) stretched the statutory words beyond the breaking point. (Doc-396at5).

But instead of dissolving the receivership and dismissing the § 13(b) proceedings, the district court granted the FTC's motion for preliminary injunction with the asset freeze, seizure, and receivership. (Doc-412at1:22-23) (1-ER-094). The district court noted that the FTC had argued that it should keep the asset freeze and receivership in place to secure a monetary judgment against the Individual Defendants and prevent ongoing and future harm. (Doc-412at5-9) (1-ER-098-102).

"Everybody agrees," the district court wrote, "that in light of *AMG Capital*, the FTC's § 13(b) claims no longer provide a basis for keeping the freeze in place." (Doc-412at9:14-15) (1-ER-102). Despite that, the district court kept the freeze in place because there were supposed violations of § 19—based in part on the FTC's absurd and foundationless claim that the alleged rule violations had supposedly created liability for over $1.15 million in damages based on rules violations. (Doc-412 at 10:2-14) (1-ER-102).

The FTC never had any proof of such astonishingly massive rule-violation damages. Indeed, as noted, the grand total of FTC rule violations concerned only five disgruntled consumers and came to a mere $6,829. (Doc-579-at105to106). The FTC must have known all along that it had no meaningful proof of the claim that there were over $1.15 million in rule-violations damages. The paltry $6,829 in actual rule-violation damages also pales in comparison with the over $450,000 in ready money that the Receiver extracted from Defendants' frozen and seized assets and then paid over in handsome remuneration to the Receiver, to the Receiver's gaggle of lawyers, and to the Receiver's assorted consultants.

Of the two key provisions in the present matter, § 19 is the only one on point for any remedies such as freezing or seizing assets, disgorgement, or imposing a receivership. Section 19 is by far the most important statute. But it is not a quick remedy. Its use is measured and deliberate and provides due-process protections to those whom the FTC has accused of violating the Act. But that is clearly what Congress wanted. Because of that, the FTC loathes § 19 and rarely uses it.

Section 19 authorizes a court "to grant such relief as [it] finds necessary," including, but not limited to, "rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(b). Damages, rescission of contracts, refunds, property returns, and damages are what § 19 covers. Those forms of relief are <u>not</u> available under § 13(b).

Section 19 represents a severe intrusion into the constitutional protections against government interference with and confiscation of private property. As a result, Congress carefully provided that relief under § 19 is not available based on a mere showing of an alleged or actual § 5 violation.

The FTC is limited to injunctive relief under § 13(b) and can only obtain monetary relief under §§ 5 and 19. As the Supreme Court has explained, § 19 of the Act authorizes the FTC to seek consumer redress in federal court for unfair or deceptive acts or practices and/or for conduct that violates a prior cease and desist order, but only when a reasonable person would have had cause to know his or her conduct was "dishonest or fraudulent." *AMG Capital Management, LLC v. FTC*, 593 U.S. 67, 77 (2021); 15 U.S.C. § 57b(a)(2), (b).

Indeed, as the *AMG* Opinion acknowledged, the process under which the FTC can obtain monetary relief from target defendants is "cumbersome." *AMG*, 593 U.S. at 82. That is because Congress intended the statutes to protect the FTC's targets from administrative excess and violation of their due-process and other vital constitutional rights, such as the right to be free of unlawful searches and seizures.

Seeking a remedy under § 19 is therefore necessarily cumbersome when the allegations are that a person has engaged in an unfair or deceptive act or practice with respect to which the FTC has issued a final cease-and-desist order.

(1) First, the FTC must prove that a reasonable person would have known

under the circumstances that the conduct at issue was dishonest or fraudulent. 15 U.S.C. § 57b(a)(2). **In the present case, the FTC failed to provide that proof.**

In its original Complaint (Doc-3) (Jan. 8, 2020) (2-ER-388), in its Amended Complaint (Doc-35) (Jan. 17, 2020), and in its Second Amended Complaint (Doc-205) (Sep. 23, 2020) (1-ER-205), the FTC never alleged that any reasonable person would have known under the circumstances that the conduct at issue was dishonest or fraudulent.

(2) Second. before seeking any monetary relief in district court under this aspect of § 19, the FTC must first file a complaint before an FTC Administrative Law Judge seeking a cease-and-desist order. 15 U.S.C. § 57b(c)(1) and 15 U.S.C. § 45(b). **The FTC never did that in the present case.**

(3) Third, the target defendants have the right to appear before the ALJ to contest the proposed cease-and-desist order. 15 U.S.C. § 57b(c)(1) and 15 U.S.C. § 45(b). **The Defendants in the present case were never provided with that right.**

(4) Fourth, if there is a decision in favor of the FTC after the ALJ hearing, the FTC must make a report in writing stating the findings on the facts and issue and cause that report to be served on the target defendants as a cease-and-desist order. 15 U.S.C. § 57b(c)(1) and 15 U.S.C. § 45(b). **That did not occur here.**

(5) Fifth, any FTC decision issuing a cease-and-desist order is appealable to a federal appeals court in any circuit where the alleged improper acts occurred. 15

U.S.C. § 57b(c)(1) and 15 U.S.C. § 45(c). **There was never any chance to do that because the FTC never followed the preliminary steps under § 19.**

(6) Sixth, the federal appeals court then has the exclusive jurisdiction to affirm, enforce, modify, or set aside the FTC's orders. 15 U.S.C. § 57b(c)(1) and 15 U.S.C. § 45(d). **That step never occurred.**

(7) Seventh, it appears that only if the FTC wins in the appeal to a federal appeals court is it then allowed to file a § 19 action in federal district court seeking monetary relief. 15 U.S.C. § 57b(c)(1) and 15 U.S.C. § 45(g). *See generally AMG*, 593 U.S. at 77.

The dispositive point is that the FTC may only "obtain monetary relief by ***first*** invoking its administrative procedures and then § 19's redress provisions (which includes limitations)." *AMG*, 593 U.S. at 78 (emphasis added). That is something that the FTC did not do here.

The *AMG* "ruling eliminated the FTC's ability to bring claims in an Article III court as their primary course of action. [It] now [has] to use [its] administrative avenues against potentially illegal schemes first." Lindsay R. Maher, *Americon Dream: Social Pressures*, 108 Minn. L. Rev. 1587, 1610 (2024). After *AMG,* "the FTC must now rely solely on Sections 5 and 19 of the FTC Act to obtain monetary relief" and "must first seek administrative relief before taking the judgment to the federal district court for monetary redress." Camille H. Mangiaratti, *Big Dreams*,

30 J.L. & Pol'y 228, 252 (2021). The FTC did not do that in our case.

Relief under § 19 necessarily "requires the violation of an existing rule or the procurement of an FTC cease-and-desist order followed by a subsequent judicial determination that a reasonable person would have known that the challenged conduct was 'dishonest or fraudulent.'" Christopher Bradley & Hannah E. Oates, *The Multi-Level Marketing Pandemic*, 89 Tenn. L. Rev. 321, 344 (2022). That did not happen here.

As another commentator with a pro-FTC outlook concluded:

> [Section 19] is a time-consuming and uncertain route to victim compensation. It first requires an administrative proceeding, the finding of which is appealable. Then, it requires either another administrative proceeding (if the FTC believes the defendant has knowingly violated the order) or a subsequent action in district court (if the FTC believes the conduct was obviously fraudulent). Under this approach, consumers who have suffered pecuniary harm from deceptive conduct would likely have to wait years to obtain recompense, and then only if the perpetrator violated a cease-and-desist order or engaged in objectively fraudulent conduct.

Caprice Roberts, *Statutory Interpretation and Agency Disgorgement Power*, St. John's L. Rev. 243, 262 (2023).

2. The FTC never had a viable § 19 cause of action for any violation of any relevant FTC rule.

That returns the discussion to several initial parts of § 19, which generally provide that if a person has violated an FTC rule "respecting unfair or deceptive acts or practices," the FTC may commence a civil action seeking such relief as

"rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(a)(1) & 57b(b). After the landmark *AMG* opinion, those remedies are unattainable under § 13(b).

In all of its pleadings, and in particular in the Second Amended Complaint, the FTC contended that it was entitled to seek monetary damages under § 19 for the violation of two—and only two—FTC rules:

(1) **"Merchandise Rule"**—more formally named the "Mail, Internet, or Telephone Order Merchandise Rule," 16 C.F.R. Part 435. (Doc-205, ¶¶ 1, 4-5, 165-173, 182, 184) (1-ER-206-207; 1-ER-248-250; 1-ER-252-253).

(2) "**Cooling-Off Rule**"—more formally named the "Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. Part 429. (Doc-205, ¶¶ 1, 4-5, 174-182, 184) (1-ER-206-207; 1-ER-250-253).

Based solely on the violation of those two FTC rules, the FTC persuaded the district court to freeze and seize the target Defendants' assets and to appoint and compensate a Receiver with massive powers who hired costly lawyers and pricey consultants. As noted above, the Receiver used up the seized and frozen assets to pay itself and to pay the Receiver's costly lawyers and consultants. None of the frozen and seized monetary assets went to provide any sort of redress to any

supposedly wronged consumer.

Appointing and compensating a receiver and a large staff, freezing, seizing, and dissipating assets does not come within the penumbra of the allowable § 19 remedies of "rescission or reformation of contracts, the refund of money or return of property, [and] the payment of damages." 15 U.S.C. § 57b(a)(1) & 57b(b). On remand, therefore, all of the money that was paid to the receiver and her lawyers and consultants, and all of the damages and losses that the asset seizure and freeze caused, and that the conduct of the receivership inflicted on the target Defendants and on their businesses, should be accounted for and refunded to the target Defendants and to their businesses.

The FTC apparently never had any proof that there was any significant damage to anyone caused by the alleged violations of the Merchandise Rule and the Cooling-Off Rule. That is not rhetoric. That is demonstrable fact.

After all, following years of disclosure, discovery, and litigation, and after a lively, intense, time-consuming 11-day bench trial, even the district court concluded that the FTC failed to prove any significant damages for the alleged violations of the "Merchandise Rule" or the "Cooling-Off Rule."

Indeed, the district court noted that, in the FTC's motion for summary judgment, it had "made no effort to identify" any consumers who would have opted for a full refund. (Doc579at106n.53). And so, in the months between the

time that it filed its under-seal original documents, its assorted Complaints, and its summary-judgment motions the FTC never found any evidence that there was any violation of any FTC Rule that had damaged any identifiable consumer.

Despite that, for the purported violation of the Merchandise Rule, the FTC demanded $561,798.80 in damages. (Doc579at97:21-22). But even the district court itself found the FTC had failed to provide even a “reasonable estimate” of the damages allegedly caused by a Merchandise Rule violation. (Doc570at100:9-10).

When all was said and done, despite having no evidence at all at the start of the case concerning any Merchandise Rule violations or damages, the FTC claimed damages of $6,829, which was 1.2% of what it had demanded in Merchandise Rule damages. That was based on five alleged instances where consumers allegedly requested refunds and possibly did not get them. (Doc-579at105:4-6).

In other words, after desperately winnowing through records for hundreds and hundreds of consumers at an enormous expenditure of time and effort, the FTC only found proof of five disgruntled consumers. Few businesses could ever boast of that exceptionally low level of consumer dissatisfaction.

On the other hand, on February 18, 2021, hundreds of affiliates (effectively consumers) of defendant Success by Health filed a motion to intervene to express their support of and satisfaction with the products and services of SBH and to enforce their contractual and constitutional rights (Doc-274), but the district court

refused to allow them to intervene. (Doc-313). Then, on June 1, 2021, almost 1,000 consumers filed a renewed motion to intervene. (Doc-358). But once again, the district court denied the motion and refused to hear from the hundreds of satisfied consumers. (Doc-386). Indeed, the persistent intervenors are also pursuing an appeal in the Ninth Circuit. *See FTC v. Success by Media Holdings, Inc*., U.S. Court of Appeals for the Ninth Circuit Case No. 23-3781.

Notably, on October 2, 2020, an astonishing 271 of the affiliates of Success by Media, doing business as Success by Health, had filed an amicus curiae brief with the Supreme Court in *AMG Capital Management, LLC v. FTC*, Docket Nos. 19-508 and 19-825, explaining the fallacy of the FTC's interpretation and misuse of § 13(b) to freeze, seize, and impose receiverships based on unproven claims of pyramid schemes. The 271 Amici Curiae explained that, in the case then pending at the District Court for the District of Arizona—our case—a receiver supposedly "charged with preserving the assets of the corporate defendants" had engendered "receivership fees [that] are consuming the assets [the receiver] is supposed to preserve so that there will be nothing left of the company by the time of trial." *AC Brief* at 6. That prediction at the highest level of the federal judiciary proved to be absolutely true.

In our case, the district court identified no evidence or proof that the supposedly non-refund-receiving consumers had been harmed by any withheld

refund, but instead found that there was supposedly a "specific reason—the refund request—to believe that all five consumers stopped ascribing any value to the products once the shipment delays got too long." (Doc-579-at105:12to106:2).

Five unhappy consumers were all that the FTC could find: (1) after years of discovery, (2) after wasting hundreds of thousands of dollars of the Defendants' frozen and seized assets on a Receiver and on her costly lawyers and consultants, and (3) after an 11-day bench-trial. After all of that, in the end the FTC was left with its "fallback claim for $6,829 in damages" arising from a mere "five specific instances in which a consumer requested a refund after experiencing a shipping delay." (Doc-579-at105:4-6).

The district court took its extended analysis a step further when it theorized that whether or not the products were shipped to the five consumers, that were supposedly harmed by the alleged violation of the Merchandise Rule to the tune of the full amount they had paid for the products. (Doc-579at106:2-5).

The relevant part of the Merchandise Rule provides that sellers must issue a prompt refund if: (1) before shipment, the buyer cancels the order; or (2) the seller fails to offer the buyer the option to consent to the delay and has not timely shipped the goods. *See* 16 C.F.R. § 435.2(c)(1), (5). Neither the district court nor the FTC identified whether orders had been cancelled or whether there was consent to any delay in any refund.

The district court acknowledged that § 19 only authorizes money damages based on a violation of an FTC rule when that is "necessary to redress injury to consumers." (Doc-579at100:15-16) (quoting § 19, codified at 15 § U.S.C. 57b(b)). And that is precisely where the FTC's improper filing of pleadings when it lacked any sort of evidence of injury to any consumer from a Rule violation comes into play. Even at the end of the case, the FTC never provided any proof that money damages were needed—or would actually be paid to any consumer—to redress any injury to any consumer.

And yet, in a lawsuit first secretly filed on January 8, 2000 (Doc-3) (2-ER-388) all the way to a Final Order filed on September 18, 2023, where the district court awarded the grant total of $6,829.00 in supposed damages for the alleged violation of the Merchandise Rule (Doc592at17-¶IX(B) (1-ER-026), the FTC never provided any evidence or proof that any specific consumer suffered Merchandise Rule monetary damages, much less the amount of any monetary damages that had to be paid to the FTC because that was "necessary," under § 19, "to redress injury to consumers." Indeed, the district court specifically did not order the payment of any Merchandise Rule-violation damages to any consumer—just to the FTC as "monetary relief," apparently solely for the FTC's benefit. (Doc-592at17-¶ IX(B) (1-ER-026).

The point is that the "FTC must establish consumer injury." *FTC v. Figgie*

International, Inc., 994 F.2d 595, 605 (9th Cir. 1993). But despite years of bluster and effort, the FTC failed to establish "consumer injury." Thus, for the asserted violation of the Merchandise Rule, the pleadings that the FTC filed and the Final Order and Judgment that the district court entered in favor of the FTC lacked any statutory or regulatory basis, support, or justification under § 19.

The district court seemed to be aware that it was on shaky grounds as far as the $6,829.00 awarded for the supposed violation of the Merchandise Rule. After all, the district court provided that the $6,829.00 in supposed damages for the supposed violation of the Merchandise Rule was made a "part of, and not in addition to" the massive $7,306,873.14 that the district court had awarded as a "compensatory sanction" against the "Contempt Defendants" (James D. Noland, Jr., Scott A. Harris, and Thomas G. Sacca. (Doc-592-at17-¶ IX(C) (1-ER-026).

Thus, as it turned out, the Merchandise Rule damages that had to be paid to the FTC because that supposedly was "necessary," under § 19, "to redress injury to consumers," were not paid to redress injury to even one consumer. Indeed, the district court specifically did not order the payment of any Merchandise Rule-violation damages to any consumer—just to the FTC as "monetary relief," solely for the FTC's benefit. (Doc-592-at17-¶ IX(B) (1-ER-026). That was an error of law and an abuse of discretion that violated § 19.

Well, what of the FTC's other purported basis for seeking monetary

damages under § 19? Thing are even bleaker for the district court and for the FTC there. In its Second Amended Complaint—the operative complaint—the FTC claimed that it was entitled to seek massive damages, and to appoint and compensate a receiver and the receiver's staff, and to seize, freeze, and take over total management of the assets of the target Defendants and of their businesses under § 19 because they had supposedly violated the Cooling-Off Rule.

That basis for a claim against the target Defendants was even less valid than the valueless claim for massive monetary damages that the FTC sought under the Merchandise Rule. The FTC demanded $581,024,75 in monetary remedies based on the supposed violation of the Cooling-Off Rule. (Doc579at106:17-18).

In the end, after years of costly, disruptive, contentious, and time-wasting discovery, disclosure, and litigation, the district court concluded that it "declines to award any damages based on the [supposed] Cooling-Rule violations." (Doc579at107:23). There simply never were any provable Cooling-Rule violations.

As it should have done for the alleged Merchandise Rule violations, the district court realized that, for the alleged Cooling-Off Rule violations, "the problem here is that the FTC's methodology goes beyond § 19's authorization to grant only 'such relief as the court finds necessary to redress injury to consumers' and violates the principle that 'the relief must be necessary to redress the injury.'" (Doc-579-at107:27to108:2) (first quoting 15 U.S.C. § 57b(b) and then quoting

FTC v. Figgie International, Inc., 994 F.2d 595, 605 (9th Cir. 1993)).

In the end, as at the beginning, the alleged § 19 Merchandise Rule violations or Cooling-Off Rule violations were either nonexistent or nonprovable.

There was therefore never any basis for imposing any of the monetary sanctions that the first parts of § 19 allow when a person has violated an FTC rule. 15 U.S.C. § 57b(a)(1). Indeed, the FTC never went through the stringent, time-consuming, protective, and cumbersome administrative procedures needed to get § 19 monetary remedies when a person has supposedly engaged in prohibited unfair or deceptive acts or practices within the meaning of § 45(a)(1) of the Federal Trade Commission Act. 15 U.S.C. § 57b(a)(2).

3. The $7,306,873.14 that the district court awarded as a "compensatory sanction" was improper because there was no proof that the FTC, or any other possible complainant, sustained any losses of that magnitude and no proof of any actual losses that supposedly were sustained.

In its post-bench-trial conclusions of law, the district court stated it "grants the FTC's request for the imposition of a $7,306,873.14 compensatory civil sanction . . . which is owed jointly and severally by the Contempt Defendants'" (Doc-579-at112:20-22), which the district court identified as James D. Noland, Jr., Scott A. Harris, and Thomas G. Sacca.

The district court derived that $7,306,873.14 figure for a "compensatory sanction" as representing the revenues from SBH, from the VOZ Travel product, and from ticket sales. (Doc-579-at118:1-2). The figure is arbitrary, unsupportable,

and capricious. It reflects no actual, identifiable, specific losses that either the FTC or any consumer or groups of consumers suffered.

"Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained." *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1965). "Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss." *Id*. at 304.

The district court is required to make a statement of its purpose or purposes underlying the imposition of sanctions for civil contempt. *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1147 (9th Cir. 1983). Here, the district court specified in its "monetary judgment[s]" that it was awarding $7,306.873.14 in favor of the FTC—as a "compensatory sanction" and not in favor of any consumers or group of consumers. (Doc-591-at¶IX(A) (1-ER-053) (Doc-592-at¶IX(A) (1-ER-026).

The district court designated the "compensatory sanction" as an item for the FTC alone to "collect." (Doc-591-at¶IX(C) (1-ER-052) (Doc-592-at¶IX(C) (1-ER-26). But the district court never determined any actual loss on the part of the FTC or on the part of any consumer or group of consumers. Instead, the district court simply decided that the compensatory sanction should be the revenues from SBH,

from the VOZ Travel product, and from ticket sales. (Doc-579-at118:1-2). According to the district court, that was the "baseline" for the "compensatory" civil sanction. But there was no basis for awarding such a massive amount as a "compensatory" sanction because there was no sort of valid "evidence of [any] complainant's actual loss." *United Mine Workers*, 330 U.S. at 304.

For a few years of government lawyer, law clerk, and paralegal effort, the FTC is hoping to get a fantastic windfall of $7,306,873.14 as a "compensatory sanction" that is no sort of compensatory sanction because it compensates neither the FTC nor any consumer or group of consumers.

Compensatory sanctions are exclusively "to compensate the contemnor's adversary for the injuries which result from the noncompliance." *Falstaff Brewing Corp. v. Miller Brewing Co*., 702 F.2d 779, 778 (9th Cir. 1983) (citing *Gompers v. Bucks Stove & Range Co*., 221 U.S. 418, 441 (1911)). Compensatory sanction awards are limited to "actual losses sustained as a result of the contumacy." *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983).

Whenever a sanction is imposed under the rules of civil procedure, it "must be compensatory rather than punitive in nature." *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 108 (2017) (citing *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 826-830 (1994)). In addition, a compensatory sanction naturally "may go no further than to redress the wronged

party ‘for losses sustained;’ it may not impose an additional amount as punishment for the sanctioned party’s misbehavior.” *Bagwell*, 513 U.S. at 829.

In our case, the district court improperly imposed a massive compensatory sanction that never identified the sustained losses or purported to redress any wronged party for any sustained losses. The $7,306,873.14 compensatory sanction was therefore improper and illegal.

It is a fundamental principle that compensation for a wrong must be such that it “tracks the loss resulting from that wrong.” *Goodyear Tire*, 581 U.S. at 108. And so, a sanction can only be a “compensatory” sanction if it is “‘calibrate[d] to [the] damages caused by’ the bad-faith acts on which it is based.” *Id*. (quoting *Bagwell*, 513 U.S. at 834). But here, the $7,306,873.14 compensatory sanction tracked no losses resulting from any wrongs and was not calibrated to any actual losses supposedly caused by the bad-faith acts on which the compensatory sanction was based.

Preponderance of the evidence is the measure for compensatory sanctions. *See*, *e.g.*, *FTC v. Kuykendall*, 371 F.3d 745, 751 (10th Cir. 2004); *Ahearn ex rel. NLRB v. International Longshore & Warehouse Union*, 721 F.3d 1122, 1129 n. 3 (9th Cir. 2013) (Recognizing that every circuit to have considered the standard of proof for compensatory sanctions has adopted a preponderance standard.). The FTC was not able even to meet the preponderance-of-evidence standard, since it

provided no proof concerning any losses that it or any consumer or group of consumers suffered as a result of the allegedly contemptuous conduct.

The district court committed an error of law and abused discretion by holding that it could base the amount of a "compensatory sanction" on revenue from sources having nothing to do with compensating anyone for "actual losses" resulting from noncompliance with court orders.

4. The Receiver eventually abandoned any pretense of acting in the best interests of the Defendants.

At the start of the case, the district court let the Individual Defendants control the legal representation of themselves and of the Corporate Defendants. (Doc-469at3). The Receiver acknowledged that she was "in the position of having to defend the corporate defendants" but supposedly was "not aware of a good faith basis to oppose most aspects of the FTC's complaint against the corporate defendants and does not anticipate spending the Receivership Estate's limited resources to fight a losing battle" since that would supposedly "reduce the recovery of former consumers from the Receivership Estate." (Doc-123-at2:27to3:3).

So instead of fighting to protect the interests of the Corporate Defendants, the Receiver "anticipates that she will reach a non-litigated resolution with the FTC that would allow the companies to conduct an orderly wind down." (Doc-123at3:3-5). In other words, the Receiver was going to cooperate with the FTC in wiping out the Corporate Defendants and not look out for any of their interests at

all. Naturally, the FTC opposed the efforts of the Individual Defendants' motion to represent the Corporate Defendants, because without forceful representation the Corporate Defendants were literally defenseless. (Doc-469at4-5). The district court denied the Individual Defendants' motion to represent the Corporate Defendants. (Doc-168).

The district court was at least troubled that a court-appointed Receiver in an FTC enforcement action had, before a final adjudication of liability was made, declined to hire a particular law firm to represent a corporate defendant, over the objection of the corporate defendant's owners and officers, due to the belief that the expenditure of funds on legal fees would supposedly be wasteful and dissipate the pool of assets that are potentially available to victims at the close of the case. (Doc168at7). Despite that, the district court ruled that the Individual Defendants could not represent their own companies. (Doc168at13).

By February 1, 2022, the Receiver frankly admitted that the Receivership Estate could not afford to manage or even participate in an active defense of the Corporate Defendants because the Receivership Estate was likely insolvent with regard to professional administrative4 expenses. (Doc-464at1). In other words, the Receiver and its attorneys and consultants had spent most of the frozen and seized money and had nothing left to defend the Corporate Defendants. On top of that, the Receiver admitted that the Receiver and the Receiver's legal counsel "did not share

the Individual Defendants' view of the merits of the case." (Doc464at2).

Complicating things was the Receiver's original understanding "that the FTC would first try its case against the Individual Defendants, and that the Corporate Defendants' issues would then be resolved by some sort of post-adjudication agreement." (Doc-464at2:16-18). The Receiver acknowledged that the FTC was now indicating that it will seek to obtain a judgment against the Corporate Defendants." (Doc464at2:18-20).

"This means," the Receiver recognized, "that the Receiver must either provide a defense to the Corporate Defendants, or they will suffer a default judgment against them." (Doc464at2:20-21).

But the Receiver sought to excuse its failure to fund or facilitate the defense of the Corporate Defendants because the FTC had supposedly "agreed that it will not seek damages against the Corporate Defendants that are in excess of its claims against the Individual Defendants." (Doc464at8:6-8). The Receiver refused to acknowledge the reality of the situation and claimed the "Corporate Defendants are not being left 'defenseless.'" (Doc464at9:2-4). The facts say otherwise. In fact, the Receiver abandoned the Corporate Defendants, used the frozen and seized assets to pay itself, its lawyers, and its consultants for administrative busywork that enriched themselves and did not help the Corporate Defendants or anyone else, and that did not in any way provide redress to any consumer.

5. The district court cannot constitutionally deprive a person of the right to earn a living through his or her chosen profession.

In the Final Judgment, the district court provided a detailed definition of a multi-level marketing program as follows:

> "**Multi-Level Marketing Program**" means any plan or program in which a participant has the right to (1) recruit others into the program or have others placed in the participant's downline, and (2) receive any benefit, including but not limited to any compensation, payment, reward, bonus, product, or product credit, that is based, in whole or in part, upon purchases, sales, or any other activities of the participant's downline. Downline refers to the collection of participants whom a participant has personally recruited (first level), any participants and customers recruited by first level participants (second level), any participants and customers recruited by second level participants (third level), and so forth, however denominated.

(Doc-592at5-6,§K) (1-ER-014-015).

In the Final Judgment filed on September 18, 2023, the district court imposed a "Ban on Multi-Level Marketing," directing that:

> **IT IS THEREFORE ORDERED** that Individual Defendants, whether acting directly or indirectly, are permanently restrained and enjoined from creating, advertising, marketing, promoting, offering for sale, selling, or operating, or assisting others in advertising, marketing, promoting, offering for sale, selling, or operating, any Multi-Level Marketing Program, including any product- or service-based pyramid scheme.

(Doc-592at8,¶I) (1-ER-017).

If by using the term "pyramid scheme" the district court is referring to an illegal marketing scheme that is set up as a pyramid, that part of the Final Judgment is innocuous. There is, after all, general agreement that a "pyramid

scheme" is, by definition, dishonest and often illegal. As the world's most respected legal dictionary explains, a "pyramid scheme" is defined as:

> A dishonest and often illegal way of selling investments, whereby money from later investors is used to pay people in the system who have already invested; esp., a property-distribution scheme in which a participant pays for the chance to receive compensation for introducing new persons to the scheme, as well as for when those new persons themselves introduce participants. Pyramid schemes are illegal in most states. – Also termed endless-chain scheme; chain-referral scheme; multilevel-distribution program; pyramid distribution plan. Cf. Ponzi scheme; gifting club.

Black's Law Dictionary 1494 (11th ed. 2019).

But merely because a product or service is sold in a pyramidical manner does not create a dishonest or illegal pyramid scheme. "Pyramid selling" is simply a "hierarchical business scheme in which the main income of the higher-tiered participants derives from recruiting other people to invest or to sell products rather than from the recruiters' own investing or selling." *Black's Law Dictionary* 1494 (11th ed. 2019).

There is nothing per se illegal or dishonest in practicing the profession of multi-level marketing, even with pyramid overtones. Multi-level marketing is a profession with a long and honorable history and many variations, including Mary Kay, Fuller Brush, Tupperware, and Avon sales systems.

"Courts and legislatures recognize a distinction between legitimate programs (known as multi-level marketing systems) and illegal schemes." *United States v.*

Gold Unlimited, Inc., 177 F.3d 472, 480 (6th Cir. 1999). "All multilevels are not considered per se deceptive and unlawful." *State ex rel. Stratton v. Sinks*, 741 P.2d 435, 440 (N.M. App. 1987). This Court itself has specifically held that not all multi-level marketing "businesses are illegal pyramid schemes," and so, to determine if "a MLM business is a pyramid, a court must look at how the MLM business operates in practice." *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 883 (9th Cir. 2014).

The district court's blanket order is unconstitutionally restrictive. It would bar the Individual Defendants from "creating, advertising, marketing, promoting, offering for sale, selling, or operating, or assisting others in advertising, marketing, promoting, offering for sale, selling, or operating, any Multi-Level Marketing Program." That would ban them from practicing a profession that is legal and that they have trained in and practiced for many years. Under the federal constitution, the district court cannot bar the Individual Defendants from practicing their multi-level marketing profession, as long as they do that in a lawful manner.

"Under the law, as presently written, every business, until found unlawful, has the right to be let alone." *Stanard v. Olesen*, 74 S.Ct. 768, 771 (1954). "It is undoubtedly the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose, subject only to such restrictions as are imposed upon all persons of like age, sex, and condition." *Dent v. West*

Virginia, 129 U.S. 114, 121 (1889). The Supreme Court has recognized, as a protected liberty interest, an individual's right "to engage in any of the common occupations of life." *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

The basic right "to follow a chosen profession free from unreasonable governmental interference comes within both the liberty and property concepts of the Fifth and Fourteenth Amendments." *Piecknick v. Commonwealth*, 36 F.3d 1250, 1259 (3d Cir. 1994). In fact, "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [14th] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41 (1915).

As this Court has added, the right of a person "to seek and obtain private employment in one of the common walks of life" is a right entitled to constitutional protection and to protection at the hands of a court of equity. *Lester v. Parker*, 235 F.2d 787, 788 (9th Cir. 1956). The "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Greene v. McElroy*, 360 U.S. 474, 494 (1959).

Based on the above legal authorities, the district court erred when it imposed a blanket prohibition on the Individual Defendants preventing them from engaging in their chosen profession of multi-level marketing. The Individual Defendants

therefore respectfully ask this Court to direct that, on remand, the district court remove that blanket prohibition.

Conclusion

For the reasons set out above, Appellants ask the Court to vacate the Judgment entered in this matter. Under § 19 of the Federal Trade Commission Act there never were any meaningful violations of the FTC Merchandise Rule or of the FTC Cooling-Off Rule making it necessary to redress injury to any consumers. 15 U.S.C. § 57b(2). Thus, the district court never had any basis for any of the many onerous monetary remedies that it imposed on the Defendants.

The Court should therefore direct that: (1) the asset freeze and receivership that are in placed should be immediately lifted; (2) all assets, companies, property, and other items that were frozen and swept into the receivership should be returned at once to the Defendants' full and complete control; (3) the Receiver should account for all of the inventory that it failed to sell when it had the opportunities to do so, and must be directed to compensate the Defendants for the resulting losses

In addition, the district court committed fundamental constitutional error in it imposed a blanket prohibition on the Individual Defendants preventing them from engaging in their chosen profession of multi-level marketing. Appellants thus ask the Court to direct the district court to remove that prohibition on remand.

Appellants also ask the Court to remand this matter for a full and proper

determination of the amount, if any, that the district court may correctly assess for compensatory sanctions under the clear, long-standing, and controlling principles that compensatory sanctions: (1) may only be awarded in an amount that will compensate a complainant for losses actually sustained; and (2) must be based on evidence of a complainant's actual loss. *United States v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1965).

Indeed, under the terms and structure of the FTC Act, the determination of any compensatory sanction amount should be the result of the comprehensive and highly protective administrative protections and procedures that § 19 requires. That sort of monetary determination fits within the system that Congress created in §19 to make sure that the FTC provides full due-process administrative protections to those that the FTC has accused of violating the FTC Act and that it demands must pay some sort of damages, sanctions, or penalties as a result. Indeed, it is a fair, logical proposition that a party should only have to pay damages, sanctions, or penalties, however denominated, after completion of the § 19 process.

The FTC positively and unquestionably never proved or even tried to prove what losses the FTC or any consumer or group of consumers had actually sustained based on any supposedly contemptuous or wrongful conduct. The FTC also failed to show how the $7,306,873.14 compensatory sanctions amount arose from any actual losses by the FTC or by any consumer or group of consumers. The sanctions

award of $7,306,873.14 was therefore unlawful and cannot stand.

On remand, the district court must actually determine the compensatory sanction amount that will truly compensate the complainant for losses that it or a relevant consumer or group of consumers actually sustained and must base that proposed amount on evidence of the actual loss sustained by a complainant. Making up a huge figure not based on established, controlling principles was easy to do, but it was unquestionably wrong.

DATED this 24th day of June, 2024.

/s/ David L. Abney, Esq.
David L. Abney
Attorney for Plaintiffs/Appellants

Form 17. Statement of Related Cases
Pursuant to Cir. Rule 28-2.6
9th Cir. Case No. 23-3757

The undersigned attorney or self-represented party states that he is aware of a related case pending in this Court as *FTC v. Success by Media Holdings, Inc*., U.S. Court of Appeals for the Ninth Circuit Case No. 23-3781.

Signature: /s/ David L. Abney **Date:** June 24, 2024

Form 8. Certificate of Compliance for Brief
9th Cir. Case No. 23-3757

I am the attorney or self-represented party.

This brief contains 12,284 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief:

[**X**] Complies with the word limit of Cir. R. 32-1.

Signature: /s/ David L. Abney **Date:** June 24, 2024

Form 15. Certificate of Service for Electronic Filing
9th Cir. Case No. 23-3757

I hereby certify I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

Signature: /s/ David L. Abney **Date:** June 24, 2024