No. 23-3757

IN THE 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.

On Appeal from the United States District Court
for the District of Arizona
No. 2:20-cv-00047-DWL
Hon. Dominic W. Lanza

ANSWERING BRIEF OF THE FEDERAL TRADE COMMISSION

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INTRODUCTION

Appellant James D. Noland, Jr., and his co-defendants operated pyramid schemes that falsely promised consumers a quick path to riches. Noland has a long history of engaging in this unlawful conduct. The Federal Trade Commission sued him in 2000, and Noland resolved that case in 2002 by agreeing to a permanent injunction barring him from operating pyramid schemes or making misrepresentations in connection with multi-level marketing programs. Undeterred, however, Noland continued to set up similar schemes, including the two at issue in this case, Success by Health ("SBH") and VOZ Travel.

Both these schemes involved recruiting "affiliates" to whom Noland and his associates would sell products, ostensibly for resale to end users (though VOZ Travel never had a viable product). In reality, affiliates earned rewards by recruiting new affiliates to buy large amounts of product. Noland falsely promised that affiliates could earn substantial, even life-changing, amounts of money. In fact, Noland and his associates bilked the affiliates out of some $7.3 million by selling them products and running expensive training classes. Noland used

this money to finance a lavish lifestyle, including fancy cars and luxury rental homes in the United States and abroad.

The FTC sued Noland and his companies and associates in 2020, alleging that they were engaged in deceptive acts or practices and violating FTC consumer protection rules through the operation of SBH and VOZ Travel. The FTC also sought to hold several defendants in contempt for violating the 2002 injunction. Following a partial summary judgment ruling and a bench trial, the court held that SBH and VOZ Travel were pyramid schemes, that the defendants promoted them using false claims that affiliates could reasonably earn substantial income, and that defendants also violated two FTC rules. The court also found that over the course of the litigation, Noland and his co-defendants engaged in numerous acts of dishonesty, including destroying evidence, lying under oath, and violations of court orders.

The court entered a permanent injunction that barred the individual defendants from further involvement in multi-level marketing. The court held the defendants who were bound by the 2002 injunction jointly and severally liable for $7,306,873.14—the total amount consumers paid to defendants—as a compensatory civil

contempt sanction. It also held all the individual defendants jointly and severally liable for $6,829 for rule violations. All monetary relief is to be paid to the FTC and distributed to victims of Noland's scams.

Noland and the other individual defendants now appeal. They do not challenge the district court's liability determinations, only aspects of its remedies. None of their arguments has any merit. The district court had authority to award a contempt sanction consisting of monetary relief for the benefit of consumers, and it properly based the amount of the sanction on the defendants' net revenues. The court also had authority to award monetary relief for defendants' rule violations, under Section 19 of the FTC Act, 15 U.S.C. § 57b. The ban on multi-level marketing activities was well within the scope of the court's discretion given the nature of the violations, Noland's recidivism, and defendants' multiple acts of dishonesty during the litigation of this case. Noland's other arguments relating to the pre-judgment asset freeze and receivership are moot now that the district court has entered a final judgment and thus are not properly before this Court on appeal. The judgment should be affirmed.

JURISDICTION

The district court had jurisdiction over both this action and the 2000 action to which the contempt sanction relates under 28 U.S.C. §§ 1331, 1337(a). and 1345. Final judgment was entered on September 18, 2023. Appellants timely filed their notice of appeal on November 17, 2023. 2-ER-430-33. This Court has jurisdiction under 28 U.S.C. § 1291.

QUESTIONS PRESENTED

1. Did the district court properly award a civil contempt sanction of monetary relief based on defendants' net revenues?

2. Did the district court properly award monetary relief under Section 19 of the FTC Act to redress consumer injury from Appellants' violations of an FTC rule?

3. Did the district court properly enter a permanent injunction banning Appellants from multi-level marketing and maintaining the asset freeze?

4. Are Appellants' claims relating to the pre-judgment asset freeze and the receivership moot or otherwise not properly before this Court?

STATEMENT OF THE CASE

A. MLM Businesses and Pyramid Schemes

Noland's conduct in this case involves running multi-level marketing ("MLM") businesses that operated as unlawful pyramid schemes. An MLM business recruits participants to sell the business's products through person-to-person sales. MLM businesses often involve deceptive promises to participants about how much money they can earn. Furthermore, if the participants receive rewards for recruiting other participants into the program, and those rewards are unrelated to the sale of the product to ultimate users, then the MLM is a pyramid scheme, which "constitutes an unfair or deceptive act or practice in or affecting commerce for the purposes of [the FTC Act]." *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 880, 885 (9th Cir. 2014); *see* 15 U.S.C. § 45(a)(1) (prohibiting unfair or deceptive acts or practices).

B. The SBH and VOZ Travel Pyramid Schemes

Noland's history of involvement with pyramid schemes dates back to the 1990s.[1] In 2000, the FTC sued Noland for promoting an MLM

[1] Among other things, Noland and Harris were involved with an MLM company called Equinox International, which the FTC sued in 1999 for operating as a pyramid scheme. SER-124; *See FTC v. Equinox Int'l Corp.*, No. 2:99-cv-969 (D. Nev.).

program that promised participants easy income through commissions on products sold through Internet-based "shopping malls." *See FTC v. Netforce Seminars*, No. 2:00-cv-2260 (D. Ariz.) ("Contempt Action"). After initially filing "bizarre pleadings filled with sovereign-citizen arguments," Noland agreed to a permanent injunction to resolve the case. SER-5. That injunction (the "2002 Order") barred Noland and others "in active concert or participation" with him from certain marketing schemes, including pyramid schemes, and from making misrepresentations in connection with MLM programs. SER-5-6.

Despite agreeing to the 2002 Order, Noland continued to set up new MLM businesses that operated as pyramid schemes and falsely promised to put participants (referred to as "affiliates") on a quick path to riches. Noland was assisted by his wife, Lina Noland ("Lina"), and by Thomas Sacca and Scott Harris (collectively, the "Individual Defendants").

Beginning in July 2017, the SBH pyramid scheme sold coffees, teas, and nutraceuticals. Noland and his associates promised their affiliates "financial freedom" and told them they could become multi-millionaires by applying Noland's training. SER-57-59. Noland

structured SBH's compensation and bonus program to encourage affiliates to focus on recruiting new affiliates rather than making retail sales of products to ultimate users—the essential hallmark of a pyramid scheme. SER-50-52. SBH made its money by selling large volumes of products to its affiliates and running expensive training events. SER-45-50, 52-59.

SBH's promise of "financial freedom" was a lie. SER-57-62. On an aggregate level, affiliates paid $6,205,551.29 (excluding purchases made with product credits) for SBH products, but earned only $2,174,301.09 in commissions, a net loss of over $4 million that does not even consider the additional costs of tickets for trainings, travel, and marketing expenses. SER-61. Less than 6% of SBH affiliates (420 of the 6,957 total affiliates) received more money from SBH than they paid SBH and only 110 affiliates (less than 2%) netted over $100 from SBH. SER-61. Although affiliates could, in theory, have earned some of those millions in losses back through "retail" sales to friends and neighbors, the district court correctly found that such sales, at most, provided "miniscule net earnings." SER-49. Notably, most affiliates who attended

Noland's trainings ended up in a higher net loss position vis-à-vis SBH than those who did not attend them. SER-61.

One affiliate, whom defendants called as their witness at trial, testified that he received $30,500 in net revenue (from commissions in addition to offline, hand-to-hand "retail" sales) working essentially full-time on SBH for roughly two years, but he paid $28,000 for the products he sold and paid an additional $18,000 to attend SBH training events. SER-23-24. Rather than achieving the promised "financial freedom," this witness went into debt to get more money to buy SBH products while he was training affiliates himself with false claims that they could make over a million dollars a month on commissions. SER-23-24. The district court described this testimony—from a witness called by the defendants—as "a damning indictment of SBH." SER-24. Other defense witnesses told similar stories: for example, one lost over $10,000 from SBH activities in 2019, and another "barely made any money from engaging in retail sales" and sustained a net loss in 2019 that led him to quit with a large stockpile of unused SBH products sitting in his house. SER-24-26.

Defendants were well aware that they were operating a pyramid scheme. Harris even told affiliates at an SBH event that when people ask him, "[I]s this one of those pyramid things?," he says, "[H]ell, yeah it is. If it wasn't, I wouldn't be doing it. Do I look dumb enough to go get a job again?" SER-47 (citing trial exhibit).

In October 2019, as SBH's income began plummeting, Noland was warned that he needed an "income run." SER-72. Noland and his associates then launched another pyramid scheme called VOZ Travel, which purported to sell travel services, though it never actually had a viable product. SER-72. Like SBH, VOZ Travel was promoted as a path to financial independence, with promises that enrollees could earn a six-figure income, or even as much as $1.5 million a year. SER-72. But the program was just another scam. Enrollees were required to buy $1,000-$2,795 "packs" to access a travel platform that was never completed, and told they could earn financial rewards by recruiting others to buy packs as well. SER-72, 76. Despite never actually providing a product or service, or even having the ability to do so, Appellants' own undisputed reporting showed that the net revenue from VOZ Travel sales was $1,194,897.01. SER-76.

As the district court found, Noland treated his companies "as a personal piggy bank, using corporate funds to pay for homes in the United States and Uruguay as well as a fleet of flashy and expensive [vehicles], including a $145,000 Range Rover and a pair of motorcycles worth a total of $50,000." SER-202-03. Overall, "a substantial portion of SBH's revenue [was] dealt to Noland, Sacca, Harris, or their associated companies." SER-205. Between July 2017 and January 2020, SBM transferred around $1.7 million to Noland, Lina, Harris, and Sacca. SER-19-20.

C. Proceedings In This Case

1. The Complaint in the Lead Action

In January 2020, the FTC filed this action (the "Lead Action") against Noland, Lina, Harris, Sacca, and their various companies, alleging that they were violating the FTC Act's prohibition on deceptive acts or practices by operating SBH as a pyramid scheme and falsely promising that participants could earn substantial amounts of money. 2-ER-388-428. The FTC later amended its complaint to add similar allegations regarding VOZ Travel. 1-ER-238-43. The FTC asserted these claims under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes suits in federal court for a "permanent injunction" to

redress violations of any provision of law within the FTC's purview. At the time, controlling case law from this Court and numerous other circuits held that Section 13(b) authorized the FTC to obtain restitution or equitable monetary relief to redress harm to consumers, as well as asset freezes to ensure that money would be available for return to consumers. *See, e.g.*, *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598-600 (9th Cir. 2016); *FTC v. Evans Prods., Inc.*, 775 F.2d 1084,1088 (9th Cir. 1985). Accordingly, the FTC sought both prospective injunctive relief and restitution under Section 13(b).

The complaint also alleged that the defendants violated the FTC's Merchandise Rule and Cooling-Off Rule when selling products or services to SBH affiliates. 2-ER-389-90, 422-26. As relevant here, the Merchandise Rule provides that when sellers of goods via mail-order, the internet, or telephone cannot ship products on a timely basis, they must contact buyers and give them an option to either consent to delayed shipping or cancel the order and receive a prompt refund. 16 C.F.R. § 435.2(b)(1). A seller who fails to offer this option is required to deem the order canceled and provide a prompt refund. *Id.* § 435.2(c)(5). The complaint alleged that the defendants had not complied with these

procedures for late-shipped products. 2-ER-422-26. The Cooling-Off Rule requires sellers of goods and services via door-to-door sales, as defined by the rule, to give the buyer three days to cancel the transaction and provide notice of this right. 16 C.F.R. § 429.1. The complaint alleged that the defendants engaged in door-to-door sales of SBH products and training events covered by the rule but failed to comply with these requirements. The FTC asserted these rule violation claims under both Section 13(b) and Section 19 of the FTC Act; the latter expressly authorizes any relief a district court deems necessary to redress consumer harm caused by violation of an FTC consumer protection rule, including the refund of money. *See* 15 U.S.C. § 57b(a)(1), (b).

2. The TRO and Preliminary Injunction

In January 2020, the district court entered an *ex parte* temporary restraining order that froze the defendants' assets and appointed a

receiver to manage their businesses and marshal their assets.[2] SER-207-70. The TRO also vested the receiver with authority to choose counsel for the corporate defendants and other entities that were subject to the receivership.[3] SER-223. In February 2020, following a hearing, the district court entered a preliminary injunction that maintained the asset freeze and receivership, based on its finding that the FTC was likely to succeed on the merits and that assets would likely be dissipated absent a freeze. SER-177-206 and 2-ER-271, 280. The court noted that "[t]he Nolands' spending spree in Uruguay was financed with SBH funds, and a substantial portion of SBH's revenue is dealt to Noland, Sacca, Harris, or their associated companies." SER-205. The court did not require the receiver to post a bond. 2-ER-280.

[2] The FTC typically seeks an *ex parte* TRO and files under seal when it initiates a case where, as in this case, there is a risk that the defendants will destroy evidence or dissipate assets. Such concerns were well-founded here. As the district court found, defendants took steps to conceal their actions when the fact of the FTC's investigation was inadvertently disclosed. SER-8-9. Noland is incorrect in suggesting (Br. 12-13) that a sealed *ex parte* TRO proceeding was somehow improper.

[3] The initial receiver, Kimberly Friday, resigned in July 2021 and the court appointed Peter S. Davis to replace her. Dkt. 379; Dkt. 395. We refer to Ms. Friday and Mr. Davis collectively as the "Receivers."

3. The Contempt Motion

In February 2020, the FTC moved in the Contempt Action to hold Noland in contempt for violating the 2002 Order through the operation of SBH and VOZ Travel. SER-6. After Harris and Sacca acknowledged that Noland had advised them of the 2002 Order, the FTC moved to hold them in contempt as parties in active concert and participation with Noland. SER-6. The district court consolidated the Lead Action with the Contempt Action for all purposes. Dkt. 516.

4. *AMG* and Noland's First Appeal.

In July 2020, the district court denied Noland's motion to modify the preliminary injunction to allow Noland to select the counsel for the corporate defendants, and in October 2020, the court denied Noland's motion to dissolve or modify the preliminary injunction. SER-164-76 and SER-142-63. In November 2020, Noland appealed to this Court. SER-139-41; *See FTC v. Noland*, No. 20-17324 ("*Noland I*").

While the appeal was pending, the Supreme Court held that Section 13(b)'s "permanent injunction" language does not authorize monetary relief. *See AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 73-78 (2021). Following *AMG*, this Court dismissed Noland's appeal of the July 2020 order as untimely and affirmed the October 2020 order

declining to dissolve or modify the preliminary injunction. *FTC v. Noland*, 854 F. App'x. 898, 899-900 (9th Cir. 2021). The Court instructed the district court to assess whether and to what extent *AMG* might impact the preliminary injunction. *Id* at 900.

5. Continuation of the Asset Freeze and Receivership

Following *AMG*, the FTC filed a motion seeking to maintain the preliminary injunction, including the asset freeze and receivership. The Individual Defendants moved again to dissolve the preliminary injunction and to stay or dismiss the Section 13(b) proceedings. The district court granted the FTC's motion and denied the Individual Defendants' motion. 1-ER-094-105. The court held that *AMG* did not undermine the receivership component of the preliminary injunction because "[t]he purpose of the receivership was not merely to preserve assets in anticipation of a future award of monetary remedies pursuant to the FTC's § 13(b) claims" but rather "to prevent ongoing and future harm, by ousting the Individual Defendants from their management positions in entities that were likely functioning as pyramid schemes and making false income representations." 1-ER-099.

The court further held that although the asset freeze could no longer be justified under Section 13(b), the freeze was permissible under Section 19 given that the FTC had alleged more than $1 million in consumer harm resulting from rule violations. *Id.* at 103. It held that *AMG* did not impact the FTC's ability to seek preliminary or permanent injunctive relief in district court. *Id.* at 104-05. The Individual Defendants again appealed to this Court, *see FTC v. Noland*, No. 21-16679, but voluntarily withdrew that appeal in December 2021. SER-134-38.

6. Partial Summary Judgment and Trial

In September 2021, the district court partially granted the FTC's motion for summary judgment on liability. It held that there was no genuine dispute of fact that VOZ Travel was a pyramid scheme, that Appellants promoted VOZ Travel using false claims, and that Appellants violated the Merchandise Rule and Cooling-Off Rule. 1-ER-110-163; SER-14-15. The court reserved the rest of the issues in the case for trial. SER-17.

The district court held an 11-day bench trial from January to February 2023. In May 2023, it issued a 131-page order laying out its

findings of fact and conclusions of law. SER-3-133. The district court found that SBH was a pyramid scheme and that the Individual Defendants made false and misleading statements with respect to SBH. SER-81-92. It also found that the FTC had proved by clear and convincing evidence that this conduct violated the 2002 Order; indeed, the defendants did not dispute that SBH's commission structure was impermissible under the 2002 Order. SER-95-97. Additionally, the court found that defendants had engaged in at least 10 discrete acts of dishonesty over the course of the litigation, including "destroying evidence, violating court orders, giving false under-oath testimony, and taking no accountability for the misconduct after being caught." SER-7-14, 127.

As a remedy for their misconduct, the district court imposed a compensatory civil sanction of $7,306,873.14 on the Contempt Defendants (Noland, Harris and Sacca) jointly and severally. This amount represents the net revenues received by SBH and VOZ Travel and from sales of tickets for training events, all of which came directly from consumers. SER-114, 120. Regarding the rule violation claims, the court found that the FTC had demonstrated $6,829 in consumer injury

for the Merchandise Rule violations but no consumer harm from the Cooling-Off Rule violations. SER-107-11. It thus held all Individual Defendants jointly and severally liable for $6,829 under Section 19. SER-107-09. All monetary relief is to be paid to the FTC to be distributed to consumers as redress; if there is money left over, the FTC must either return it to the defendants or ask the district court for permission to use it for some other purpose. 1-ER-027.

The district court also held that a permanent injunction under Section 13(b) was appropriate and that the injunction should include a complete ban on the Individual Defendants participating in MLM programs. SER-129. In reaching this conclusion, the court found that the violations were "serious and deliberate" and that it would be "quite easy for Defendants to transfer the violative conduct to other products." SER-128. It noted that "[s]hortly before launching SBH, Noland claimed he could 'plug any company or product into [his] process'"; that when SBH began to falter, Defendants started another pyramid scheme, VOZ Travel, which "featured the same deceptive income claims and commission structure"; and that "since this case began, Defendants have attempted to launch what are in many respects new versions" of

SBH and VOZ Travel. *Id*. Furthermore, the court held that defendants had "shown a propensity to violate court and administrative orders," noting that "the Contempt Defendants violated multiple provisions of the 2002 permanent injunction, all Defendants violated certain provisions of the TRO, and the various forms of spoliation-related misconduct … violated an array of court orders." *Id*.

On September 18, 2023, the district court entered final orders implementing this relief. 1-ER-010-059. This appeal followed.

SUMMARY OF ARGUMENT

Appellants do not challenge any of the district court's liability determinations. Their challenges to the relief granted in the final judgment lack merit, and their challenges to the relief granted in the preliminary injunction (the asset freeze and receivership) are moot.

1. The district court properly awarded $7,306,873.14 as a compensatory contempt sanction, to be paid to the FTC and distributed to Noland's victims. This Court has recognized that a contempt sanction may be based on consumer loss. *FTC v. EDebitPay, LLC*, 695 F.3d 938, 945 (9th Cir. 2012). Here, the award represents Appellants' net revenues from their illegal activities—i.e., the money they received from

affiliates from sales of products or ticket sales less any refunds, returns, or commissions paid—which is equivalent to consumer loss. The district court's use of net revenues as a baseline for measuring consumer loss is consistent with numerous decisions from courts of appeal, and Appellants did not present evidence of any appropriate offsets to reduce this amount.

2. The district court properly awarded $6,829 in monetary relief under Section 19 of the FTC Act for violations of the Merchandise Rule. Section 19 expressly authorizes a court to order a "refund of money" where a defendant has violated an FTC consumer protection rule. 15 U.S.C. § 57b(a)(1), (b). Here, defendants violated the Merchandise Rule by failing to provide refunds to five affiliates who requested them after SBH failed to ship products on time. The district court properly held that these affiliates were entitled to refunds. Noland's assertion that the award is solely for the FTC's benefit is wrong. The judgment requires all monetary relief to be paid out as consumer redress and prohibits its use for other purposes.

Noland's assertion that Section 19 was not an adequate basis for the pre-judgement asset freeze and the receivership is moot now that a

final judgment has been entered and the receivership has been terminated. In any event, the district court did not rely on Section 19 for the receivership (though it could have) and an asset freeze was appropriate under Section 19 where the FTC sought more than $1 million in monetary relief and there was evidence that the defendants would dissipate their assets absent a freeze. The fact that the FTC did not recover all of the relief it sought does not mean the pre-judgment freeze was inappropriate. To the extent any assets remain subject to a freeze post-judgment, the $7.3 million contempt sanction plainly justifies such a freeze.

3. The district court did not abuse its discretion by enjoining Appellants from operating MLM businesses. The court properly found that such relief was appropriate given the seriousness of the violations, the ease which the violative conduct can be transferred to other operations, and Appellants' history of wrongdoing, including their violations of a prior injunction that was more narrowly drawn and their extensive record of dishonesty and violations of court orders in this case. The fact that the injunction may bar some lawful activity does not mean it is overbroad, as it is well settled that a defendant who is caught

violating the FTC Act must expect some fencing in. This Court has previously affirmed similar industry bans in numerous cases where defendants have engaged in comparable misconduct. Appellants' suggestion that such bans are unconstitutional is frivolous and unsupported by any of the cases they cite.

4. Appellants challenges to the appointment of a receiver and the lack of a bond are moot because a final permanent injunction has been issued that supersedes the preliminary injunction and the receivership is now terminated. In any case, Appellants also have not shown injury due to the lack of bond or inability to choose counsel for the receivership entities, and their argument that a bond was required lacks merit. The district court actively supervised the receivership and concluded that the Receivers' expenses were appropriate and not extravagant.

STANDARD OF REVIEW

All of the issues that Appellants have raised are subject to review for abuse of discretion. *See EDebitPay*, 695 F.3d at 943 (civil contempt order reviewed for abuse of discretion); *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1101 (9th Cir. 2014) (equitable remedies under FTC Act reviewed for abuse of discretion); *CFTC v. Topworth Int'l, Ltd.*, 205 F.3d

1107, 1115 (9th Cir. 1999) (district court's supervision of equitable receivership reviewed for abuse of discretion).

ARGUMENT

Noland does not challenge any of the district court's liability or credibility determinations—only the remedies it imposed.[4] Furthermore, many of Noland's arguments are not directed to the relief the district court imposed in the final judgment, but rather to aspects of the district court's preliminary injunction. For example, Noland argues at length that Section 19 was not a sufficient basis for the pre-judgment asset freeze. Br. 27-37. But where a permanent injunction has been granted, it supersedes and moots any challenges to the original preliminary injunction. *Hilao v. Estate of Ferdinand Marcos (In re Estate of Marcos Human Rights Litig.)*, 94 F.3d 539, 544 (9th Cir. 1996). Noland voluntarily dismissed his appeal from the post-*AMG* order maintaining the preliminary injunction and asset freeze, and any issues as to the propriety of that order are now moot. All that is at issue on

[4] For convenience, we refer only to Noland, but all of the appellants join in Noland's arguments.

this appeal is the propriety of the final judgment, and none of Noland's challenges to that judgment have any merit.[5]

I. THE DISTRICT COURT PROPERLY AWARDED A COMPENSATORY CONTEMPT SANCTION BASED ON THE NET REVENUES DEFENDANTS RECEIVED FROM CONSUMERS.

The district court properly awarded $7,306,873.14 as a compensatory contempt sanction, to be paid to the FTC and distributed to consumers who suffered monetary losses as a result of their involvement in Noland's pyramid schemes. This sum represents the net revenues from SBH, VOZ Travel, and ticket sales for training events—in other words, the amounts that consumers paid the defendants less any refunds, returns, or commissions paid to consumers. The Supreme Court has long recognized that "[j]udicial sanctions in civil contempt

[5] The two recent Supreme Court cases Noland cited in his Rule 28(j) letters are irrelevant to any issue in this appeal. *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), held that the SEC's imposition of civil penalties for securities fraud in an administrative proceeding violated the respondent's Seventh Amendment right to a jury trial. That holding has no bearing on this case, which was brought in district court and seeks only equitable relief; furthermore, defendants did not demand a jury trial. *Loper Bright Enterprises v. Raimondo,* 144 S.Ct. 2244 (2024), overruled the longstanding *Chevron* doctrine in administrative law, which required courts to defer to agencies' interpretation of ambiguous statutes in some circumstances. The FTC and district court did not rely on *Chevron* in this case.

proceedings may, in a proper case, be employed … to compensate the complainant for losses sustained." *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04 (1947). This Court has held (along with numerous other circuits) that "district courts have broad discretion to use consumer loss to calculate sanctions for civil contempt of an FTC consent order." *EDebitPay,* 695 F.3d at 945 (internal citations omitted). The district court faithfully adhered to these principles in awarding a compensatory contempt sanction here.[6]

As the district court explained, SER-119, numerous courts of appeals have held that a defendant's revenues are the proper baseline for determining consumer loss when calculating a compensatory contempt sanction. *See FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 245 (2d Cir. 2014); *FTC v. Kuykendall*, 371 F.3d 745, 764-65 (10th Cir. 2004); *McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (11th Cir. 2000). Once the FTC establishes the baseline by proving revenues, the burden shifts to defendants "to put forth evidence showing that certain

[6] As the district court properly held, *AMG* did not affect district courts' authority to order compensatory contempt sanctions. SER-116-17; *see, e.g.*, *FTC v. Pukke*, 53 F.4th 80, 106-07 (4th Cir. 2022) (affirming compensatory civil contempt sanctions post-*AMG*); *FTC v. Nat'l Urological Grp., Inc.*, 80 F.4th 1236, 1243 (11th Cir. 2023) (same).

amounts should offset the sanctions assessed against them." *Blue Hippo*, 762 F.3d at 245; *Kuykendall*, 371 F.3d at 766-67. In this case, Noland does not challenge the district court's finding that the pyramid schemes' net revenues were $7,306,873.14, and defendants did not put on evidence of any appropriate offsets. SER-121-22.

Noland is thus wrong in arguing (Br. 47-51) that the compensatory award does not reflect any consumer loss. The defendants in this case induced consumers to pay money into pyramid schemes and related training events through a series of deceptive representations. Defendants' net revenues consist of their gross receipts—money that came from the affiliates—minus the commissions the defendants paid. Since all of this money came from consumers, the district court properly determined that this was an appropriate baseline for determining consumer loss. SER-61, 76, 112. Contrary to Noland's suggestion (Br. 49), this amount does not represent a "windfall" to the FTC. Under the terms of the district court's order, any money the FTC recovers on the judgment will be paid back to the consumers from whom it was taken in the first place. 1-ER-027 (Dkt. 592 at 18, X.D).

II. THE DISTRICT COURT PROPERLY AWARDED MONETARY RELIEF UNDER SECTION 19 FOR VIOLATIONS OF THE MERCHANDISE RULE.

The district court properly awarded $6,829 under Section 19 of the FTC Act for defendants' violations of the Merchandise Rule. The district court held that monetary relief was appropriate for five SBH affiliates who requested, but did not receive, refunds after SBH failed to ship them products on time. SER-107. The district court rejected the FTC's request for monetary relief under Section 19 based on other Merchandise Rule violations and violations of the Cooling-Off Rule. SER-101-11.

Section 19 plainly permits the monetary relief the district court awarded. It authorizes the FTC to file a civil action in district court against "any person, partnership, or corporation" who "violates any rule under [the FTC Act] respecting unfair or deceptive acts or practices," and obtain "such relief as the court finds necessary to redress injury to consumers … resulting from the rule violation." 15 U.S.C. § 57b(a)(1), (b). Such relief "may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule

violation," but not "exemplary or punitive damages." 15 U.S.C. § 57b(b). The relief ordered in this case is a refund of money, which the statute expressly authorizes.

Noland's assertion that the FTC failed to establish consumer injury (Br. 44-45) is wrong. The district court correctly held that the FTC had identified five instances in which consumers who should have received a refund under the rule, and who also requested refunds, did not, and noted that "Defendants made no effort to specifically address or dispute the FTC's claim for damages based on these five episodes." SER-107. Noland's assertion that the district court did not order the payment of the $6,829 to any consumer and that the money can be used "solely for the FTC's benefit" (Br. 44-45) is also incorrect. The judgment requires that "[a]ny funds the FTC applies as monetary relief for the Merchandise Rule Violations shall not be used for purposes other than consumer redress." 1-ER-027. These funds therefore cannot be used for the FTC's benefit. And contrary to Noland's assertion, the fact that the district court held that the Merchandise Rule refund would be "part of, and not in addition to" the larger contempt sanction does not suggest that the court was on "shaky grounds." Br. 45; 1-ER-026. This provision

is necessary to ensure that consumers injured by the Merchandise Rule violation do not receive a double recovery, *i.e.*, two refunds for the same payment.

Noland mixes up two different parts of the statute in arguing (Br. 35-37) that before asserting a Section 19 claim, the FTC was required to conduct an administrative proceeding and show that a reasonable person would have known that defendants' conduct was dishonest or fraudulent. The FTC brought this suit under Section 19(a)(1), which applies where the FTC seeks relief based on a violation of one of its consumer protection rules. That subsection allows the FTC to sue directly in district court based on the rule violation without initiating an administrative proceeding. A different statutory provision, Section 19(a)(2), applies where a defendant engages in unfair or deceptive acts or practices that do not violate a rule. Under that subsection, the FTC must first commence an administrative proceeding and issue a cease-and-desist order under Section 5 of the FTC Act, 15 U.S.C. § 45, before filing a Section 19 action. *See* 15 U.S.C. § 57b(a)(2). The FTC must also establish that the unfair or deceptive act or practice to which the cease-and-desist order relates "is one which a reasonable man would have

known under the circumstances was dishonest or fraudulent." *Id.* Since this case involves a rule violation, it is governed by Section 19(a)(1), and the additional Section 19(a)(2) requirements that Noland cites do not apply.

Noland's argument that Section 19 was an inadequate basis for the preliminary injunction's imposition of a pre-judgment asset freeze and a receivership is not properly at issue in this appeal because, as discussed above, the final judgment here has superseded that preliminary injunction. But the argument lacks merit in any event. First of all, the district court did not rely on Section 19 for the appointment of the receiver. It relied on Section 13(b), explaining that the "key reason" for the receivership was "to prevent ongoing and future harm, by ousting the Individual Defendants from their management positions in entities that were likely functioning as pyramid schemes and making false income representations." 1-ER-099. In any case, Section 19's authority to award relief "necessary to redress injury to consumers" includes the authority to order an asset freeze or receivership. *See FTC v. Simple Health Plans LLC*, 58 F.4th 1322, 1329-30 (11th Cir. 2023). Here, the district court found ample basis for

an asset freeze based on "a likelihood of dissipation of the claimed assets," including evidence of a personal "spending spree in Uruguay" that was financed with SBH funds. SER-205.

The fact that the FTC ultimately recovered only $6,829 on its Section 19 claims does not suggest that an asset freeze was inappropriate. When the district court issued its ruling maintaining the freeze in September 2021, it had already granted summary judgment to the FTC on liability as to the rule violations, and the FTC had "developed a theory as to why the Individual Defendants should be held liable for $1,156,865.50." 1-ER-102-03. The fact that the FTC did not recover that entire sum does not mean the asset freeze was improper. The district court was justified in continuing the asset freeze "to prevent [the defendants] from dissipating assets in order to preserve the *possibility* of equitable remedies." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (en banc) (emphasis added). And to the extent that the asset freeze remains in effect post-judgment,

it is plainly justified by the $7.3 million compensatory contempt sanction.[7]

III. THE DISTRICT COURT PROPERLY ENJOINED DEFENDANTS FROM ENGAGING IN MULTI-LEVEL MARKETING PROGRAMS.

Given the gravity of the misconduct here, Noland's recidivism, and the multiple acts of dishonesty the district court documented, the district court properly enjoined the Individual Defendants from any future involvement in MLM programs.[8] The Supreme Court has been clear that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). An injunction should be "framed 'broadly enough to prevent [defendants] from engaging in similarly illegal practices in [the] future.'" *Grant Connect*, 763 F.3d at 1105 (quoting *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965)).

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[7] The final judgment modifies the asset freeze "to the extent necessary to permit Individual Defendants to satisfy, in whole or in part," the monetary judgment, and provides that the court will dissolve the asset freeze when the judgment is fully satisfied. 1-ER-027.

[8] Noland does not dispute that an injunction was appropriate and does not challenge any of the injunction's provisions other than the MLM ban.

In determining an injunction's scope, courts must consider "(1) the seriousness and deliberateness of the violation; (2) the ease with which the violative claim may be transferred to other products; and (3) whether the respondent has a history of prior violations." *Grant Connect*, 763 F.3d at 1105 (cleaned up). The district court here properly considered these factors and concluded that a permanent ban on participation in MLM programs was appropriate. It found that the violations were "serious and deliberate," noting that "[t]he sheer volume of deceptive tactics and statements associated with those businesses provides unmistakable evidence of scienter and shows that the violations were not isolated, but recurrent." SER-125, 128. The court also found that "it would be quite easy for Defendants to transfer the violative conduct to other products." SER-128. It noted that Noland himself claimed that he could "plug any company or product into [his] process," that defendants had previously started VOZ Travel when SBH faltered, and that they had tried to launch new versions of these scams since the case was filed. *Id*. Finally, the court found that the defendants had "shown a propensity to violate court and administrative orders." *Id*. In particular, "the Contempt Defendants violated multiple provisions of

the 2002 permanent injunction, [and] all Defendants violated certain provisions of the TRO" and engaged in "various forms of spoliation-related misconduct" that "violated an array of court orders." *Id.* These findings amply justify the court's decision to order a broad injunction that includes a ban on any further involvement in MLM programs.

The fact that MLM programs may not be inherently illegal, as Noland argues (Br. 54-55), does not mean that defendants could not properly be enjoined from engaging in this business. It is well settled that a defendant who is "caught violating the [FTC] Act … must expect some fencing in." *Colgate-Palmolive*, 380 U.S. at 395 (cleaned up). In light of the defendants' history of operating multiple illegal MLM programs, the district court reasonably concluded that they cannot be trusted to operate such programs lawfully in the future.

This Court has repeatedly upheld similarly broad injunctive bans on working in an industry. In *FTC v. Gill*, 265 F.3d 944 (9th Cir. 2001), the Court affirmed a permanent ban on a defendant "participating in *any aspect* of the credit repair business." *Id.* at 954 (emphasis added). The district court found there that the defendants posed a "real likelihood of recurring violation" given their "systematic" misdeeds and

flouting of a preliminary injunction. *Id.* at 957. The Court rejected the defendants' argument that the industry ban was an abuse of discretion, finding "no basis for disturbing the district court's prudent assessment that giving Defendants another chance might prove to be unwise." *Id.*

Similarly, in *Grant Connect,* the Court affirmed an order barring a defendant from "engaging in ... negative-option marketing, continuity programs, preauthorized electronic fund transfers, the use of testimonials, and marketing or selling products related to grants, credit, business opportunities, diet supplements, or nutraceuticals." 763 F.3d at 1097-98. The defendant in that case sought to limit the injunction to his "specific bad acts," but the Court rejected that argument, noting that the defendant had "consistently engaged in variations on the same deceptive marketing scheme," and those practices were "easily transferable both to new product lines and to new modes of communication with consumers." *Id.* at 1105. Likewise, the court in *FTC v. Pukke*, 53 F.4th 80 (4th Cir. 2022), upheld permanent injunctions barring the defendants "from engaging in any real estate ventures" and "from any involvement in telemarketing." *Id.* at 99, 101.

The same reasoning supports the issuance of the permanent ban on participation in MLM programs here.

Noland's constitutional arguments (Br. 56-58) are frivolous. None of the cases Noland cites remotely suggests that a district court may not enjoin a defendant from working in a particular industry where that defendant has repeatedly engaged in illegal conduct within that industry and is likely to do so again absent an injunction.[9] As discussed above, this Court and others have repeatedly upheld such injunctions.

[9] In *Stanard v. Olesen*, 74 S. Ct. 768, 769-71 (1954), Justice Douglas, sitting as a Circuit Justice, denied a business's application for relief from a Post Office order pending judicial and administrative review. *Dent v. West Virginia*, 129 U.S. 114 (1889) held that a state law requiring doctors to be graduates of reputable medical schools does not violate the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 401-02 (1923) struck down a statute that banned teaching children languages other than English. *Piecknick v. Com. of Pa.*, 36 F.3d 1250, 1253 (3d Cir. 1994) held that a towing company not picked for a state job did not have a valid claim for deprivation of a liberty interest. *Truax v. Raich*, 239 U.S. 33, 35, 42-43 (1915) struck down a state law limiting the number of non-citizens a business could employ. *Lester v. Parker*, 235 F.2d 787 (9th Cir. 1956) upheld an injunction that barred Coast Guard officers from interfering with rights of merchant seamen to employment. *Greene v. McElroy*, 360 U.S. 474 (1959) held that an engineer's rights were violated when he was fired after the government revoked his security clearance without due process.

IV. THE RECEIVERS' ACTIONS ARE NOT PROPERLY BEFORE THE COURT IN THIS APPEAL.

Noland's various attacks on the way the court-appointed Receivers performed their duties (Br. 13-19, 51-53) have no bearing on the propriety of either the monetary relief or the injunctive conduct relief awarded in the court's final judgment, and are not properly before the Court in this appeal. And in any event, none of Noland's receiver-related arguments have any merit.

To the extent that Noland is challenging the initial appointment of a receiver as part of the preliminary injunction, that issue is moot now that the preliminary injunction has been superseded by a final judgment terminating the receivership.[10] 1-ER-054-55. There is no relief the Court can award with respect to the receivership. In any event, the court did not abuse its discretion by appointing a receiver under Section 13(b), given the serious harm that Noland's continued operation of the businesses as pyramid schemes would have posed to the public.

[10] This Court rejected Noland's argument that the district court erred in imposing a receivership in *Noland I*, when it affirmed the pre-*AMG* order declining to dissolve or modify the injunction. *Noland I*, 854 F. App'x at 899-900. Noland voluntarily withdrew his appeal of the district court's post-*AMG* ruling holding that a receivership was still proper under Section 13(b) to further prevent harm to the public.

Noland has not explained how any of the Individual Defendants were injured by the district court's decision not to require the Receivers to post a bond. *See* SER-204-05 (declining to order a receiver's bond because the United States and its agencies are not required to post one under Fed. R. Civ. P. 65(c)). Noland did not raise this argument in either of his prior appeals. In any case, this Court has made clear that a bond is discretionary, and that a district court does not abuse its discretion by not requiring a bond where the "main effect" of doing so "would be to deplete further the resources available to [those] with an interest in the receivership estate." *SEC v. Universal Fin.*, 760 F.2d 1034, 1039 (9th Cir. 1985).

Noland's argument that 28 U.S.C. § 754 required a bond (Br. 19) is waived because defendants did not make the argument in the district court. *See, e.g.*, *Tibble v. Edison Int'l*, 843 F.3d 1187, 1193 (9th Cir. 2016) (en banc). It is also contrary to the plain language of the statute, which provides that "[a] 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 (emphasis added). The words "as required by the court" plainly indicate that the posting of a bond in these circumstances is a discretionary decision by the district court.[11] If Congress had wanted to require a bond in all cases involving property in different districts, it would have omitted these words.

Noland fails to cite a single case or authority in support of his argument that the Receivers failed to act in the best interests of the Corporate Defendants by not mounting a defense to the FTC's claims. (Br. 51-53). Noland lacks standing to assert this claim because he cannot show that the Receivers' decision not to spend corporate assets pursuing defenses they deemed futile caused any injury to the Individual Defendants, who are the only appellants here. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) ("[I]njury in fact" is the "first and foremost of standing's three elements.") (cleaned up). To hold the Individual Defendants liable, the FTC first had to prove that the Corporate Defendants were liable. *See, e.g.*, *FTC v. Cyberspace.com*

[11] Other district courts have recognized that a bond is discretionary under § 754. *See, e.g.*, *FTC v. ACRO Servs. LLC*, No. 3:22-CV-00895, 2022 WL 17177641, at *13 (M.D. Tenn. Nov. 21, 2022). Noland cites nothing to the contrary.

LLC, 453 F.3d 1196, 1202 (9th Cir. 2006) (describing circumstances in which an individual "is personally liable for a corporation's [FTC Act] violations"). Noland and the other Individual Defendants thus had a full and fair opportunity to litigate the Corporate Defendants' liability as part of their defense and were not injured by the Receiver's failure to mount a duplicative defense.

But even if Noland could show some injury, the district court plainly did not abuse its discretion by allowing the Receiver not to mount a defense. This Court has recognized that "a district court's power to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." *SEC v. Cap. Consultants, LLC*, 397 F.3d 733, 738 (9th Cir. 2005) (cleaned up); *see also SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 606 (9th Cir. 1978) ("[T]he district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership."). Furthermore, because "a primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of creditors," this Court "generally uphold[s] reasonable procedures instituted by the district

court that serve this purpose." *SEC v. Hardy*, 803 F.2d 1034, 1038 (9th Cir. 1986). Here, it was reasonable for the district court to accept the Receivers' conclusion that they had no good-faith basis for defending against the FTC's claims—much less a good-faith basis that would have added to the arguments already pursued by the Individual Defendants—and that spending corporate funds on a defense would serve only to reduce consumers' potential recovery from the receivership estate.

Finally, although Noland complains about the fees paid to the Receivers and their lawyers and consultants (Br. 14-15), the district court reviewed each of the Receivers' fee requests and determined that they were reasonable and not excessive or extravagant.[12] *See e.g,* Dkt. 136, Dkt. 154, Dkt. 199 (court approval of Receiver fees). Noland has not shown that these determinations were an abuse of the district court's broad discretion. Noland's repeated observation that the

[12] Part of the reason for the Receivers' expenditures on lawyers and consultants was to allow them to perform their court-ordered duty of identifying and fixing problems created by Noland and his associates: for example, an SBH product containing an ingredient banned by the FDA, misleading promotional materials that lacked substantiation, and financial irregularities such as operating in Kentucky without registration or commercial liability insurance. SER-7.

Receivers did not pay anything to consumers for redress is a red herring. It was not the Receivers' job to pay consumer redress. Under the final judgment, the Receivers' job was to liquidate the assets of the receivership entities, pay any court-approved administrative expenses, and remit the net proceeds to the FTC as payment toward the judgment. 1-ER-055. They have done so. It is the FTC's responsibility to pay consumer redress out of any money it collects on the judgment, but no payment can be made until this litigation is finally concluded.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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September 6, 2024

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FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 23-3757

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