IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

In re SANCTUARY BELIZE LITIGATION	No: 18-cv-3309-PJM

REPLY IN SUPPORT OF MOTION TO REFORM AND REAFFIRM FINAL ORDERS

The Court can and should enter the Proposed Order reforming and reaffirming the final orders in this case, bringing this litigation to a swift conclusion. Crucially, the Defendants do not dispute that Andris Pukke, Peter Baker, and John Usher control each of the Corporate Defendants and The Estate of John Pukke. *See, e.g.*, *Mentch v. E. Sav. Bank, FSB*, 949 F. Supp. 1236, 1247 (D. Md. 1997) (issue conceded "by failing to address [it] in [their] opposition"); *see also Satcher v. Univ. of Ark. at Pine Bluff Bd. of Trustees*, 558 F.3d 731, 735 (8th Cir. 2009) ("[F]ailure to oppose a basis for summary judgment constitutes waiver of that argument."). Having so conceded, the legal consequence is that the Court should enforce the monetary provisions in the De Novo Order, DE 1194, and the Default Order, DE 1112, to give effect to the unequivocal monetary relief in the Contempt Order, DE 1113.

The Defendants' hodgepodge of objections—mostly misguided and inaccurate claims of judicial estoppel and the mandate rule—all miss the mark. Their argument that consumers have already been made whole is disingenuous and inaccurate. While they complain of due process, they identify nothing lacking and are being provided all required process by responding to the FTC's motion. The Defendants also continue to incorrectly argue that the Fourth Circuit vacated portions of the Default Order even though they can point to no required finding by the Fourth

Circuit that this Court abused its discretion. Finally, Section 19 independently supports the monetary relief in the De Novo and Default Orders.

I. The Defendants do not challenge their control over the Corporate Defendants or The Estate of John Pukke.

At no point in their opposition do Pukke, Baker, or Usher dispute their control over the Corporate Defendants or The Estate of John Pukke. If anything, they admit this control both in their opposition and in internal communications. In response to the FTC's concern about which people and entities are actually represented,[1] the Defendants deferred to the FTC's allegation that Pukke, Baker, and Usher "own, control, or manage" the various Corporate Entities and The Estate of John Pukke. DE 1405 at 1, fn. 1. The FTC also urges the Court to again review the Defendants' November 29, 2022 email. DE 1404-1 at 7-8. There, the Defendants' counsel reports solely to Pukke, Baker, and Usher regarding a motion affecting the Corporate Defendants. They plot to take control of assets with the intent of returning them to Pukke, Baker, and Usher, while knowing that they cannot do so openly and will need to wait some period of time before Pukke, Baker, and Usher can assert open, public control over those assets: "What this should mean is th[at] the companies will have money—**although for now the money cannot go to you guys [Pukke, Baker, and Usher]**." DE 1404-1 at 8 (emphasis added); *see also id.* ("There is also going to be a question as to who runs the company because the injunction that still stands prohibits you all from running Sanctuary Bay. Someone needs to be in charge.

[1] DE 1404 at 5, n.3 (detailing the inconsistencies in who the attorneys representing the Defendants claim to represent and urging the Court to require the Defendants to provide an appropriate report).

Alphonso Bailey?"). Not only is it inappropriate to thwart the Court's orders,[2] this stresses Pukke's, Baker's, and Usher's control.

This control has legal consequences. The Contempt Order requires Pukke, Baker, and Usher to transfer $120.2 million to the FTC. The only defense is impossibility, which means that they must turn over or transfer all assets that they control. *See, e.g.*, *SEC v. Hickey*, 322 F.3d 1123, 1131-32 (9th Cir. 2003) (contempt authority included freezing assets held by third party but controlled by contemnor); DE 1404 at 13-16 (FTC argument, collecting cases). To satisfy this obligation, the Court can and should order that the Defendants comply with the various turnover and related provisions in the De Novo and Default Orders.

As a result, Pukke and Baker are also not yet entitled to their passports. DE 1405 at 8 (demanding their return). The Court appropriately placed their passports in the hands of the Receiver to ensure compliance with the Court's orders, including transfers of assets. The Fourth Circuit affirmed. DE 1377-1 at 42-43. Until Pukke and Baker comply with Section V.E of the De Novo Order,[3] or its equivalent, the Receiver should keep their passports.

II. Other FTC actions, including *On Point* and *Noland*, support the relief the FTC is requesting rather than providing a basis for "judicial estoppel."

The Defendants argue that the FTC is judicially estopped from pursuing their assets, claiming the FTC has admitted *AMG*[4] prevents the FTC from collecting on judgments. But, two of the cases they cite stand for the opposite: In both *FTC v. On Point Capital Partners*, and *FTC v. Noland*, the FTC successfully argued, as here, that other legal authority entitles the FTC to both asset freezes and, ultimately, assets. Their two other cases, *FTC v. Cardiff* and the district

[2] *See McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192-93 (1949) (party avoids court order at its own peril unless it "petition[s] the District Court for a modification, clarification or construction of the order").

[3] Section V.E sets the minimum compliance necessary for the passports' return.

[4] *AMG Capital Mgmt. LLC v. FTC*, 141 S. Ct. 1341 (2021).

court proceedings in *FTC v. AMG Services Inc.*, are simply distinguishable. The FTC did not have companion contempt motions in either and in *AMG* had no reason to further pursue the defendants in light of the massive criminal forfeiture order they faced. Moreover, other courts such as *FTC v. Credit Bureau Center LLC* and *FTC v. Simple Health Plans LLC* have modified previous Section 13(b)-based orders to grant the FTC assets and asset freezes under Section 19 of the FTC Act, after the Supreme Court's ruling in *AMG*, at the FTC's urging. Therefore, not only is the FTC not judicially estopped, this Court would hardly be alone in granting the relief the FTC seeks.

But first, the Defendants' own authorities cast doubt on whether judicial estoppel could ever apply to the FTC and whether it could apply to perceived differences in legal positions the FTC might take. *See* DE 1405 at 12 (promoting *New Hampshire v. Maine*, 532 U.S. 742 (2001) and *Lowery v. Stovall*, 92 F.3d 219 (4th Cir. 1996) as the relevant sources for this doctrine). In *New Hampshire v. Maine*, the Supreme Court questioned whether judicial estoppel could ever apply to a governmental body when it is engaged in law enforcement. 532 U.S. at 755 ("When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant.") (quoting *Heckler v. Comm. Health Svcs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984)). More damning, in *Lowery*, the Fourth Circuit explained that "the position to be estopped ***must be one of fact*** rather than law or legal theory." 92 F.3d at 224 (emphasis added) (citing *Tenneco Chems. v. William T. Burnett & Co., Inc.*, 691 F.2d 658, 664-65 (4th Cir.

1982)).[5] Here, the Defendants are not complaining about a change in a factual assertion. They are instead complaining about an (incorrectly perceived) change in legal theory. Judicial estoppel, therefore, is not only unlikely ever to apply to the FTC, it cannot apply in this circumstance.

Turning to the cases at issue, the FTC did not take inconsistent positions resulting in court actions that the FTC is now attempting to use to unfairly disadvantage the Defendants.[6] To the contrary, the FTC's positions are entirely consistent. The FTC has already explained how *FTC v. On Point Capital Partners, LLC*, 17 F.4th 1066 (11th Cir. 2021), supports its position. *See* DE 1372 at 1-2. *On Point* is one half of joint legal proceedings. In *On Point*, the FTC filed a new proceeding alleging violations of the FTC Act. Simultaneously, the FTC filed an overlapping contempt motion in *FTC v. Acquinity Interactive LLC*, just as the FTC did here when it filed the *Ecological Fox LLC* proceeding and overlapping contempt motions in *AmeriDebt*. Post-*AMG*, the district court upheld the asset freeze under its contempt authority, just as the FTC is asking this Court. *FTC v. Acquinity Interactive LLC*, 2021 WL 3603594, *6-9 (S.D. Fla. Aug. 13, 2021) (upholding the asset freeze and ruling it will enter a preliminary injunction as a result of the court's contempt powers). In *On Point*, the Eleventh Circuit carefully carved out the district court's ability to impose that relief in the companion contempt proceedings. *On Point*, 17 F.4th at 1078 ("Furthermore, nothing in this opinion should be construed as commenting on or having a legal effect on the separate asset freeze in *Acquinity*[.]").

---

[5] The court also cited to Mark J. Plumer, Note, *Judicial Estoppel: The Refurbishing of a Judicial Shield*, 55 Geo. Wash. L. Rev. 409, 435 (1987) ("Judicial estoppel is properly defined as ***a bar against the alteration of a factual assertion*** that is inconsistent with a position sworn to and benefitted from in an earlier proceeding.") (emphasis added).

[6] Paraphrased, this is the standard from *New Hampshire v. Maine*, 532 U.S. at 750-51.

The *Noland* case also does not help the defendants. As here, the FTC had viable Section 13(b), Section 19, and contempt actions against the *Noland* defendants. Prior to *AMG*, the FTC primarily relied on Section 13(b) when seeking preliminary relief, including an asset freeze and receivership. Post-*AMG*, the FTC continued to argue that the asset freeze and receivership were appropriate, and the *Noland* court agreed. First, it held that Section 13(b) still supported the receivership, much as the Fourth Circuit did in this case. *FTC v. Noland*, 2021 WL 4318466, *3 (D. Ariz. Sept. 23, 2021) ("[T]he Court agrees with the FTC that AMG Capital does not undermine the receivership component of the original order granting a preliminary injunction."); DE 1377-1 at 39-40 (affirming Receivership). The *Noland* court then continued the asset freeze, based on Section 19, one of the arguments the FTC has asserted here. 2021 WL 4318466 at *5. Although not addressed by the *Noland* court, the FTC had also argued that the related contempt motions against the *Noland* defendants provided an independent basis for the asset freeze. *See* Exhibit 1, DE 363 from *Noland*, at 4.

The district court proceedings in *AMG* following the Supreme Court's ruling are just irrelevant. First, unlike in this case, there were neither pending Section 19 nor contempt proceedings to independently justify monetary relief in that case. Second, there was no reason for the FTC to pursue any possible remedy on remand because the lead defendant was by that time subject to a $3.5 billion criminal forfeiture order. *See* Exhibit 2, DE 344 from *United States v. Scott Tucker*, at 8.

The *Cardiff* matter is also distinguishable. There, the FTC did not have an overlapping contempt judgment and, as the Defendants explain in their brief, the FTC had attempted other methods to preserve monetary relief. DE 1405 at 10. That the FTC did not appeal that ruling does not mean that the FTC agrees with that result and cannot mean it is estopped from pursuing

relief here. This also could never be spun as a change in *factual* position, further eliminating any possible judicial estoppel claims.

Other courts have granted the FTC the relief it is seeking here. In addition to the *On Point* and *Noland* cases, in *FTC v. Credit Bureau Center LLC*, the district court reimposed the same relief under Section 19 following a remand from a decision vacating Section 13(b) monetary relief, like the FTC is asking here. 2021 WL 4146884, *5-6, 9-10, & 12 (N.D. Ill. Sept. 13, 2021). More recently, in *Simple Health Plans*, the Eleventh Circuit permitted the FTC to substitute preliminary relief, including an asset freeze, that it had obtained under Section 13(b) with identical relief under Section 19. *FTC v. Simple Health Plans LLC*, --- F.4th ---, 2023 WL 465660, at *5 (11th Cir. Jan. 27, 2023).

In short, there can be no judicial estoppel here because the FTC is enforcing the law and because the Defendants have not identified a change in a *factual assertion*. Moreover, the FTC's positions here are entirely consistent with its legal positions in prior cases, including cases where it has prevailed on these same issues.

III. The "mandate rule" does not help the Defendants.

The Defendants assert that the mandate rule bars the FTC from taking all manner of steps necessary to enforce the Contempt Order and otherwise provide justice to consumers. They are wrong. The mandate rule does not apply to issues not decided on appeal or not ruled on by the district court prior to the appeal. *See Quern v. Jordan*, 440 U.S. 332, 347 n.18 (1979) (mandate only covers "issues previously determined"); *Molinary v. Powell Mountain Coal Co., Inc.*, 173 F.3d 920, 923 (4th Cir. 1999) ("On remand, a lower court may decide matters left open[.]") *Hester v. Int'l Union of Operating Engineers AFL-CIO*, 941 F.2d 1574, 1581 n.9 (11th Cir. 1991) (mandate rule allows district court to consider "those issues not disposed of on appeal," including "arguments not yet considered by the district court"); *Dish Network Corp. v. Arrowood*

Indem. Co., 772 F.3d 856, 865-66 (10th Cir. 2014) (mandate rule did not apply to "additional arguments" not previously raised in the district court or on appeal: "[N]othing in the remand language in DISH I specifically limited or prevented the district court from allowing the Insurers to dispute the purported duty to defend on [other] grounds[.]"). As a result, new issues and issues left open by the appeal are appropriate on remand.

Here, the FTC is not asking to relitigate any issues. To the contrary, the FTC is asking the Court to enforce an order that was affirmed—the Contempt Order—and otherwise to decide issues it raised on appeal but that the Fourth Circuit did not address.

The Contempt Order requires the Defendants to turn over assets, which just so happens to be precisely what the De Novo and Default Orders required. Ordering that these same steps be taken because of the Contempt Order, therefore, does not violate the mandate rule. Instead, it was expected by the Fourth Circuit, which explained that because of the existence of the Contempt Order, vacating the 13(b) monetary relief against Pukke, Baker, and Usher "does not in fact change the bottom line." DE 1377-1 at 36.

Similarly, when ruling on that Section 13(b) monetary relief, the Fourth Circuit explicitly held it was vacating it only "to the extent that judgment rests on Section 13(b)." DE 1377-1 at 35. This leaves open other methods of supporting the monetary relief in the De Novo and Default Orders, including Section 19.

The Defendants are also simply wrong in saying that the Fourth Circuit's denial of the FTC's motion to clarify has any effect. The FTC took the position in its papers that the Default Order's monetary relief had not been vacated, but asked the Fourth Circuit to say more for fear that the Defendants would argue to the contrary. Fourth Circuit Docket No. 103. The Fourth

Circuit declined to say more. This resolves nothing and makes it just as likely that the Fourth Circuit agreed with the FTC's position but did not believe additional clarification was necessary.

IV. The Defendants have not satisfied their financial obligations and should play no role in providing relief to consumers beyond turning over assets.

The Defendants contend they should not have to turn over any assets and, in fact, should have assets returned to them because some combination of the FTC, the Receiver, and consumers have already received more than $120.2 million. DE 1405 at 12-13. But, consumers have not been made whole and if the Court were to agree with the Defendants it would ensure that consumers are never made whole. As their only support for this defense and request, they submit a declaration by Baker which amounts to nothing more than unsupported hearsay and which the Court can simply disregard. DE 1405-1.[7] At no point in the declaration does Baker indicate that he has first-hand knowledge of any of the contentions it includes or is competent to address those topics. For instance, Baker makes various assertions about the amounts assets could be sold for, without reference to any expertise he may have or ways in which he personally could have such knowledge. Regardless, paragraph 4 of the Contempt Order requires the Defendants to transfer $120.2 million to the FTC or to consumers, and the Defendants fail to explain how this has already occurred. They should also not be permitted to take an active role regarding any assets given their history of deceptive conduct.

Baker's hearsay assertions quickly fall apart. He claims that consumers, by virtue of not making payments on their lots since the FTC filed suit, have received the equivalent of $50 million in value and the Receiver possesses $157 million in lot payment receivables. DE 1405-1 ¶¶ 4 & 8. This fundamentally misunderstands the litigation and shows his and the Defendants'

[7] The declaration is a series of "I believe" statements by Baker that do not include the only items that could be relevant or admissible: the information forming the basis of his purported beliefs.

callousness. Consumers are not obligated to make those payments at all because the contracts for the lots were the product of the Defendants' deception. *See* DE 1020 (Court's trial opinion); DE 1377-1 at 35 (Fourth Circuit opinion confirming that the transactions, and Defendants' business, were "dishonest to the core"). If consumers had continued making payments this would have *increased* the Defendants' liability, resulting in a $170.2 million obligation rather than a $120.2 million obligation (assuming Baker's $50 million figure). Put another way, telling consumers they do not have to make additional payments on illegal contracts does not return to them the money that was already stolen. Furthermore, it would be illegal for the Receiver, or the Defendants, to collect on any purported "receivables" derived from those contracts because the contracts were induced by misrepresentations. *See, generally*, DE 1020 and 1377-1.

Baker also makes a variety of unsupported claims regarding the value of the Kanantik and Sanctuary Belize land. DE 1405-1 ¶ 5 ($74,125,000 for Kanantik); ¶ 7 ($104 million for Sanctuary Belize); ¶ 9 ($26 million in fixed assets at Sanctuary Belize); ¶ 11 ($16 million in other assets at Sanctuary Belize). But, there is no current basis for these valuations and Baker's unsworn statements carry no weight. Until these assets are marketed and liquidated there is simply no way to determine their value.[8] If it turns out the value exceeds the Defendants' obligations—including the $172 million Pukke owes from *AmeriDebt*, DE 1113 ¶ 1—the Defendants would receive the excess, as in any collections matter. Baker claims he knows buyers willing to pay these amounts. If so, nothing prevents him from directing those buyers to the FTC and the Receiver. Notably, he has not done so. Similarly, because none of the Defendants can operate Sanctuary Belize or Kanantik, it would be appropriate for the Receiver to

[8] The only known value is that the land comprising Sanctuary Belize was originally purchased for approximately $3 million. DE 1020 at 11-12.

market and liquidate these assets to ensure qualified, legal developers are put in place moving forward even if there were any likelihood that the sales would satisfy the monetary obligations. *See* DE 1112, Section I (real estate ban); DE 1194, Section I (same); DE 1377-1 at 39-40 (affirming receivership based on need to ensure compliance with injunctive relief).

There is also good reason to doubt Baker's figures given that the Defendants could not obtain financing for their development, though they tried many times. *See* DE 1020 at 37 ("[T]he fact is that, from the beginning, especially in 2010, SBE sought to obtain just such financing from one or more banks and was uniformly turned down."); *see also* DE 1020 at 69-71 (consumers struggled to resell lots at any price, with many simply abandoning their lots). It is also counterproductive for the parties to discuss possible values for the development in open court—values too high may dissuade bidders from participating and values too low may unreasonably depress interest and reduce the amount recovered by consumers. While unnecessary, if the Court has any concerns, the better strategy would be to ask the Receiver to submit a filing under seal regarding its current understanding of the market and possible sales prices.

Regardless, paragraph 4 of the Contempt Order precludes any argument that the Defendants' financial obligations have been satisfied. Pukke, Baker, and Usher are only entitled to credit for money transferred to the FTC or actually distributed to consumers. *See* DE 1113 ¶ 4. Even Baker has not asserted that the FTC or the Receiver has recovered more than $45 million. DE 1405-1 ¶ 3.[9] But, not even all of this will reduce their payment obligations because

[9] Much of the money Baker claims has been collected appears to be related to the settlements with Atlantic International Bank Ltd ("AIB"), Angela Chittenden, and John Vipulis. *See* DE 607 (AIB settlement); DE 819 (Chittenden settlement); DE 1314-1 (motion to approve sale of land, also noting encumbrances); DE 352 (Vipulis Settlement); DE 559 (interim order permitting the FTC to transfer Vipulis settlement funds to the Receiver). Other settlements have

it was not transferred to the FTC or consumers. For instance, cash or assets marshalled by the Receiver but then used to fund receivership expenses do not, by the plain language of paragraph 4, reduce the Defendants' obligations. DE 1113 ¶ 4 (requiring "transfer to the FTC" "as reduced by the amounts, if any, already distributed to consumers").[10] Logically, this makes sense. If there had never been a Receivership and the Defendants had maintained control over these assets during the litigation, they would not receive "credit" for the costs of maintaining those assets.[11] In contrast to the Defendants' mandate rule assertions, the mandate rule does in fact apply here. If they disagreed with how paragraph 4 functioned, they were required to challenge it on appeal. They cannot now argue they are entitled to credit contrary to the provisions of paragraph 4 of the Contempt Order.

It also hardly merits discussion that the Defendants should not be permitted to take part in controlling or marketing assets. As the Court has previously found, these Defendants have a history of improperly hiding and disposing of assets to the detriment of their victims. DE 1020 at 166-67 (detailing Pukke's and Baker's prior history of concealing the Belizean land); *id.* at 95 (Pukke diverted $18 million from the development). Combining this with the dishonest conduct giving rise to the final orders, the Defendants should play no role in operating, controlling, or disposing of the assets. That is why the Court appointed a Receiver. *See also* DE 1377-1 at 40 ("The receiver was the district court's means of ensuring that further FTC Act and TSR violations would not occur and that Pukke would not continue to profit from these deceptions.").

---

resulted in relatively small payments directly to the FTC. DE 668 (Costanzo settlement); DE 788 (Greenfield settlement); DE 789 (Kazazi settlement); DE 820 (Santos settlement). None of these payments come close to $120.2 million.

[10] The FTC is also entitled to interest. *Id.* ("increased by any applicable interest").

[11] As the Court is undoubtedly aware, this is also how a bankruptcy trustee functions. It collects funds from the estate. 11 U.S.C. § 330. But these payments do not reduce obligations to creditors.

V. The Defendants are receiving due process.

The Defendants baselessly complain that seizing assets pursuant to the Court's contempt authority violates their due process, insisting that the FTC and the Court follow state garnishment processes. DE 1405 at 12-13. The Defendants have already had due process, including a trial to determine their contempt and obligations to transfer assets. Regardless, even contempt proceedings can be decided on the papers so long as the defendant has the opportunity to respond, which is precisely what is currently happening. *In re Gen. Motors Corp.*, 110 F.3d 1003, 1016 (4th Cir. 1997); *Thomas, Head & Greisen Emps. Trust v. Buster*, 95 F.3d 1449, 1458-59 (9th Cir. 1996*); Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 782 n. 2 (7th Cir. 1981).

Furthermore, there is no reason to impose garnishment proceedings. First, they are inapplicable because the FTC is enforcing (1) contempt relief and (2) the order to pay and turnover provisions in the Default Order. As detailed in the FTC's opening memorandum, the Defendants have an affirmative obligation to transfer the funds, enforceable through contempt, with the only defense being impossibility, regardless of legal ownership or other restrictions or processes when collecting on a standard judgment. *See* DE 1404 at 13-15. Second, the Defendants did not explain how such proceedings would benefit them or differ from the current motion practice. Like these proceedings, garnishment proceedings are decided on the papers with the minimal process of permitting the debtor to respond. *See* 28 U.S.C. § 3205. They have had the opportunity to see the FTC's motion and respond to it in writing, complete with the ability to raise objections. They have not asked for anything else and nothing else is required.

VI. The Fourth Circuit did not vacate the monetary relief in the Default Order.

The Defendants add nothing to this issue in their opposition beyond reciting that they disagree. In contrast, the FTC fully explained how the Fourth Circuit's ruling by its plain

language did not vacate the monetary relief in the Default Order—the Fourth Circuit would have needed to find that this Court abused its discretion but, instead, found that the Court did not. *See* DE 1404 at 16-18. The Defendants counter, "[t]he FTC offers no logical reason why the Fourth Circuit would vacate the $120.2 million monetary judgment in the De Novo Order . . . and not vacate the . . . monetary judgment in the Default Order[.]" DE 1405 at 15.[12] To the contrary, the FTC provided multiple reasons, not least that Rule 60(b) governs relief from the Default Order and binding Fourth Circuit precedent precludes relief from a judgment based on a change in decisional law. *See* DE 1404 at 17 (citing *Dowell v. State Farm Fire & Cas. Auto Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993) ("A decisional change in the law subsequent to the issuance of a final judgment, especially, as here, where the earlier judgment is neither res judicata nor provides collateral estoppel, does not provide a sufficient basis for vacating the judgment under Rule 60(b)(5).")).

VII. Section 19 provides an independent basis for the monetary relief in the De Novo and Default Orders.

The Court can and should hold that Section 19 independently supports the monetary relief in the De Novo and Default Orders. As the FTC explained in its August 2021 motion, DE 1273, Rule 54(c) would permit the Court to grant the FTC relief under Section 19 even if the FTC never explicitly cited to Section 19 in its complaint or later pleadings. Fed. R. Civ. P. 54(c) ("A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.").

[12] The Defendants also state there is no reason to think the Fourth Circuit was referring to the judgment against Pukke, Baker, and Usher when stating: "**As noted**, *AMG* requires vacating the $120.2 million equitable monetary judgment, but the default judgments are upheld because the district court did not abuse its discretion[.]" DE 1405 at 15 (emphasis added). The "as noted" is more than telling—the only judgment already ruled on is that from the De Novo Order.

Multiple courts have agreed and granted parties relief under unpled statutes or theories. *See, e.g.*, *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 900-01 (4th Cir. 1996); *Minyard Enterprises Inc. v. SE Chem. & Solvent Co.*, 184 F.3d 373, 385-86 (4th Cir. 1999); *Pitrolo v. Cty. of Buncombe, N.C.*, 589 F. App'x 619, 627 (4th Cir. 2014); *Matter of Hannover Corp. of Am.*, 67 F.3d 70, 75 (5th Cir. 1995); *Travis v. Gary Community Mental Health Cetner, Inc.*, 921 F.2d 108, 112 (7th Cir. 1990). Indeed, the FTC did more than is typically required by explicitly pleading the basis for relief, violations of the Telemarketing Sales Rule, and demanding the relief it ultimately sought for those violations, refunds for consumers. DE 1 at ¶¶ 119-24 (Counts II and III alleging violations of the TSR); *id.* at 46 (Prayer for Relief, including "such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the FTC Act and TSR" including "restitution [and] refund of monies paid"); *Avellan v. Asset Acceptance, LLC*, 2015 WL 13841581, at *1 (W.D.N.C. Oct. 23, 2015) (no need to plead statute in prayer for relief) (quoting *Tolle v. Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (7th Cir. 1992) ("[A] complaint need not point to the appropriate statute or law in order to raise a claim for relief under Rule 8 of the Federal Rules of Civil Procedure.");[13] *see also* DE 990 at 23-24 (providing notice to defaulting parties of the amount of monetary relief). As mentioned earlier, another district court has already granted the FTC this relief—substituting Section 19 for Section 13(b) on remand after the Section 13(b) judgment was vacated. *Credit Bureau Center*, 2021 WL 4146884, at *5-6.

[13] *See also Missouri, K & T Ry. Co. v. Wulf*, 226 U.S. 570, 576 (1913) (incorrect citation to state statute as opposed to controlling federal statute did not affect complaint); *Anderson v. Lancaster Aviation, Inc.*, 220 F. Supp. 2d 524, 528-29 (M.D.N.C. 2002) (citation to incorrect statute in complaint irrelevant when another statute provided authority for requested relief).

The Defendants cannot claim prejudice: Section 19 operates in this case precisely the way Section 13(b) did at the time the FTC filed suit. The FTC is not seeking additional relief. It is simply citing a different statute to support the same relief on the same terms, all of which were litigated through trial. *See Minyard Enterprises*, 184 F.3d at 386-87 (plaintiff's failure to cite correct statutory provision while seeking the same relief did not cause prejudice); *Travis*, 921 F.2d at 112 ("Misplaced reliance on § 1985(2) does not undercut the verdict; § 216(b) supplies all the authority the district court required."). This is particularly true when the FTC informed the Defendants in its complaint what relief it was seeking and, prior to trial, that it would seek the same relief under Section 19 if necessary, with Pukke and Baker explicitly laying out their purported defenses to Section 19 liability at that time. *See* DE 804 (Joint Pretrial Order) at 123 (FTC explaining that "the Court can construe its pleadings as a request for monetary relief under Section 19"); *id.* at 50 (Pukke arguing, incorrectly, that Section 19 does not apply); *id.* at 92-93 (Baker making similar incorrect arguments); *id.* at 129 (service on, among others, Usher's then known counsel).

There are no procedural hurdles that the FTC did not clear. Rather, Section 19(a)(1) permits the FTC to file suit directly in federal court for violations of rules, like the Telemarketing Sales Rule. 15 U.S.C. § 57b(a)(1) ("If any person, partnership, or corporation violates any rule . . . then the Commission may commence a civil action against such person, partnership, or corporation for relief under subsection (b) in a United States district court or in any court of competent jurisdiction of a State."). Section 19(b) permits the Court to provide "relief as the court finds necessary to redress injury to consumers[,]" 15 U.S.C. § 57b(b), which courts have found to be identical to the measure of relief under Section 13(b). *Credit Bureau Center*, 2021 WL 4146884, at *10; *United States v. Mylife.com Inc.*, 567 F. Supp. 3d 1152, 1170-71 (C.D. Cal.

2021). The Court already detailed how much the Defendants took from consumers as a result of their deceptive conduct. DE 1020 at 156-61. This is the appropriate measure of relief, and the Court has already made the relevant findings.

Finally, Section 19's three-year statute of limitations does not help the Defendants.[14] As the FTC detailed in DE 1273, tolling doctrines apply. DE 1273 at 26-35 (ECF pagination). The Fourth Circuit has also resolved this. On appeal the Defendants also argued that the contempt and injunctive relief were subject to a five-year statute of limitations contained in 28 U.S.C. § 2462. The Fourth Circuit rejected this argument, holding that if the statute "did apply, it has not run. The district court found that Pukke's contumacious and violative conduct ran from the early 2000s up through 2018 when the FTC brought suit. . . . Thus, the FTC's suit was within the five-year period, and the judgments are not time-barred." DE 1377-1 at 41-42. The same reasoning applies full-force to Section 19's statute of limitations.

[REST OF PAGE LEFT INTENTIONALLY BLANK]

[14] While not directly argued, the face-to-face exception, 16 C.F.R. § 310.6(b)(3), is also inapplicable because all consumers were required to make payments before any face-to-face interaction. DE 1273 at 22-26 (ECF pagination).

VIII. Conclusion

The Court can and should enter the proposed order employing its contempt and Section 19 authority to quickly and comprehensively bring this case to a conclusion and ensure relief for the Defendants' victims.

Dated: February 21, 2023

Respectfully Submitted,

/s/ Benjamin J. Theisman

Jonathan Cohen (jcohen2@ftc.gov)
Benjamin J. Theisman (btheisman@ftc.gov)
Christopher J. Erickson (cerickson@ftc.gov)
Federal Trade Commission
600 Pennsylvania Ave., N.W., CC-9528
Washington, DC 20580
202-326-2551 (Cohen); -2223 (Theisman); -3167 (Erickson)

Counsel for the Federal Trade Commission

Certificate of Service

I hereby certify that on February 21, 2023, I caused to be served the foregoing, and all related documents, through the Court's electronic filing system ("ECF") and otherwise on the following people and entities by email at the email addresses provided:

Gary Caris and James E. Van Horn, counsel for the Receiver, by ECF or at gcaris@btlaw.com and jvanhorn@btlaw.com;

John B. Williams, by ECF or at jbwilliams@williamslopatto.com, counsel for Defendants;

Neil H. Koslowe, by ECF or at nkoslowe@potomaclaw.com, counsel for Defendants;

Shon Hopwood and Kyle Singhal, by ECF or at shon@hopwoodsinghal.com and kyle@hopwoodsinghal.com, counsel for proposed intervenors

/s/ *Benjamin J. Theisman*

Exhibit 1

EVAN M. MENDELSON, DC Bar No. 996765
JONATHAN W. WARE, DC Bar No. 989414
Federal Trade Commission
600 Pennsylvania Avenue NW, CC-9528
Washington, DC 20580
(202) 326-3320; emendelson@ftc.gov (Mendelson)
(202) 326-2726; jware1@ftc.gov (Ware)

Attorneys for Plaintiff Federal Trade Commission

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Federal Trade Commission, Plaintiff, v. James D. Noland, Jr., *et al.*, Defendants.	No. CV-20-0047-PHX-DWL **PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION FOR PRELIMINARY INJUNCTION WITH ASSET FREEZE AND RECEIVERSHIP**

Individual Defendants admit their companies violated two FTC rules and do not dispute that those rule violations tainted over $1 million in sales. Nor do Individual Defendants dispute that even after the Court imposed a TRO and preliminary injunction against them, they continued to mislead their supporters in order to take their money. Instead, they raise an assortment of unsound legal arguments—many already rejected by this Court or the Ninth Circuit—and their usual conspiratorial, irrelevant, or unsupported assertions. As a result, Individual Defendants fail even to dent the FTC's evidence and arguments that: (1) they have engaged in extensive misconduct prior to and throughout this litigation; (2) the Court has the authority to enter the preliminary injunction; (3) the FTC is likely to prevail in this case and in the contempt matter; (4) the equities favor entry of the preliminary injunction; and (5) the asset freeze and receivership are necessary to preserve funds for consumer redress and prevent further consumer harm.

I. DEFENDANTS VIOLATED THE COURT'S ORDERS AND LIED TO THEIR SUPPORTERS IN ORDER TO TAKE THEIR MONEY.

The Motion (Doc. 351 at 6-9) described evidence that the Defendants violated the TRO and Preliminary Injunction in myriad ways; concealed, destroyed, and fabricated evidence; and misled their supporters as part of their fundraising efforts. Individual Defendants do not dispute these facts.[1] Nor do they dispute the general proposition that courts may appoint receivers to prevent continuing consumer harm during litigation. (*Id.* at 12-13.) These admissions alone are sufficient to justify the receivership.

II. THE COURT HAS AUTHORITY TO ORDER AN ASSET FREEZE AND RECEIVERSHIP.

The Motion also explained that the Court had authority to order an asset freeze and receivership to preserve money for consumers and to prevent further consumer harm during the litigation. (Doc. 351 at 10-13.) Individual Defendants do not dispute that courts generally can freeze assets to preserve the possibility of equitable monetary relief and can order preliminary relief (including a receivership) to prevent unlawful conduct during litigation. Instead, Individual Defendants offer three arguments why *this* Court lacks that authority. Each argument fails.

First, Individual Defendants argue that Section 19 does not authorize monetary relief in this case because the FTC did not provide notice to Defendants of their rule violations. (Doc. 360 at 2-3.) They rely on *Heater v. FTC*, 503 F.2d 321 (9th Cir. 1974) for the proposition that the "FTC is not empowered to take down a business without notice so the business can correct what it is doing." (Doc. 360 at 3.) But *Heater* says nothing like that. It merely says that a Commission cease-and-desist order cannot include an award of monetary relief. *See Heater*, 503 F.3d at 321-22 (concluding that "the

[1] In earlier filings, Defendants did dispute the timing of their evidence destruction and the fact that they fabricated evidence. (Docs. 232, 276.) The FTC previously detailed the inconsistences, inaccuracies, and gaps in Defendants' explanations. (Docs. 235, 277.)

Commission under the 'cease and desist' provision [does not] possess power to order the refund in question"). In fact, the Ninth Circuit has already rejected Defendants' *Heater* argument, explaining that *Heater* merely "delineated the scope of the powers given the *Commission* . . . rather than the power of the district court to remedy violations brought to its attention by the FTC acting as a litigant." *FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1087 n.1 (9th Cir. 1985) (emphasis added). In any event, *Heater*—decided before Congress added Section 19 to the FTC Act (Pub. L. No. 93-657, § 206, 88 Stat. 2183, 2201-02 (1975))—cannot be read to add a pre-filing "notice" requirement to Section 19.

Defendants also rely on *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764, 771 (7th Cir. 2019) in support of their notice argument. They state that *Credit Bureau* held that the FTC "may not resort to court unless it, first, *promulgates a rule* or gets a cease-and-desist order." (Doc. 360 at 4 (emphasis added).) Of course, the FTC *has* alleged rule violations here. Defendants do not why explain why *Credit Bureau* helps them.

Second, Individual Defendants assert that the Court lacks jurisdiction to adjudicate whether Success By Health ("SBH") is a pyramid scheme. (Doc. 360 at 6.) This assertion is unsupported by any citation or meaningful elaboration, but it appears to be a rehash of Defendants' request to dismiss this case (Doc. 352), which was based on their misguided view that FTC cannot obtain permanent injunctions in district courts. It fails for the reason previously explained by the FTC (Doc. 355 at 2-4): the FTC retains authority under Section 13(b) to seek permanent injunctions that do not include monetary relief. *See also* Doc. 362 at 4 (noting that Ninth Circuit does "not seem to interpret *AMG Capital* in the expansive manner urged in the Individual Defendants' memorandum").

Third, Defendants assert that "seeking relief in this 2020 case for a claimed violation of the 2002 [Order] is inappropriate." (Doc. 360 at 13.) Defendants' argument is overly formalistic. The same conduct—Defendants' material misrepresentations and operation of a pyramid scheme—violates both the FTC Act and the 2002 Noland Order.

(Doc. 351 at 14-15, 17.) In similar circumstances, the Fifth Circuit upheld an asset freeze issued to preserve funds for a later judgment in a separate proceeding: "[A]lthough it may seem unusual at first to seek preliminary relief with reference to a separate action, it has long been considered within a court's equitable jurisdiction to issue an injunction preserving property pending a subsequent determination in another forum . . . ." *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 719 (5th Cir. 1982). In any event, if the Court prefers, the FTC will, of course, re-file the relevant portions of this Motion in the Contempt Matter (No. CV-00-2260).

III. THE FTC IS LIKELY TO PREVAIL ON ALL COUNTS AND IN THE CONTEMPT MATTER.

Individual Defendants do not dispute that the FTC is likely to prove that Success By Media LLC and Success By Media Holdings Inc. (collectively, "SBM") violated two FTC rules. In fact, they admit that "Success By Health did technically violate both the Merchandise Rule and the Cooling-Off Rule." (Doc. 360 at 10.) Instead, Individual Defendants argue that they (as individuals) and Defendant Enhanced Capital Funding ("ECF") are not liable for the violations. (Doc. 360 at 9-10.) They also argue that the FTC is unlikely to prove Defendants operated a pyramid scheme or made material misrepresentations to consumers. (*Id.* at 6.) Individual Defendants' rule-violation argument ignores the law, and their pyramid and deception arguments ignore and misrepresent the facts.

A. Individual Defendants and Enhanced Capital Funding Are Liable for SBM's Rule Violations.

Individual Defendants' own admissions establish their and ECF's liability for SBM's rule violations.

First, although unacknowledged by Individual Defendants, the law is clear that individuals are liable for corporate violations of the FTC Act or rules promulgated thereunder, and subject to injunctive relief, if they "had authority to control" or "participated directly" in the unlawful acts. *FTC v. Publishing Clearing House, Inc.*, 104

F.3d 1168, 1170 (9th Cir. 1997). Individual Defendants are liable for monetary relief if they also had knowledge of the unlawful acts. *Id.; see also FTC v. Stefanchik*, 559 F.3d 924, 931 (9th Cir. 2009) (same); *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006) (same). Here, Individual Defendants admitted to both elements of individual liability. (Doc. 285 at 34-35.) In fact, they did not even dispute their liability in response to the FTC's Motion for Summary Judgment as to Liability. (*Id.*; Doc. 348.)

Second, Defendants admit that ECF formed a common enterprise with SBM. (Doc. 285 at 34.) "When corporate entities operate together as a common enterprise, each may be held liable for the deceptive acts and practices of the others." *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014). ECF is therefore liable for the rule violations. Again, Individual Defendants did not dispute the common enterprise's joint and several liability in their summary judgment opposition. (Doc. 285 at 34; Doc. 348.)

B. The FTC Is Likely to Prove Its Pyramid and Deception Counts in Both This Matter and the Contempt Matter.

Individual Defendants' only argument that the FTC is unlikely to prevail on its pyramid and deception counts is that approximately 200 affiliates signed declarations (Doc. 33-3) in their defense.[2] Defendants are conspicuously silent as to *how* the declarations actually refute the FTC's evidence. They do not. Instead, the declarations demonstrate only that Defendants' handpicked respondents (less than 3% of all affiliates)—to whom Defendants continue to lie about this case and Defendants' business practices, *see supra* p. 2; Doc. 351 at 6-9—want the Defendants to prevail.[3] The

---

[2] Individual Defendants sometimes inflate this number, referencing "1,277 offended individuals." (Doc. 360 at 11.) It is unclear where that number comes from.

[3] Individual Defendants also repeat their conspiracies about consumers who complained to the FTC. (Doc. 360 at 7-9.) The Court has decried these arguments as "unencumbered by legal citation and authority" and of unclear relevance. (Doc. 177 at 15.)

declarations do not, for example, refute that Defendants told affiliates they should have a reasonable expectation of achieving financial freedom (a level of income greater than one's employment income), and that Jay Noland had achieved unfathomable wealth that was also attainable for them. (Doc. 106 at 21-25; Doc. 285 at 2-5.) Nor do the declarants dispute that these claims were false. (Doc. 106 at 21-25; Doc. 285 at 4-5, 21-23, 31-32.) Instead, the declarants simply "confirm" conclusory, argumentative statements drafted by Individual Defendants.[4] (*E.g.*, Doc. 335-3 at 2-10.) Tellingly, Defendants' declarants do not even report their own expenses or net profits from pursuing SBH, and Defendants once again fail to dispute the FTC's evidence that only a very small handful of affiliates had *any* net positive income. (Doc. 360 at 5 n.2; Doc. 285 at 21-23.)

In short, the declarations are no more persuasive than the ones submitted by Defendants for the preliminary injunction hearing. (Docs. 85-1, 85-2.) The Court characterized those declarations as "anecdotal" and was "puzzl[ed]" that Defendants though the declarations rebutted the FTC's pyramid scheme evidence. (Doc. 106 at 18 & n.17.) The Court also credited the FTC's evidence that those declarants paid $365,000 more to the Defendants than they earned from SBM in return, with "no evidence" that the declarants made up the massive losses through retail sales or by consuming products themselves. (Doc. 106 at 18-19.) The results are no better for the current set of 209 declarants, representing 183 unique affiliate accounts. (Ex. 1 ¶ 5.) They paid *$1.3 million* more to SBM than they earned in commissions from the company (Ex. 1 ¶ 6), again with no evidence that they consumed $1.3 million in products or made $1.3 million in retail sales—which would still only bring them back to a breakeven point. Only seven of the declarants had net positive income, with only five earning more than $131. (*Id.*)

---

[4] Defendants' reliance on the proposed intervenors' declaratory judgment complaint is misplaced for the same reasons. The complaint offers conclusory statements rather than an actual rebuttal of the FTC's evidence. (Doc. 360 at 4-5.)

Rather than dispute the FTC's evidence, Individual Defendants seem to make a "satisfied customer" defense. "Importantly," however, "the existence of some satisfied customers does *not* constitute a bar to liability or an award of restitution." *FTC v. Inc21.com Corp.*, 745 F. Supp. 2d 975, 1011 (N.D. Cal. 2010) (citing *FTC v. Stefanchik*, 559 F.3d 924, 929 (9th Cir. 2009)). "In fact, by the nature of a pyramid scheme, there should be participants at the top of the pyramid who were satisfied." *FTC v. Five-Star Auto Club, Inc.*, 97 F. Supp. 2d 502, 530 (S.D.N.Y. 2000).

Finally, Individual Defendants do not dispute that the FTC is likely to prove that VOZ Travel is a pyramid scheme. (Doc. 351 at 14-15 (citing Doc. 285 at 17-20, 30-31.) None of the declarations submitted by Individual Defendants even address VOZ.

C. THE EQUITIES FAVOR ENTRY OF THE PRELIMINARY INJUNCTION.

Individual Defendants do not dispute that the equities favor entry of the Preliminary Injunction, instead arguing that purported "Constitutional infirmities" outweigh the equities. (Doc. 360 at 6.) They support that argument solely by incorporating an *amicus* brief filed at the Supreme Court by a group of SBH affiliates.[5] None of the *amici's* five arguments is sound, even if properly made in this Court.

First, the *amici* argue that Individual Defendants have a right to choose counsel for the Corporate Defendants. (Doc. 360-1 at 13-14.) The Court already decided this issue. (Doc. 168.) As before, Defendants fail to establish that "a company's owners and officers . . . have any enforceable right to control the company's [representation] after the appointment of a receiver." (Doc. 168 at 8; *see also* Doc. 155 at 2-4.)[6]

---

[5] The Court need not consider the *amicus* brief that Individual Defendants incorporate by reference. *See, e.g.*, *Kazi v. PNC Bank, N.A.*, 2021 WL 965372, at *22 n.23 (N.D. Cal. Mar. 15, 2021) (party may not "incorporat[e] by reference legal arguments submitted by other parties in other cases" because doing so would "evade the page limits applicable to [its] briefs").

[6] Defendants make the same argument in an "aside" in their brief. (Doc. 360 at

Second, the *amici* argue that the Preliminary Injunction violates affiliates' "right to engage in any of the sort of common occupations of life that are typical of someone living in a free society." (Doc. 360-1 at 16-18.) Whatever the scope of those rights, they surely do not require the Court to allow the continued operation of what it has found is likely a pyramid scheme.

Third, the *amici* argue that the Receivership violates the Fourth Amendment because it is equivalent to a "general writ." (Doc. 360-1 at 18-20.) Defendants identify no court that has reached the same conclusion. In fact, the Fifth Circuit and other courts have rejected it. *See, e.g.*, *United States v. Setser*, 568 F.3d 482, 487-88 (5th Cir. 2009) ("No court has ever held that the equivalent of a warrant must be issued in order for a receiver to be permitted to seize the property of the subject entity."); *FTC v. Pointbreak Media, LLC, et al.*, 343 F. Supp. 3d 1282, 1288 (S.D. Fla. 2018); *United States v. Coughlin*, 2013 WL 1506990, at *2-4 (E.D. Tex. Feb. 4, 2013).

Fourth, the *amici* argue that the FTC violated the Fifth Amendment through a blog post that purportedly defamed Jay Noland. (Doc. 360-1 at 20-21.) The law is clear, however, that "reputational harm alone does not suffice for a constitutional claim." *Miller v. California*, 355 F.3d 1172, 1178 (9th Cir. 2005); *see also* Doc. 193 at 12-13 (identifying other flaws with Noland's defamation claim). The *amici* add that the Receiver violated the Fifth Amendment by "join[ing] forces with the FTC." (Doc. 360-1 at 20-21.) That argument is factually incorrect and legally incomprehensible.

Fifth, the *amici* allege a violation of the Eighth Amendment's "excessive fines" clause. (Doc. 360-1 at 21-22.) A fine is a "cash or in kind payment directly imposed by, and payable to, the government." *Kim v. United States*, 121 F.3d 1269, 1276 (9th Cir.

10.) Even ignoring the lack of any constitutional violation, Individual Defendants still fail to identify any reason why, as a practical matter, the Receiver's decision not to contest the FTC's allegations affects this case. *See* Doc. 168 at 12-13 ("[I]t is difficult to see how any appreciable harm would flow from declining to allow Counsel to represent the Corporate Defendants at this juncture of the case. . . . [T]here has been no suggestion that the Corporate Defendants wish to pursue any different defenses or theories that those currently being pursued, via Counsel, by the Individual Defendants.").

1997). Here, there is no order that Defendants pay money to the government and, therefore, no fine. *See also* Doc. 193 at 11-12 & n.9 (identifying other flaws with Defendants' Eight Amendment argument).

D. AN ASSET FREEZE AND RECEIVER ARE APPROPRIATE PROVISIONAL REMEDIES IN THIS CASE.

Individual Defendants, in shotgun fashion, assert many other reasons for denying a preliminary injunction. The FTC addresses these arguments below.

1. Defendants' Rule Violations Injured Consumers.

Individual Defendants argue that the asset freeze is unnecessary because the FTC has not established any harm from the rule violations. (Doc. 360 at 12.) Defendants, however, simply ignore the FTC's undisputed evidence that the rule violations tainted over $1 million in sales. (Doc. 351 at 5-6, 13-14 (citing Doc. 285 at 16-17, 32-33).) That evidence is more than sufficient to meet the FTC's burden of justifying an asset freeze at this stage of the litigation. *See SEC v. Liu*, --- F. App'x ---, 2021 WL 943743, at *2 (9th Cir. Mar. 12, 2021) (because asset freezes are "a device for preserving the status quo," district courts are not "required . . . to make a finding as to the amount of equitable remedies prior to final judgment" (internal quotation marks omitted)).[7] That is particularly true here, where one of the rule violations is a failure to pay legally required refunds, totaling over $500,000, for late or unshipped orders. (Doc. 285 at 32-33; Doc. 286-3 at 8-10) The harm from a failure to pay $500,000 in required refunds is $500,000.

2. The Receiver Is Necessary to Preserve Assets and Prevent Consumer Harm.

Defendants also argue that the Receiver has depleted, rather than preserved, assets. (Doc. 360 at 6-7.) Prior to the TRO, Defendants' deception caused at least $6 million in consumer harm (Doc. 285 at 21), and the four Individual Defendants alone siphoned $1.7 million for themselves (Doc. 285 at 23). Beyond the illegal conduct alleged by the FTC,

[7] Individual Defendants also rely on the fact that the Receiver has not received many refund requests. (Doc. 360 at 10-11.) It is unclear why Defendants consider this fact helpful or relevant. There is no reason to expect victims to request refunds from the Receiver, especially in light of the asset freeze and the FTC's request for monetary relief.

Defendants also had failed to: pay sales taxes; obtain liability insurance; secure a state license to do business; or maintain any substantiation for their claims about the purported health benefits of their products. (Doc. 150 at 8-9.) The Receiver also discovered that Defendants' "G-Burn" product included an ingredient that the FDA considers illegal in dietary supplements. (Doc. 154 at 3.) The Receiver concluded the Receivership Entities could not be operated lawfully and profitably, a view the Court credited. (Doc. 106 at 19-20.) On the whole, the Receiver halted Defendants' scheme and brought the companies into compliance with the law. That work, in addition to preserving evidence and reporting to the Court, takes time and money. The Court has approved the Receiver's fees over the Defendants' sporadic objections. (Docs. 154, 199, 320.)

Defendants also do not dispute that they have violated the Court's Orders and lied to consumers since entry of the TRO, and that receiverships are appropriate tools to address this type of misconduct. *See supra* p. 2.

3. Noland's Violations of the 2002 Order Are a Valid Basis for Broad Injunctive Relief.

Individual Defendants state that the FTC "lied to this court" by citing the 2002 Noland Order as evidence that Noland previously violated the FTC Act. (Doc. 360 at 7.) They, of course, cite no instances of this purported lie. In fact, the FTC argued that Noland's violations of the 2002 Order showed a disregard for the Court's authority, which justified broad injunctive relief. (Doc. 8 at 3-4, 45.) The Court agreed that "Noland's track record, which included the likely violation of a court order . . . , counseled against allowing him to continue operating SBH." (Doc. 224 at 20-21.)

4. The Totality of Defendants' Wrongdoing, Both Pre- and Post-TRO, Justifies the Preliminary Injunction.

Individual Defendants argue that the FTC's declining their "cooperation" offer is somehow evidence that their rule violations were not sufficiently serious to warrant injunctive relief. (Doc. 360 at 2, 10.) But the FTC's argument is not, and never has been, that the rule violations alone justify all of the relief sought by the FTC. Rather, the FTC consistently has argued that Defendants' misconduct as a whole justifies strong injunctive

relief.[8] The fact that the sole remaining basis for recovering money in this case (but not the Contempt Matter) derives from rule violations does not mean that the Court must ignore Defendants' other unlawful conduct when assessing what relief is necessary.

In any event, as the FTC explained at the preliminary injunction hearing (Feb. 12, 2020 Tr. at 100), whether to seek information from the target of any investigation is a judgment call that requires the FTC to balance its goals of preventing future consumer harm and obtaining redress for past victims. Whether the FTC made the "right" decision here is irrelevant to this Motion. Nevertheless, Individual Defendants' immediate efforts, upon learning of the FTC's investigation, to cloak their "important" communications (that they then concealed and destroyed during this litigation, Doc. 259) and the Nolands' subsequent move to Uruguay and purchase of nearly $200,000 in luxury vehicles from company funds confirm that the FTC was correct to be skeptical of the "cooperation" offer and wary of the potential for destruction of evidence and dissipation of assets.

---

[8] Defendants falsely claim that FTC counsel told the Court at the preliminary injunction hearing that "it would not have filed this case" if the rule violations stood alone. (Doc. 360 at 2.) In fact, the FTC told the Court that it likely would not have sought an *ex parte* receivership and asset freeze if Defendants had only violated the rule and had not also deceived consumers regarding potential income in their pyramid scheme. (Doc. 351 at 4.) Defendants also claim, without explanation, that the FTC "would have [had] no claim under [Section 19]" if it had informed Defendants of the violations in advance. (Doc. 360 at 2.) That, of course, is also false; the FTC would have had the exact same claim for consumer redress that it has brought.

Dated: June 16, 2021

Respectfully submitted,

/s/ Evan M. Mendelson

EVAN M. MENDELSON, DC Bar No. 996765
JONATHAN W. WARE, DC Bar No. 989414
Federal Trade Commission
600 Pennsylvania Ave. NW
Mailstop CC-9528
Washington, DC 20580
(202) 326-3320; emendelson@ftc.gov
(202) 326-2726; jware1@ftc.gov
(202) 326-3197 (Fax)

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

Exhibit 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	AMENDED PRELIMINARY ORDER OF FORFEITURE AS TO SPECIFIC PROPERTY/ MONEY JUDGMENT
-v.-	:	
SCOTT TUCKER,	:	
Defendant.	:	S1 16 Cr. 091 (PKC)

WHEREAS, or about November 30, 2016, SCOTT TUCKER (the "defendant") was charged in a fourteen-count superseding Indictment S1 16 Cr. 091 (PKC) (the "Indictment") with: conspiracy to collect unlawful debts, in violation of Title 18, United States Code, Section 1962(d) (Count One); collection of unlawful debts, in violation of Title 18, United States Code, Sections 1962(c) (Counts Two through Four); conspiracy to commit wire fraud, in violation of Title 18, United States Code, Section 1349 (Count Five); wire fraud, in violation of Title 18, United States Code, Sections 1343 and 2 (Count Six); conspiracy to commit money laundering, in violation of Title 18, United States Code, Section 1956(h) (Count Seven); promotion money laundering, in violation of Title 18, United States Code, Sections 1956(a)(1)(A)(i) and 2 (Count Eight); concealment money laundering, in violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2 (Count Nine); and with false Truth in Lending Act disclosures, in violation of Title 15, United States Code, Section 1611 and Title 18, United States Code, Section 2 (Counts Ten through Fourteen);

WHEREAS, the Indictment included a forfeiture allegation as to Counts One through Four, seeking forfeiture to the United States, pursuant to Title 18, United States Code,

Section 1963, of a sum of money in United States currency equal to at least $2,000,000,000.00 in that such a sum represents (i) any interest acquired or maintained as a result of the offenses charged in Counts One, Two, Three, and Four; (ii) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over any enterprise which the defendant has established, operated, controlled, conducted, or participated in the conduct of, as part of the offenses charged in Counts One, Two, Three, or Four; or (iii) any property, constituting or derived from, any proceeds obtained, directly or indirectly, from the unlawful collections of debt charged in Counts One, Two, Three, and Four of the Indictment, including, but not limited to:

i. Any and all funds in account number 10840015031 in the name of BA Services LLC at Midwest Trust Company and any and all funds traceable thereto;

ii. Any and all funds in account number 10840015021 in the name of Tucker Scott FI at Midwest Trust Company and any and all funds traceable thereto;

iii. Any and all funds in account number 10840015041 in the name of Tucker Scott EQ at Midwest Trust Company and any and all funds traceable thereto;

iv. Any and all funds in account number 10840015556 in the name of Scott Tucker LT FI at Midwest Trust Company and any and all funds traceable thereto;

v. Any and all funds in account number 97363826 in the name of Kim Cunningham Tucker TTEE at Charles Schwab and any and all funds traceable thereto;

vi. Any and all funds in account number 10840017641 in the name of Kim Tucker at Midwest Trust Company and any and all funds traceable thereto;

vii. Any and all funds in account number 2727864 in the name of BA Services LLC – Operating Account at Welch Bank and any and all funds traceable

thereto;

viii. Any and all funds in account number 10840016009 in the name of Black Creek Capital LLC at Midwest Trust Company and any and all funds traceable thereto;

ix. Any and all funds in account number 1218503 in the name of Level 5 Motorsports LLC at Capital City Bank and any and all funds traceable thereto;

x. Any and all funds in account number 4026665 in the name of West Fund LLC at Freedom Bank and any and all funds traceable thereto;

xi. Any and all funds in account number 741003284 in the name of Stephanie R. Tucker Muir at Commerce Bank and any and all funds traceable thereto;

xii. Any and all funds in account number 35104126 in the name of Scott A. Tucker at Charles Schwab and any and all funds traceable thereto;

xiii. Any and all funds in account number 597554 in the name of Scott A. Tucker POD Kim Tucker at First National Bank of Louisburg and any and all funds traceable thereto;

xiv. Any and all funds in account number 590957615 in the name of Tim J. Muir at Commerce Bank and any and all funds traceable thereto;

xv. Any and all funds in account number 4026053 in the name of West Fund LLC at Freedom Bank and any and all funds traceable thereto;

xvi. Any and all funds in account number 4026061 in the name of West Fund LLC at Freedom Bank and any and all funds traceable thereto;

xvii. Any and all funds in account number 2727974 in the name of BA Services LLC – Payroll Account at Welch Bank and any and all funds traceable thereto;

xviii. Any and all funds in account number 735106896 in the name of Stephanie R. Tucker or Tim J. Muir at Commerce Bank and any and all funds traceable thereto;

xix. Any and all funds in account number 145591766784 in the name of AMG Capital Management LLC at US Bank and any and all funds traceable thereto;

xx. Any and all funds in account number 1218423 in the name of Level 5 Management LLC at Capital City Bank and any and all funds traceable thereto;

xxi. Any and all funds in account number 1218458 in the name of Level 5 Apparel LLC at Capital City Bank and any and all funds traceable thereto;

xxii. Any and all funds in account number 603325 in the name of ST Capital LLC at First National Bank of Louisburg and any and all funds traceable thereto;

xxiii. Any and all funds in account number 1218431 in the name of Level 5 Eyewear LLC at Capital City Bank and any and all funds traceable thereto;

xxiv. Any and all funds in account number 1218466 in the name of Level 5 Scientific LLC at Capital City Bank and any and all funds traceable thereto;

xxv. Any and all funds in account number 1218474 in the name of Level 5 Capital Partners LLC at Capital City Bank and any and all funds traceable thereto;

xxvi. All right, title and interest in real property located at 269 Park Avenue, Aspen CO 81611, with all improvements, appurtenances, and attachments thereon;

xxvii. All right, title and interest in real property located at 2405 W. 114th Street, Leawood, KS 66211, with all improvements, appurtenances, and attachments thereon;

xxviii. One Ferrari 599XX bearing VIN: ZFF69PXX000170883;

xxix. One 2011 Ferrari 599 GTO bearing VIN: ZFF70RCA2B0175653;

xxx. One 2011 Porsche Cayenne bearing VIN: WP1AE2A26BLA91678;

xxxi. One 2011 Ferrari 458 Challenge bearing VIN: ZFF71NXX000179226;

xxxii. One 2011 Ferrari 458 Challenge bearing VIN: ZFF71NXX000177700;

xxxiii. One 2011 Porsche 911 GT2 RS bearing VIN: WP0AE2A92BS778077;

xxxiv. One 2011 Porsche Panamera Turbo bearing VIN: WP0AC2A71BL090988;

xxxv. One 2011 Ferrari SA Aperta bearing VIN: ZFF72RHA7B0181404;

xxxvi. One 2005 Porsche Carrera GT bearing VIN: WP0CA29835L001261;

xxxvii. One 2014 Ferrari 458 bearing VIN: ZFF68NHA8E0196808;

xxxviii. One Model 60 Learjet bearing FAA Registration N551ST;

((i) through (xl), collectively the "Subject Property");

WHEREAS, the Indictment also included a forfeiture allegation as to Counts Five and Six, seeking forfeiture to the United States, pursuant to Title 18, United States Code, Section 981(a)(1)(C) and Title 28, United States Code, Section 2461(c), of any and all property, real or personal, which constitutes or is derived from proceeds traceable to the commission of Counts Five and Six of the Indictment, including, but not limited to, a sum of United States currency equal to at least $2,000,000,000.00 representing the amount of proceeds traceable to the commission of said offenses and including, but not limited to, the Subject Property;

WHEREAS, the Indictment also included a forfeiture allegation as to Counts Seven through Nine, seeking forfeiture to the United States, pursuant to Title 18, United States Code, Section 982(a)(1), of any and all property, real or personal, involved in said offenses, or any property traceable to such property, including but not limited to, a sum of United States currency equal to at least $2,000,000,000.00 representing the amount of property involved in said offenses and including, but not limited to, the Subject Property;

WHEREAS, the Court entered an Amended Order for the Interlocutory Sale of the Learjet authorizing the United States Internal Revenue Service to conduct an interlocutory sale of

the Learjet and that any net proceeds realized from such a sale would be a substitute res for the Learjet (Docket Entry 142);

WHEREAS, on or about November 8, 2017, the Learjet was sold and the proceeds are currently on deposit in the United States Treasury Suspense Account (the "Learjet Proceeds");

WHEREAS, the Government has identified the following additional property that (i) constitute proceeds of the offenses charged in Counts One through Six of the Indictment and (ii) is property involved in the offenses charged in Counts Seven and Nine of the Indictment:

a. PLAT 7.02 Ct., OVL D SI1 Dia 184@ .93 Ct. PV Dia 2@.61 Ct. HM F VS1 Diamond Ring purchased from VanBrock jewelry store on or about October 24, 2008 in the amount of $316,000;

b. 18 kt WG 388@3.75 Ct. G VS Dia Cage Earrings purchased from VanBrock jewelry store on or about February 19, 2009 in the amount of $8,875;

c. PLAT 163@.94 Ct. Melee Dia Mounting for 7.0 Ct. oval diamond purchased from VanBrock jewelry store on or about August 26, 2009 in the amount of $6,825;

d. 18 ktWG 2@8.57 Ct. PRS Grey Opaque Diamond Earrings Dia 1.09 Ct. Melee Dia purchased from VanBrock jewelry store on or about December 24, 2009 in the amount of $13,650; and

e. 18 ktWG 422@4.50 Ct. F VVS1 Dia Bangle purchased from VanBrock jewelry store on or about May 13, 2010 in the amount of $17,260.

((a) through (e), collectively, the "Additional Property");

WHEREAS, on or about October 13, 2017, the defendant was found guilty following a jury trial of all counts of the Indictment;

WHEREAS, during the trial in this matter, the Government admitted bank records, summaries thereof and other evidence establishing, among other things, that the gross proceeds

from payment processors to the bank accounts for the defendant's businesses from 2008 through June 2013 was $3,500,000,000.00;

WHEREAS, the total amount of any interest the defendant acquired or maintained in violation of section 1962, any interest in, security of, claim against and property or contractual right of any kind affording a source of influence over any enterprise which the defendant has established, operated, controlled, conducted or participated in the conduct of, in violation of section 1962, and any property constituting, or derived from, any proceeds which the defendant obtained, directly or indirectly, from unlawful debt collection in violation of section 1962, in connection with the offenses alleged in Counts One through Four of the indictment, is $3,500,000,000.00;

WHEREAS, the defendant obtained $1,317,753,577 in United States currency worth of proceeds derived from the offenses alleged in Counts Five and Six of the Indictment;

WHEREAS, the defendant obtained $3,500,000,000 in United States currency worth of property involved in the commission of the offenses alleged in Counts Seven through Nine of the Indictment;

WHEREAS, the Subject Property, the Learjet Proceeds and the Additional Property (collectively, the "Specific Property") (i) constitutes proceeds of the offenses alleged in Counts One through Six of the Indictment and (ii) is property involved in the offenses alleged in Counts Seven and Nine of the Indictment;

WHEREAS, pursuant to Title 21, United States Code, Section 853(g), and Rules 32.2(b)(3), 32.2(b)(6), and 32.2(c) of the Federal Rules of Criminal Procedure, the Government is now entitled, pending any assertion of third-party claims, to reduce the Specific Property to its

possession and to notify any person who reasonably appears to be a potential claimant of their interest therein;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. As a result of the offenses charged in Counts One through Nine of the Indictment, to which the defendant was found guilty, a money judgment in the amount of $3,500,000,000.00 in United States currency (the "Money Judgment") shall be entered against the defendant.

2. As a result of the offenses charged in Counts One through Nine of the Indictment, to which the defendant was found guilty, all of the defendant's right, title and interest in the Specific Property is hereby forfeited to the United States for disposition in accordance with the law, subject to the provisions of Title 21, United States Code, Section 853. Upon the entry of a Final Order of Forfeiture forfeiting the Specific Property to the United States, the Specific Property shall be applied towards the satisfaction of the Money Judgment.

3. Pursuant to Rule 32.2(b)(4) of the Federal Rules of Criminal Procedure, upon entry of this Amended Preliminary Order of Forfeiture as to Specific Property/Money Judgment, this Amended Preliminary Order of Forfeiture as to Specific Property/Money Judgment is final as to the defendant, SCOTT TUCKER, and shall be deemed part of the sentence of the defendant, and shall be included in the judgment of conviction therewith.

4. The United States Department of Treasury (or its designee) is hereby authorized to deposit the payments on the Money Judgment into the Treasury Assets Forfeiture Fund, and the United States shall have clear title to such forfeited property.

5. All payments on the outstanding Money Judgment shall be made by postal

money order, bank or certified check, made payable, in this instance to the United States Department of Treasury, and delivered by mail to the United States Attorney's Office, Southern District of New York, Attn: Money Laundering and Asset Forfeiture Unit, One St. Andrew's Plaza, New York, New York 10007 and shall indicate the defendant's name and case number and the United States Department of Treasury shall be authorized to deposit the payments on the Money Judgment into the Treasury Assets Forfeiture Fund, and the United States shall have clear title to such forfeited property.

6. The United States (or its designee) is hereby authorized to take possession of the Specific Property and to hold such property in its secure custody and control.

7. Pursuant to Title 21, United States Code, Section 853(n)(1), Rule 32.2(b)(6) of the Federal Rules of Criminal Procedure, and Rules G(4)(a)(iv)(C) and G(5)(a)(ii) of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, the United States shall publish for at least thirty (30) consecutive days on the official government internet forfeiture site, www.forfeiture.gov, notice of this Amended Preliminary Order of Forfeiture as to Specific Property/Money Judgment and notice that any person, other than the defendant in this case, claiming an interest in the Specific Property must file a petition within sixty (60) days from the first day of publication of the notice on this official government internet site, or no later than thirty-five (35) days from the mailing of actual notice, whichever is earlier.

8. The notice referenced in the preceding paragraph shall state that the petition shall be for a hearing to adjudicate the validity of the petitioner's alleged interest in the Specific Property, shall be signed by the petitioner under penalty of perjury, and shall set forth the nature and extent of the petitioners right, title or interest in the Specific Property and any additional facts

supporting the petitioner's claim and the relief sought pursuant to Title 21, United States Code, Section 853(n).

9. Pursuant to 32.2 (b)(6)(A) of the Federal Rules of Criminal Procedure, the Government shall send notice to any person who reasonably appears to be a potential claimant with standing to contest the forfeiture in the ancillary proceeding.

10. Pursuant to Title 21, United States Code, Section 853(n), upon adjudication of all third-party interests, this Court will enter a Final Order of Forfeiture with respect to the Specific Property in which all interests will be addressed.

11. Pursuant to Rule 32.2(b)(3) of the Federal Rules of Criminal Procedure, upon entry of this Amended Preliminary Order of Forfeiture as to Specific Property/Money Judgment the Office is authorized to conduct any discovery needed to identify, locate or dispose of property subject to forfeiture, including depositions, interrogatories, requests for production of documents and subpoenas, pursuant to Rule 45 of the Federal Rules of Civil Procedure.

12. The Court retains jurisdiction to take additional action, enter further orders, and amend this and any future orders as necessary to implement and enforce this Amended Preliminary Order of Forfeiture as to Specific Property/Money Judgment.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

Exhibit 2

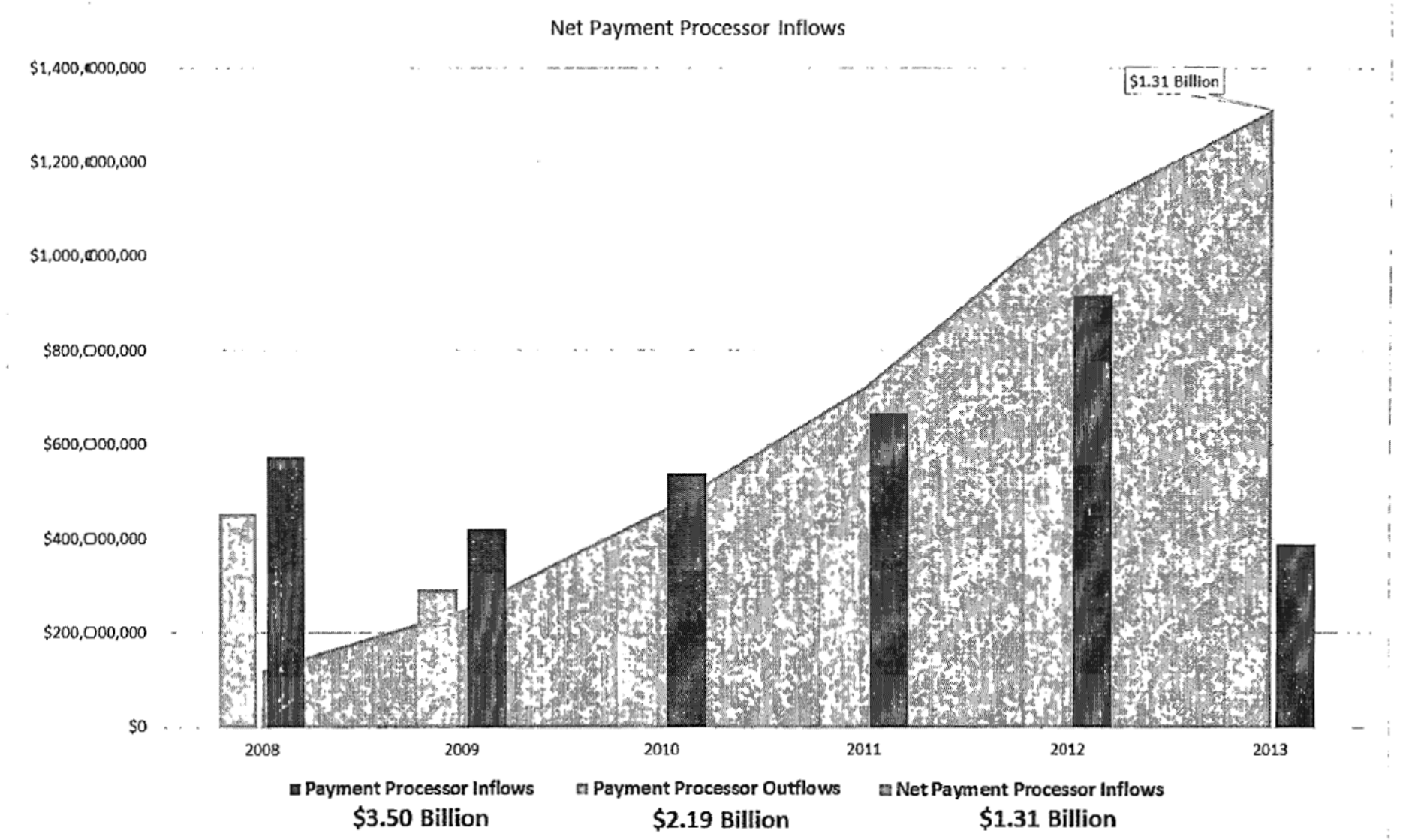
13. The Clerk of the Court shall forward three certified copies of this Amended Preliminary Order of Forfeiture as to Specific Property/Money Judgment to Assistant United States Attorney Alexander J. Wilson, Chief of the Money Laundering and Asset Forfeiture Unit, United States Attorney's Office, One St. Andrew's Plaza, New York, New York 10007.

Dated: New York, New York
~~March ___, 2018~~
4-16-18

SO ORDERED:

HONORABLE P. KEVIN CASTEL
UNITED STATES DISTRICT JUDGE

Total Payment Processor Inflows and Outflows (2008 – June 2013)



11

Source: Bay Cities (MNEDBASCP,MNEDBAACS,MNEDBAAML,MNEDBAUCL,MNEDBAUSFC,RCSDBA500FC,SFSDBAOCC), USBank (MNEDBA500FC,RCS,SFSDBAOCC,TFSDBAAML,TFSDBAUCL,TFSDBAUSFC,MNEDBAACS,MNEDBASCP)

Exhibit 2

106. During its Rule 30(b)(6) deposition, Park 269 confirmed that the company has never engaged in any business activities and that its only sources of funding were transfers it received from AMG Services and Kim Tucker, for which Park 269 provided no consideration. When asked to describe the reason for the transfers between AMG and Park 269, the deponent stated only that "monies were transferred from AMG to Ms. Tucker in connection with the normal transfers and gifts, et cetera, from husband to wife." Park 269 also testified that from 2009, when the company was formed, until 2012 or 2013, AMG Services paid all expenses relating to the maintenance and upkeep of the property, as well as real estate taxes and homeowners' insurance fees, and that Park 269 provided no consideration for those payments made on its behalf.[182]

107. Excluding Kim Tucker's AMG salary, Kim Tucker and Park 269 do not claim to have actually earned or provided consideration for the transfers they received from the other defendants. Significantly, Mrs. Tucker affirmatively disclaims any role with or ownership interest in any corporate defendant. Likewise, Park 269 disclaims having offered any services or other value to the other defendants.[183]

F. Defendants' Deceptive And Inaccurate Disclosures Cost Consumers At Least $1.32 Billion

108. The FTC's consumer harm calculation, based on a summary of defendants' voluminous consumer and loan data pursuant to Rule 1006 of the Federal Rules of Evidence (Ex. 244, Decl. of Elizabeth Anne Miles ("Miles Decl."), Ex. 245 ("Miles Supp. Decl.")),[184] is outlined below.

---

181 Ex. 87, TUCKER-DEF_017783-88 ("ScottData" document listing checks to CM2 Inspections, CMC Aspen Homes, Janckila Construction, Joshua & Co., Surface Solutions, and Zelaya's Landscaping).

182 Ex. 237, Park 269 Dep. 19:17-20:13, 21:10-18, 23:14-24:4, 34:9-35:5, 43:12-44:1, 44:8-22, 45:7-47:15.

183 Ex. 242, K. Tucker Resps. to 2nd Interrogs. at pp. 7-26; Ex. 243, Park 269 Ans. to 2nd Interrogs. at pp. 4-18; Ex. 226, K. Tucker Supp. Resp. To Interrog. No. 1; Ex. 235, Park 269 Supp. Resp. to Interrog. No. 6.

184 The FTC performed two summations of Defendants' loan data: one based on loan data produced by AMG after the FTC's settlement with AMG (Ex. 244 at ¶ 3; Singhvi Decl. ¶ 244), and one based on an earlier set of loan data files utilized by Defendants' expert, David Scheffman. (Ex. 245 at ¶ 1; Singhvi Decl. ¶ 245). As noted below, both sets of files yielded near identical totals.

109. From 2008 to 2012, Defendants, via seven loan portfolios, issued five million (Ex. 244, Miles Decl. ¶ 10; Ex. 245 Miles Supp. Decl. ¶ 7.a.i) high-interest, short term, payday loans that incorporated deceptive representations concerning the total cost of the loans. (According to AMG, loan data before 2008 is inaccessible due to software obsolescence.)

110. All loans falsely represented to consumers that the total cost of a loan would be the amount financed plus one finance charge of $30 per $100 borrowed: *e.g.*, a $300 loan would cost $390 to repay.[185]

111. Defendants incorporated the same deceptive mechanism identified by the Court into all loans: they prominently disclosed one finance charge to consumers (*e.g.*, $90) but automatically withdrew multiple, significantly higher finance charges from them (*e.g.*, $675) in the absence of affirmative consumer opt-out. (ECF No. 584 at 15.)

112. From 2008 to 2012 (the only years for which loan data is currently accessible), Defendants' loan data establishes that *all* consumers who repaid more than the amount borrowed plus one finance charge as a result of defendants' deceptive scheme had an aggregate principal borrowed amount of $981,858,500 and an aggregate disclosed cost of $1,276,416,050. Defendants collected $2,594,169,627 from consumers on those loans. Thus, in aggregate, Defendants' unlawful conduct caused borrowers to pay $1,317,753,577 more to Defendants than Defendants disclosed. (Ex. 244, Miles Decl. ¶ 12; *see also* Ex. 255 Miles Supp. Decl. ¶ 9.) Again, this figure is conservative in that Defendants' unlawful practices predate significantly the 2008-2012 period for which Defendants have produced data.

113. In the same period, Defendants issued 928,801 loans to *one-time* borrowers (consumers who took one loan from any single portfolio and did not borrow again from that portfolio) who repaid more than the amount borrowed plus one finance charge. Those loans had an aggregate principal borrowed amount of $282,704,950 and a disclosed cost of $367,516,435. Defendants collected $710,053,309 on those loans. Thus, in aggregate, Defendants' unlawful conduct caused one-time borrowers to pay at least $342,536,874 more to Defendants than Defendants disclosed. (Ex. 244, Miles Decl. ¶ 13.)

185 Ex. 7, Lenders' 30(b)(6) Dep. 279:23-281:23 (language used to explain loan terms has been the same for all loan portfolios over time, with the exception of a few "cosmetic changes"); *see also* Exs. 37 to 43 (examples of loan documents used by all seven loan portfolios over time).