No. 20-17324

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

JAMES D. NOLAND JR, ET AL.,
Defendants-Appellants,

SUCCESS BY MEDIA HOLDINGS INC., ET AL.,
Defendants,

KIMBERLY FRIDAY,
Receiver-Appellee.

On Appeal from the United States District Court
for the District of Arizona
No. 2:20-cv-47
Hon. Dominic W. Lanza

BRIEF OF THE FEDERAL TRADE COMMISSION

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This case involves two district court orders rejecting motions to modify or dissolve a preliminary injunction. The appeal is plainly time-barred as to one order, and the other is a non-appealable decision declining not to dissolve a preliminary injunction on grounds already rejected. The Court should dismiss the case for lack of jurisdiction. If the Court concludes otherwise, it should affirm the district court's rulings.

Appellants are four defendants in a suit brought by the Federal Trade Commission alleging that they operated an unlawful pyramid scheme and that they falsely claimed that participation in the scheme would bring financial independence. The district court imposed a temporary restraining order appointing a receiver to exercise full control over corporate defendants and freezing all defendants' assets, which it then converted to a preliminary injunction after a hearing. Defendants never appealed the preliminary injunction. Instead, months later they sought to modify it to allow them to exercise some of the receiver's powers. The district court denied the modification in July 2020, but the defendants did not appeal until late November, well after the deadline had passed. Later still, defendants sought to dissolve the preliminary injunction entirely, but on the same grounds the district court had already considered and rejected. The court once again denied the request, and this time they timely appealed.

JURISDICTION

For the reasons set forth in Argument Section I below, the Court lacks jurisdiction over this appeal.

QUESTIONS PRESENTED

1. Whether the Court has jurisdiction to review an order denying a motion to dissolve a preliminary injunction when the motion raised no new matter not already considered when the court imposed and decided to maintain the injunction.

2. Whether under the collateral-order doctrine the court of appeals has jurisdiction to hear an otherwise untimely appeal of a district court order rejecting a defendant's claimed right to choose legal counsel for another party.

3. Whether the district court abused its discretion in refusing to dissolve a preliminary injunction absent a change in law.

4. Whether the district court abused its discretion in refusing to modify a preliminary injunction to allow defendants to exercise a receiver's authority to choose legal counsel.

STATEMENT OF THE CASE

A. The Complaint, Preliminary Injunction, and Receivership

On January 8, 2020, the Federal Trade Commission sued James D. Noland Jr. and others along with corporations they controlled for operating an illegal pyramid scheme and making false promises of "financial freedom" to consumers

who paid to participate in the scheme. The complaint alleged that the defendants engaged in deceptive practices that violated Section 5(a) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45(a), as well as two rules promulgated by the Commission: the Mail, Internet, or Telephone Order Merchandise Rule, 16 C.F.R. pt. 435; and the Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations, 16 C.F.R. pt. 429. The complaint named both corporate defendants, Success By Media Holdings and Success by Media LLC,[1] and Individual Defendants James D. Noland Jr., Lina Noland, Scott A. Harris, and Thomas G. Sacca (collectively, "the Nolands").

Defendants operated a nationwide pyramid scheme, led by Jay Noland, a serial pyramid-scheme promoter.[2] The scheme falsely promised consumers that they would attain "financial freedom" and never have to work again, if they enrolled as "Affiliates" in Defendants' Success By Health (SBH) program and

[1] A Second Amended Complaint added Enhanced Capital Funding and Rinpark SA as corporate defendants. ER-069.

[2] The FTC had sued Jay Noland in 2000 for promoting an illegal pyramid scheme. *See FTC v. Netforce Seminars, et al.*, No. 2:00-cv-2260 (D. Ariz.). That case settled with Noland agreeing to a Final Judgment that barred him from further pyramid schemes and prohibited him from making misrepresentations, including about potential earnings. *Id*., *FTC v. Netforce Seminars, et al.*, No. 2:00-cv-2260, "Stipulated Final Judgment and Order for a Permanent Injunction as to J.D. Noland," ECF 66 (D. Ariz. July 2, 2002). Despite that judgment, Noland continued to promote pyramid schemes, including the one at issue here. The Commission has sought a contempt judgment in the *Netforce* case, which the district court has held in abeyance pending resolution of the instant litigation.

followed Noland's instructions. FTCSER-88–92. SBH marketed coffees, teas, and nutraceuticals through its Affiliates, but Defendants instructed Affiliates that earnings success depended not on their ability to sell products but on recruiting new Affiliates. FTCSER-77–87. Affiliates could recoup their costs only by enrolling new Affiliates, who themselves needed to recruit new affiliates, and so on. Far from the promised financial freedom, the vast majority of Affiliates lost money. FTCSER-87. Meanwhile, the Nolands amply lined their own pockets. Through June 2019 they had paid themselves $1.35 million, FTCSER-140, while their 5,000-plus non-employee Affiliates received about $200 each, despite spending more than $1,100 apiece on Defendants' products and "training." FTCSER-139.

In January 2020, the district court entered a temporary restraining order (TRO) against Defendants that, among other things, froze their assets; appointed a Receiver (Kimberly Friday) to manage the assets and businesses; required financial disclosures and accounting of all assets; required repatriation of assets, documents, and records, including those in the possession of third parties; prohibited the dissipation of domestic and foreign assets; required delivery of assets and information to the Receiver; and ordered expedited discovery. FTCSER-104–134 (order); FTCSER-137 (appointment of Receiver). The TRO vested the Receiver

with authority to choose counsel for the Corporate Defendants and other entities subject to the Receivership. FTCSER-120.

The district court later entered a preliminary injunction (PI) largely reflecting the TRO. ER-043–064. In support of the PI, the FTC showed that, contrary to the Nolands' claims (Br. 6-7), the Corporate Defendants were not profitable. FTCSER-99. Indeed, the companies were broke, but the Nolands spent what revenues the companies generated on opulent foreign homes and luxury vehicles. FTCSER-100. In concluding that the FTC would likely succeed in showing that Defendants operated an illegal pyramid scheme, the court credited the Receiver's conclusion that Corporate Defendants likely could not be operated without violating the TRO. FTCSER-87. It characterized as "powerful evidence" of an unlawful pyramid scheme the Corporate Defendants' "inaccurate marketing statements, the organization of the commission system, and the movement of large amounts of cash to insiders." *Id.* In concluding that the FTC would likely succeed in showing that Defendants engaged in deceptive practices, the court cited their "false" and "misleading" claims that consumers would obtain "financial freedom" and levels of "wealth that would exceed the income from standard employment." FTCSER-87, FTCSER-92.

The PI also continued the appointment of Friday as the Receiver over the opposition of the Defendants. ER-055; FTCSER-93. In support, the district court

cited evidence that the Nolands had used the Corporate Defendants as their "personal piggy bank." FTCSER-93. It noted that Jay Noland was already constrained by a permanent injunction pertaining to a different pyramid scheme (see n.2, *supra*). FTCSER-94. Based on the foregoing, the district court also maintained the asset freeze. FTCSER-96.

The Nolands did not appeal the PI. ER-007.

Since issuance of the PI, including as part of this appeal (Br. 12-20), the Nolands have criticized the Receiver for allegedly mismanaging the Corporate Defendants. The district court has rebuffed such suggestions, noting instead that the Receiver "inherited a difficult situation—she took control of entities that the FTC has demonstrated were likely operating as a pyramid scheme, discovered that some of the entities' inventory was tainted with an illegal ingredient and that the entities had not been following necessary business practices and legalities, and then had to confront the COVID-19 pandemic." FTCSER-52–53. It further found that Receiver's discounted fees "are reasonable and not excessive or extravagant, particularly given the challenging nature of her work in this case." FTCSER-18. As the district court observed, the Nolands' "true disagreement is with the Court's preliminary injunction ruling (which they did not appeal), not with [the Receiver's] conduct." FTCSER-53.

B. Legal Representation of Corporate Defendants

At the outset of the current litigation and through entry of the PI, the law firm of Gordon Rees Scully Mansukhani, LLP (Gordon Rees) represented the Nolands and, with the consent of the Receiver, Corporate Defendants. ER-030. In March 2020, however, Gordon Rees moved to withdraw as counsel to all Defendants. ER-031. The district court granted the motion, but substituted the Receiver (herself a lawyer) as counsel for the Corporate Defendants, which may not appear *pro se* in court. ER-032. The Receiver had indicated that she did not plan to expend the Receivership Estate's limited resources continuing to contest the allegations in the FTC's complaint on behalf of the Corporate Defendants. ER-031–032.

On April 3, 2020, the law firm of Williams|Mestaz, LLP, sought to enter an appearance on behalf of both the Nolands and the Corporate Defendants. ER-032. The Receiver, who had authority to hire counsel for the Corporate Defendants, had not consented. ER-032. On April 16, Williams|Mestaz withdrew as counsel for the Corporate Defendants. Thereafter, the Nolands, through Williams|Mestaz, asked the court to modify the PI to allow new counsel to represent the Corporate Defendants. ER-164–167. The FTC and the Receiver opposed the motion. ER-151–162.

In an order issued July 29, 2020, the first of the two orders on appeal, the district court denied the Nolands' motion to modify the PI. ER-021–041. In response to the Nolands' assertion that the First and Fifth Amendments allowed them to choose counsel for entities they own, the court found that they had not "even attempt[ed] to grapple" with settled law holding that, upon appointment of a receiver, a corporation's management loses the power to run the corporation's affairs. ER-036. The court also noted the potential ethical problems posed by the Nolands' selection of counsel, because the Receiver would remain the client, with interests conflicting with those of the Nolands. ER-037. The court further observed that, to the extent the Nolands really sought access to frozen funds to pay for counsel, courts consistently find that frozen funds need not be released to pay for attorney's fees, especially where the amount frozen is far less than the amount needed to compensate victims for defendants' alleged frauds. ER-038. As for the Nolands' "passing claim" that the Supreme Court's decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), rendered the receivership improper, the court concluded that *Liu* was not controlling because it concerned a different statutory scheme and cannot be read as curtailing a court's power in FTC enforcement proceedings to appoint receivers. ER-039–040. The Nolands appealed the order four months later, ER-002–004, well after the 60-day appeal window had closed.

C. Motion to Dissolve the PI

About eight months after entry of the PI, the Nolands filed a motion to dissolve it. ER-119–142. The FTC opposed the motion. ER-097–117. In an order issued October 27, 2020, the second order on appeal, the district court concluded that the Nolands had failed to show that a significant change in law or facts warranted dissolution of the PI. ER-006–027. Regarding a change of law, the court rejected the Nolands' argument that the special concurrence in *FTC v. AMG Capital Management, LLC*, 910 F.3d 417 (9th Cir. 2018), *cert. granted*, No. 19-508 (argument held 1/13/2021), the Seventh Circuit's decision in *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019), and the Supreme Court's decision in *Liu*, 140 S. Ct. 1936, overruled long-standing Circuit precedent that a court may award equitable monetary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). ER-008. The district court noted that it had rejected these arguments twice previously and, in any event, was bound by Ninth Circuit precedent. ER-008. Regarding a change of facts, the district court concluded that the Nolands largely failed to show any new facts and that any allegedly new facts supported the PI in any event. ER-009–027.

On November 27, 2020, the Nolands filed a notice of appeal of the district court's July 29 and October 27 orders. ER-002–004.

SUMMARY OF ARGUMENT

1. The Court lacks jurisdiction over both orders on appeal.

a. The October 27 Order denying the Nolands' motion to dissolve the PI is not appealable. A district court order declining to dissolve an injunction may be appealed "only if the motion raises new matter not considered when the injunction was first issued." *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1418 n.4 (9th Cir. 1984). As the district court expressly noted, the Nolands' motion to dissolve involved no legal or factual matter that the district court had not previously considered when imposing or considering whether to modify the PI. Indeed, the Nolands had challenged the court's authority to appoint a receiver and freeze assets twice before.

b. Appeal from the July 29 Order is time-barred. The appeal was filed in late November, well beyond the 60-day window for appeal. The collateral-order doctrine does not cure the default. That doctrine has to do with whether an interlocutory order is subject to appeal in the first place; it has nothing to do with excusing the requirement of timely appeal.

Even if the collateral-order doctrine were relevant, its stringent requirements are not met here. The Supreme Court has not placed orders involving the Nolands' claimed right to choose counsel in the narrow of category of cases for which

interlocutory appeals are permitted. And even if it had, the Nolands could not satisfy the strict demands of the doctrine.

2. If the Court reaches the merits, it should conclude that the district court did not abuse its discretion.

a. The October 27 Order properly refused to dissolve the PI because controlling Circuit precedent authorized the receivership and asset freeze. That precedent remains binding even though the Supreme Court is currently reviewing one of this Court's decisions applying it. Should the Supreme Court reverse and if the Nolands' appeal is still alive, this Court may act accordingly.

b. The July 29 Order properly refused to modify the PI to allow the Nolands to choose counsel for the Corporate Defendants. The Nolands have chosen their own personal counsel, so their right to representation is not threatened. But they have no right to choose counsel for separate corporate entities that they own. The district court's appointment of a receiver over the Corporate Defendants divested the Nolands of management, including choice of counsel. The Nolands' inability to choose counsel for the Corporate Defendants does not harm them, because they can advance in their personal capacities the very same arguments that counsel of their choosing would have made for the Corporate Defendants.

ARGUMENT

I. THE COURT LACKS JURISDICTION OVER BOTH ORDERS AT ISSUE

Neither of the two orders challenged here is appealable. Appeal of the October 27 Order is barred by a rule forbidding appeal of orders declining to dissolve injunctions on grounds already raised. Appeal of the July 29 Order is plainly time-barred, and the collateral-order doctrine does not allow the Nolands to overcome this jurisdictional infirmity.

A. The October 27 Order Is Not Appealable Because It Considered No New Legal or Factual Matter

The October 27 Order declining to dissolve the PI considered arguments the Nolands had already made and the district court had already rejected. It is black-letter law that the "denial of a motion to modify or dissolve an injunction" is appealable "only if the motion raises new matter not considered when the injunction was first issued." *Sierra On-Line, Inc.*, 739 F.2d at 1418 n.4. This jurisdictional limitation rests on the idea "that the moving party could have appealed the grant of the injunction but chose not to do so, and thus that a subsequent challenge to the injunctive relief must rest on grounds that could not have been raised before." *Alto v. Black*, 738 F.3d 1111, 1120 (9th Cir. 2013).[3] The Nolands bear the "burden of establishing that a significant change in facts or law

[3] *United States v. Oriho*, 969 F.3d 917, 923 (9th Cir. 2020), relied upon by the Nolands (Br. 2), is inapposite, because it does not address a refusal to dissolve or modify an injunction that defendants failed to appeal when it was entered.

warrants revision or dissolution of the injunction." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). Because they cannot bear that burden, the Court lacks jurisdiction over the October 27 Order.

When the Nolands sought to dissolve the PI, they raised the same arguments they had made previously in their original opposition to, and a subsequent attempt to modify, the injunction. Each time, they claimed that the FTC Act does not convey authority to appoint a receiver over Defendants' businesses or freeze their assets. They first made the argument in February 2020 in opposition to the FTC's motion for a PI, including a receivership and an asset freeze. FTCSER-102–103. Specifically, they claimed support in Judge O'Scannlain's special concurrence in *FTC v. AMG Capital Management, Inc.*, 910 F.3d 417, 430-31 (9th Cir. 2018) (*AMG*), in which he reasoned that the FTC Act's grant of authority to issue an "injunction" did not include the power to order monetary relief. *Id.* The Nolands did not appeal.

They raised the very same argument again in June 2020 in seeking to modify the injunction to remove one of their companies from the Receiver's control. FTCSER-41–47. They relied once again upon Judge O'Scannlain's special concurrence in *AMG*. FTCSER-46. This time, they also relied upon the Seventh Circuit's decision in *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019) (*CBC*), which held that a court could not award monetary relief under

Section 13(b). *Id*. That decision had been rendered well before their initial challenge to the PI, however, so it could not constitute newly issued law (even if it were binding in the Ninth Circuit).

The Nolands also relied on the Supreme Court's decision in *Liu v. SEC*, 140 S. Ct. 1936 (2020), which defined the scope of equitable monetary relief under the securities laws. They argued that *Liu* confirmed that the Seventh Circuit in *CBC* and Judge O'Scannlain in *AMG* were correct, FTCSER-46, and that "[t]he whole receivership order in this case and the seizure of assets [*i.e.*, the PI] is [sic] beyond the jurisdiction of this court and the remedies allowed by Congress." FTCSER-40. The district court rejected the argument and refused to modify the PI. FTCSER-19–35. The Nolands did not appeal.

The Nolands raised the same arguments again when they moved to dissolve the PI on September 7, 2020. ER-119. They repeated their contentions that the special concurrence in *AMG* and the decisions in *CBC* and *Liu* deprived the district court of authority to enter the PI imposing a receivership and freezing their assets. ER-136–138. In the October 27 Order denying the motion, the district court remarked that it had already rejected those very arguments. ER-008.

It is clear on that record that the Court lacks jurisdiction over the appeal of the October 27 Order.[4] The facts fit squarely into the rule that appeal will lie only when a motion to dissolve an existing injunction "raises new matter not considered when the injunction was first issued." *Sierra On-Line*, 739 F.2d at 1418 n.4. The Nolands' September 7 motion to dissolve, which led to the October 27 Order, made the same arguments the district court had already rejected twice, not any "new matter."

B. The Appeal of the July 29 Order Is Time-Barred, and the Collateral-Order Doctrine Does Not Excuse the Default

Appellate Rule 4 required any appeal of the July 29 Order to be filed no later than September 27, 2020. Fed. R. App. P. 4(a)(1)(B)(ii). The Nolands filed their notice of appeal on November 27, 2020. ER-002–004. The appeal was untimely and thus jurisdictionally barred. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007).

Apparently recognizing that their appeal of the July 29 Order is time-barred, the Nolands maintain that the collateral-order doctrine, *see Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), somehow supplies jurisdiction over the appeal. Br. 2-3.[5] That doctrine concerns whether an interlocutory order may be

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[4] On appeal, Defendants challenge only the district court's legal authority. They do not challenge the district court's conclusion (ER-009–027) that the Nolands failed to prove changed factual circumstances justifying dissolution of the PI.

[5] In fact, had the Nolands timely appealed, they would not need to rest jurisdiction on the collateral-order doctrine, because the July 29 Order denied their motion to modify the PI. *See* 28 U.S.C. § 1292(a)(1).

appealed at all; it has nothing to do with excusing an untimely notice of appeal. Any appeal of an interlocutory order must be timely. *See D.E.C. Int'l, Inc. v. Schneider, Inc.*, 974 F.2d 1341 (9th Cir. 1992) (unpublished); *Weir v. Propst*, 915 F.2d 283, 286 (7th Cir. 1990); Wright & Miller, 15A Fed. Prac. & Proc. Juris. § 3911 (2d ed. Oct. 2020 update). Thus, even if the Nolands could satisfy the stringent requirements of the collateral order doctrine, it provides them no help here.

The Nolands are wrong in any event that the district court's refusal to modify the PI to allow them, rather than the Receiver, to choose counsel for the Corporate Defendants satisfies the requirements of the collateral-order doctrine. Br. 3. Their argument that the doctrine applies amounts only to a conclusory statement that its requirements are satisfied, *id.*, without any attempt to show how. Even if that were sufficient to preserve the claim, it is clear that orders rejecting a party's claim to a right to choose its own legal counsel are not within the narrow category of cases for which interlocutory appeals are permitted.

Ordinarily, only "final orders" of a district court are subject to appeal. 28 U.S.C. § 1291. The Supreme Court applies a three-part test to determine whether a "category" of orders is immediately appealable under the collateral-order doctrine. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (cleaned up); *see Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) ("we look to categories of cases,

not to particular injustices"). An order that does not terminate the litigation must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (cleaned up). "[A]ll three requirements [must be] satisfied." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987).

These requirements are "stringent," to ensure that the collateral-order doctrine does not "overpower the substantial finality interests § 1291 is meant to further." *Will*, 546 U.S. at 349-50 (cleaned up). "Permitting piecemeal, prejudgment appeals … undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indus.*, 558 U.S. at 106 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

For these reasons, the Supreme Court repeatedly has stressed that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk Indus.*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). The Court's "admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders

should be immediately appealable." *Id*. (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995)).

The Nolands cite no case permitting interlocutory appeal of an order rejecting relief premised on a party's claimed right to choose its own counsel, let alone counsel for a separate corporate entity. Indeed, both the Supreme Court and this Court have found that the collateral-order doctrine was not satisfied in cases where a party claimed a right to counsel of its own choosing. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 433-34, 438-39 (1985); *In re Butler Indus., Inc.*, 8 F.3d 25 (9th Cir. 1993) (unpublished).

The facts here show why. The Nolands' motion did not involve "an important issue completely separate from the merits of the action." *Will*, 546 U.S. at 349 (cleaned up). They sought modification of the receivership provisions of the PI, which is part of the injunctive relief that a district court may order in a case brought under Section 13(b) of the FTC Act. Thus, the issue of whether or not the PI should be modified necessarily involved the merits of the 13(b) action. In addition, the district court's refusal to grant the Nolands' requested modification can be effectively reviewed as part of an appeal of a final judgment in the case. *Id.* Were that determination reversed on appeal, and if the Court concluded that the Nolands' inability to choose counsel for the Corporate Defendants was prejudicial to the Nolands, the Court could vacate the judgment. *See Sec. Pac. Bank*

Washington v. Steinberg (In re Westwood Shake & Shingle, Inc.), 971 F.2d 387, 390 (9th Cir. 1992).

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DISSOLVE OR MODIFY THE PRELIMINARY INJUNCTION

If the Court reaches the merits, it should find that the district court properly exercised its discretion in this matter.

A. Standard of Review

The Court will reverse district court decisions refusing to dissolve or modify preliminary injunctions "only where the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Hook v. State of Arizona*, 120 F.3d 921, 924 (9th Cir. 1997) (cleaned up). The Court reviews "the district court's legal conclusions *de novo*, the factual findings underlying its decision for clear error, and the injunction's scope for abuse of discretion." *FTC v. Consumer Defense, LLC*, 926 F.3d 1208, 1212 (9th Cir. 2019).

B. The District Court Correctly Adhered to Controlling Circuit Precedent

Under this Court's precedents, a district court may award under Section 13(b) of the FTC Act "complete relief," including equitable monetary relief. *See*, *e.g.*, *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 601-02 (9th Cir. 2016); *FTC v. H.N. Singer*, 668 F.2d 1107, 1110-11 (9th Cir. 1982). The district court faithfully

applied these precedents in maintaining the PI, including the receivership and the asset freeze. ER-008. "Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting *en banc*, or by the Supreme Court," or unless Congress changes the law. *Hart v. Massanari*, 266 F.3d 1155, 1171 & n.28 (9th Cir. 2001). The Nolands do not even contend that the district court ER-red in adhering to Circuit precedent. And despite their complaint that the specific provisions of the PI are not authorized under Section 13(b) (Br. 8-12), the Nolands make no attempt to demonstrate that those provisions depart from Circuit precedent. The Court should affirm on this basis alone.

Instead, the Nolands spend much of their brief presenting arguments that Section 13(b) of the FTC Act does not permit any type of monetary relief. Br. 26-40. At this point, the law of this Circuit is firmly to the contrary, although the question is pending before the Supreme Court in *AMG Capital Management, LLC v. FTC*, No. 19-508 (argument held Jan. 13, 2021).[6] The Supreme Court should decide the case by July. Should the Supreme Court reverse this Court's precedent on Section 13(b), and if this case is still live, the Court may act accordingly.

[6] The Nolands misread the Supreme Court's order vacating the grant of certiorari in *CBC* and deconsolidating the *AMG* and *CBC* cases. Br. 33-35. That action reflects Justice Barrett's service on the Seventh Circuit, which decided *CBC*, and allowed her to participate in the *AMG* case.

Such an approach makes particular sense here. In denying the Nolands' motion to stay district court proceedings pending a Supreme Court decision in *AMG*, the district court recently explained that a trial in the case is unlikely before August 2021 and that "resolution of *AMG Capital* will have a limited impact on the issues in this case: it will provide guidance on the extent to which monetary remedies are available under § 13(b) but will not address liability, the propriety and scope of a permanent injunction, monetary remedies under § 19, or what remedies are available should the FTC eventually prevail in the parallel contempt action." FTCSER-13–14.

Given the foregoing, we will not burden the Court with a response to the Nolands' arguments about the scope of equitable relief under Section 13(b), which at this point are incorrect under controlling Circuit precedent. We do note, however, that the Nolands are wrong that *Liu* undercuts the Court's precedents concerning equitable relief under Section 13(b). Br. 32. *Liu* did not overrule or otherwise cast doubt upon *H.N. Singer*, 668 F.2d 1107, and *Commerce Planet*, 815 F.3d 593. *Liu* interpreted a provision in the securities laws that allows a court to order "equitable relief." 15 U.S.C. § 78u(d)(5). The FTC Act, by contrast, authorizes a "permanent injunction." 15 U.S.C. § 53(b). The Court has recognized that "equitable relief" serves as "a limitation on the relief available" from a court of equity, whereas "permanent injunction" conveys a broader power "to award

complete relief," including legal remedies. *Commerce Planet*, 815 F.3d at 602 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 399 (1946)). *Liu* did not address that matter, so the interpretation of the FTC Act set forth in *Commerce Planet* remains binding.

If anything, *Liu* supports existing precedent. In upholding the SEC's ability to obtain disgorgement of profits as "equitable relief" under 15 U.S.C. § 78u(d)(5), *Liu* reaffirmed the holding of *Porter v. Warner Holding Co.* that "[o]nce a District Court's equity jurisdiction has been invoked … a decree compelling one to disgorge profits … may properly be entered." *Liu*, 140 S. Ct. at 1943 (quoting *Porter*, 328 U.S. at 398-99). The securities laws interpreted by the Court said nothing about disgorgement but, following *Porter*, *Liu* concluded that "[u]nless otherwise provided by statute, all … inherent equitable powers … are available for the proper and complete exercise of [equitable] jurisdiction." *Id.* at 1947 (quoting *Porter*, 328 U.S. at 398). This Court relied on these very principles from *Porter* when ruling that Section 13(b) of the FTC Act permits "restitution" and the return of "unjust gains from past violations." *Commerce Planet*, 815 F.3d at 599. *Liu*'s unqualified endorsement of *Porter* thus reinforces this Court's precedent interpreting Section 13(b).

Moreover, like the FTC Act, the statute in *Porter* authorized a "permanent … injunction," and the Court held that monetary remedies "may be considered as

an equitable adjunct to an injunction decree." *Porter*, 328 U.S. at 399. The Court explained that "[n]othing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief." *Id.* "[W]here, as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to … award complete relief." *Id.*

C. The District Court Properly Refused to Allow the Nolands to Exercise the Receiver's Authority to Choose Counsel for Receivership Entities

The PI vested the court-appointed receiver with "full control" over the Corporate Defendants, ER-054, and specifically empowered her to "[c]hoose, engage, and employ attorneys …, as the Receiver deems advisable or necessary in the performance of duties and responsibilities under the authority granted by" the PI. ER-055. The Nolands moved to modify the PI to allow them to engage their own counsel to serve as counsel for the Corporate Defendants as well. ER-164–167. The district court denied the Nolands' motion. ER-029–041.

On appeal, they maintain that the district court decision violates their right to retain counsel of their choosing. Br. 42-43. There is no such violation, because the Nolands have chosen and are represented by their own counsel. They cite no authority for the proposition that they also have a right to choose counsel for the Corporate Defendants. The cases they do cite, *Potashnick v. Port City*

Construction Co., 609 F.2d 1101, 1117-18 (5th Cir. 1980), and *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 257 (1st Cir. 1986), identify no such right. Rather, both cases addressed an individual defendant's right to retain or consult his own counsel and did not involve or recognize a claimed right to choose counsel for a separate corporate entity. Indeed, the district court's appointment of the Receiver divested the Nolands of their authority to choose counsel for the corporate defendants. *See Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 585 (9th Cir. 1993) (citing *CFTC v. Weintraub*, 471 U.S. 343, 353 (1985)); *SEC v. Quest Energy Mgmt. Gp., Inc.*, 768 F.3d 1106, 1109 (11th Cir. 2014); *First Sav. & Loan Ass'n v. First Fed. Sav. & Loan Ass'n*, 531 F. Supp. 251, 255 (D. Haw. 1981).

Any error is harmless anyway. As the district court observed (ER040–041), the Nolands have no serious ground for complaint because they can advance the very same arguments that counsel of their choosing would have advanced on behalf of the Corporate Defendants. In order to hold the Nolands liable, the FTC must prove that the Corporate Defendants acted unlawfully. *See*, *e.g.*, *FTC v. Cyberspace.com LLC*, 453 F.3d 1196, 1202 (9th Cir. 2006). The Nolands are free to argue that the FTC has not met its burden. Moreover, the FTC and Receiver have agreed not to seek a non-litigated (*i.e.*, default or settlement) resolution of the claims against the Corporate Defendants until the case is resolved as to the

Nolands. FTCSER-66. This eliminates the possibility of an incongruous result in which, for example, the Corporate Defendants concede liability, but the FTC, in its case against the Nolands, fails to prove that the Corporate Defendants acted unlawfully.

The only practical impact of their not being able to choose counsel for the Corporate Defendants is that the Nolands cannot use frozen assets to help pay their own attorney's fees. ER-041. The district court correctly observed that "Ninth Circuit law is clear that frozen corporate assets need not be unfrozen in this circumstance." ER-041; *see FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (no constitutional right to access frozen funds to pay attorney's fees).

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction. If it reaches the merits, it should affirm the district court's decisions.

Respectfully submitted,

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January 25, 2021

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7), in that it contains 5,701 words.

January 25, 2021

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CERTIFICATE OF SERVICE

I certify that on the 25th day of January, 2021, an electronic copy of the foregoing Brief of the Federal Trade Commission was filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system and that service will be accomplished via that system.

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