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

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Federal Trade Commission,

Plaintiff,

v.

Netforce Seminars, Richard Slaback, J.D. Noland, Darin Epps, and Edward Lamont,

Defendants.

Case No. 00-2260-PHX-RCB-FJM

PLAINTIFF'S MOTION AND MEMORANDUM IN SUPPORT FOR AN ORDER TO SHOW CAUSE WHY JAMES D. NOLAND, JR., SUCCESS BY MEDIA HOLDINGS INC., AND SUCCESS BY MEDIA LLC SHOULD NOT BE HELD IN CONTEMPT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Treatises

Serial pyramid scheme promoter Defendant James Dwight ("J.D. or "Jay") Noland, Jr. ("Noland") is at it again. In Arizona and across 49 U.S. states he is blatantly violating multiple terms of this Court's 2002 Stipulated Final Judgment and Permanent Injunction (the "Final Order"), Dkt. No. 66. Specifically, Noland operates a pyramid scheme using false earnings claims to defraud thousands of consumers out of more than $7 million. The Federal Trade Commission ("FTC"), therefore, requests the Court issue an order for Noland to show cause why he should not be held in contempt.[1]

Since late 2017, Noland baited entrepreneurial consumers into a financial abyss by telling them that they will attain "financial freedom," and never have to work again, if they enroll as "Affiliates" in his Success By Health ("SBH") scheme and follow his instructions. SBH markets coffees, teas, and nutraceuticals through its Affiliates, but tellingly, Noland instructs Affiliates that success depends not on finding consumers and selling them products, but instead on recruiting new Affiliates. As a result, Affiliates enter an endless chain of consumers, who can only recoup their costs by enrolling new Affiliates, who themselves must duplicate Noland's duplicity to break even. Unsurprisingly, rather than provide financial freedom, Noland siphons cash into his own pocket. Through June 2019, he paid himself more than $770,000 from company accounts

[1] The FTC herein cites evidence attached to its temporary restraining order application, filed in *FTC v. Noland, et al.*, No. CV-20-0047-PHX-DML (D. Ariz. Jan. 13, 2020), Dkt. Nos. 7, 8. Citations use the same format, referencing exhibits as Plaintiff's Exhibit [#], followed by an overall page number [#] within that exhibit and the attachment number or paragraph number. For example: PX[#] at [#] (Att. #) or PX[#] at [#] (¶ [#]). The FTC has concurrently filed a motion to transfer this contempt action to Judge Lanza, who presides over *FTC v. Noland*. Should transfer not occur, the FTC will in this case file the voluminous evidence from its TRO application in *Noland*.

to other accounts he controls. By contrast, SBH's 5,000-some Affiliates received less than $210 each (on average), despite spending more than $1,100 each (on average) on Noland's products and his get-rich "training."

I. STATEMENT OF FACTS

A. Noland's History of Promoting Illegal Pyramid Schemes

Jay Noland, his deceptive promises, and his pyramid schemes are not new to this Court. In 2000, the FTC sued him for operating a pyramid scheme with the same type of false promises of substantial income. *See* FTC's Complaint at ¶¶ 6-7, 22-24, Dkt. No. 1. He eventually settled with a consent order. That Final Order bars Noland from a variety of marketing schemes, including pyramids, and prohibits him from making misrepresentations, including about potential earnings. Final Order at 3-4. It also bars him from failing to take reasonable steps to monitor and ensure compliance with the Final Order and to investigate and respond to consumer complaints. *Id.* at 6-7.

Despite these injunctions, Noland keeps making false claims to lure consumers into his latest pyramid.[2] Worse yet, he brazenly misrepresents the Final Order to do this. For example, shortly before launching his current pyramid, Noland told consumers:

> ***[The Government] delivered me paperwork, and they said you cannot tell people how much you make because it unfairly entices them***. . . . Yes, your Federal Trade Commission said, hey Jay, listen, you make people feel like they can run through walls . . . . We want you to understand that you can't tell people how much you make . . . . So what we started doing instead of telling people how much we make, we just go, okay, last week, I made enough to buy that Maserati cash.

[2] The FTC also has sued at least two other pyramid schemes in which Noland participated. *See FTC v. Equinox Int'l Corp.*, No. 99-cv-0969 (D. Nev.); *FTC v. NexGen3000.com, Inc.*, No. 03-cv-0130 (D. Ariz.). PX 2 at 72-73 (9:23-10:9), 119-20 (56:7-19) (Att. 7) (confirming Noland's participation in Equinox and NexGen3000).

PX 1 Att. 27 (emphasis added). Unsurprisingly, his description is pure fantasy. He also proudly boasts of violating the Court's pyramid ban, telling the same audience he builds pyramids and they can, too:

> Everything in this world is a pyramid. . . . Your church, pyramid. School system, pyramid. ***People ask me what do I do. I said I build pyramids, man.*** . . . I build some little pyramids, except I'm at the top of the ones I built . . . . I've got over 700,000 distributors in my network . . . . [and] you can do what I did.

PX 1 at 243-44 (52:25-53:8) (Att. 27) (emphasis added).

B. Noland's Current Scheme

Noland now runs SBH, which sells its products to and through a network of business opportunity participants, called "Affiliates." Coffee is SBH's flagship "product," the shell vehicle for Noland's pyramid. He claims SBH will be selling $24 billion of coffee per year in 5-7 years,[3] and SBH will pay back half of that ($12 billion) to its Affiliates. PX 1 at 547 (Att. 55).

Noland tells consumers if they enroll as Affiliates in SBH, work hard, and follow his instructions, they will replace their job income and become financially free. At that point, they can stop working entirely while reaping a perpetual stream of million-dollar yearly, if not monthly, payments. Noland instructs Affiliates that recruiting is the key to achieving these goals. He furthers his scheme through costly "training" events. At the

[3] For comparison, Starbucks's annual revenues are $24.7 billion. Starbucks, 2018 Form 10-K at 21, *available at* https://s22.q4cdn.com/869488222/files/doc_financials/annual/2018/2018-Annual-Report.pdf. Two years into SBH's 5-7 year plan, the company has yet to exceed $5 million in annual revenues. PX 4 at 10 ¶ 16.

end of the day, SBH is simply a pyramid scheme. As a result, the vast majority of Affiliates are destined to, and do, lose money.

1. Noland Runs His Scheme Through Entities He Controls

Noland operates SBH through two closely-held companies he founded, owns, and controls with his wife. PX 1 at 61 (Att. 1), 71 (Att. 2). SBH is an "unincorporated division" of Success By Media LLC ("SBM LLC"), which itself is a wholly owned subsidiary of Success By Media Holdings Inc. ("SBM Holdings," together with SBM LLC, "Success By Media" or the "Success By Media parties"). PX 2 at 211, 221 (Att. 9). The Nolands formed SBM Holdings to "manage and more formally consolidate the financial operations of seven subsidiaries formally all under Success By Media, LLC." *Id.* at 211 (Att. 9). The two companies "operat[e] as one corporation," *id.*, including, for example*,* by consolidating their funds in shared bank accounts and sharing common controlling personnel (*i.e.*, the Nolands). PX 4 at 4 (¶ 12) (SBM LLC bank statements reflect all cash reported in SBM Holdings' financial statements).

Noland controls both companies. He owns 71 percent of SBM Holdings and serves as its CEO and as the CEO of Success by Media LLC and SBH. PX 2 at 194, 196, 198, 210 (Att. 9). He and his wife are the sole directors of SBM Holdings,[4] *id.* at 71 (Att, 2), and are the sole managers of Success by Media LLC, *id.* at 67 (Att. 1). They also are the sole signatories on the entities' shared bank accounts. PX 6 at 2, 5, 14. SBH licenses all its products from another company, Enhanced Capital Funding, of which Noland is

[4] An Offering Statement filed with the SEC by SBM Holdings identifies "Crystal Roney" as a director of SBM Holdings and omits Noland's wife. PX 2 at 194 (Att. 9). This differs from corporate records filed with the State of Nevada.

the "President and sole-owner;" the SBH products are "the same" as what Noland used "for another business." PX 2 at 209-210, 224 (Att. 9). Noland and his wife are also the sole administrators of the SBH Affiliates-only Facebook page. PX 1 at 883 (Att. 90).

2. Noland and SBH Promise Affiliates Substantial Income

Noland repeatedly tells Affiliates and recruits, if they do as instructed, they will replace their current job income in six months and become financially free in 18 months, meaning they "never, ever have to work again." PX 1 (Att. 113). He claims this is reasonable and achievable for anyone, telling Affiliates that they have a "reasonable expectation" of replacing their job income within six months simply by being "result-oriented and focused." PX 1 at 867 (10:3-6) (Att. 88); *see also id.* at 169 (9:5-9) (Att. 18) (Noland: "[Y]ou're going to be able to get out of that job in about six months if you pay close attention."). Similarly, Noland tells Affiliates if they "just appl[y] [his system], without fail, you should be able to be financially free in 18 months." *Id.* at 1157 (8:3-6) (Att. 136). Additionally, at least two of SBH's recruiting scripts direct Affiliates to claim falsely that "several people" are "achieving Financial Freedom already with our company." *Id.* at 403-05 (Atts. 48, 49).

Consistent with these promises, Noland highlights that SBH will make Affiliates millions. SBH calls Noland the "Millionaire Maker." *See, e.g.*, PX 1 at 25 (¶ 42(b)), 140 (Att. 10), 806 (9:13-14) (Att. 82). Noland, in turn, promises to create "1,000 millionaires" through SBH. *See, e.g.*, *id*. at 38 (¶ 57(j)), 1093 (28:13-15) (Att. 127), 1233 (Att. 146). To do so, he boastfully titles many of his training videos, "Millionaire Mentorship." *Id.* at 42 (¶ 60(c)). During one such training, he encouraged his online audience to each type, "I'm going to be a millionaire in SBH." *Id.* at 37 (¶ 57(e)). Close to 100 viewers did, including an SBH executive, who wrote, "Millionaire thru SBH!! Guaranteed!" *Id.* In another training, Noland told Affiliates, "You will be a millionaire if you apply this training." *Id.* at 39 (¶ 57(m)).

SBH repeats this "millionaire" mantra in writing. Its recruiting script trains Affiliates to talk to recruits about making $1 million per month and immediately say "people become what we call 'Coffee Millionaires" (and then directs the Affiliates to "[l]augh at this point"). PX 1 at 397 (Att. 47). Further, Noland encourages Affiliates to sign a "Million Dollar Contract," in which they commit to spend at least $10,000 over 18 months and attend all of his costly trainings. *Id.* at 885 (Att. 91).

Noland and SBH trumpet their lucrative rewards as "achievable for the masses." *Id.* at 398 (Att. 47). Although Noland sometimes equivocates by saying that not everyone ***will*** get million-dollar payouts, he explains "the masses" ***could*** if they just put the time in:

> Now, what percentage of the people that are participating . . . in SBH are going to accomplish [$1 million per year]? Minimal. Why? It's not because it's not possible. See, there's a difference in who's going to obtain it and what's potential. ***The masses can do it.*** The masses won't do it."

Id. at 1007 (7:13-18) (Att. 110) (emphasis added). In another training, Noland called his plan to earn millions "literally 'Direct Sales for Dummies.' A dummy can just go follow these instructions and create wealth." *Id.* at 918 (29:8-12) (Att. 100).

At times, Noland and SBH go even further, declaring that Affiliates can earn "unlimited income." *See, e.g.*, PX 1 at 410 (Att. 50) (touting SBH's "UNLIMITED

Income" opportunity by telling Affiliates you "can earn as much money as you want"). SBH's "Prospecting System" instructs Affiliates to ask a recruit how much money they want to make and then tell them they can make that much. *Id.* at 1115 (10:3-5) (Att. 131). Noland calls SBH a "literal gold goose" and a "perpetual money and health machine." *Id.* at 1115 (10:3-5) (Att. 131).

SBH sometimes tells Affiliates to avoid making "income claims" by instead referring to "lifestyle enhancements." Its "Getting Started Training" bluntly tells Affiliates, "No Income Claims (Share Lifestyle Enhancements Instead)." PX 1 at 321 (Att. 38). Noland admits the purpose of this strategy is to avoid government scrutiny. *Id.* at 249 (75:1-8) (Att. 27). In any event, Noland's "lifestyle" claims convey the same message as his income claims: SBH is likely to make you rich. SBH's marketing materials show images of luxury yachts, sports cars, cash, and exotic vacations. *See, e.g.*, PX 1 at 12 (¶ 27(b)). Noland claims that his past trainees acquired "Lamborghinis; Rolls Royces; Bentleys; multimillion-dollar homes," *id.* at 37 (¶ 57(e))., and that his three-year-old-son is "already retired," as are his son's future grandchildren, PX 1 at 13 (¶ 29).

3. Noland and SBH Undermine Their Already-Limited Disclaimers

Noland and SBH occasionally include disclaimers after making income or lifestyle claims, but they bury and then undermine those statements. For example, SBH's "Business Overview" recruiting slide deck has a small-print, inconspicuous statement that income is not "guaranteed" and "[i]ndividual income results may vary significantly." *See, e.g.*, PX 1 at 121 (Att. 8). In initial marketing materials, these statements appeared in tiny two-millimeter type, at the bottom of a page below an example of an Affiliate earning a $1.2 million monthly payout circled in yellow. *Id.* Later, Noland cut the disclaimer's size in half and lightened the font, while making the $1.2 million even larger, bolder, and highlighted in a contrasting color. *Id.* at 470 (Att. 52).

Even when disclaimers are not buried, Noland and SBH officials undermine them. They sometimes refer to million-dollar payments as "theoretical examples." *See, e.g.*, PX 1 at 121 (Att. 8), 208 (53:24-54:2) (Att. 25), 397 (Att. 47), 627 (27:8-11) (Att. 64). They then typically undo even that limited warning by explaining that the examples are only theoretical "[b]ecause you just ain't done it yet" and adding, "but are there people that do it? . . . Yes. I got people in my network globally, they make that look silly." *Id.* at 208 (53:24-54:5) (Att. 25); *see also* PX 1 at 1191 (9:5-9) (Att. 140) ("they're theoretical because you haven't done it yet.").

4. Noland and SBH Drive Affiliates to Focus on Recruiting Rather than Retail Sales

Noland and SBH drive Affiliates to focus on recruiting new Affiliates, rather than selling products to ultimate users.

a. Noland and SBH Instruct Affiliates to Recruit Exponentially

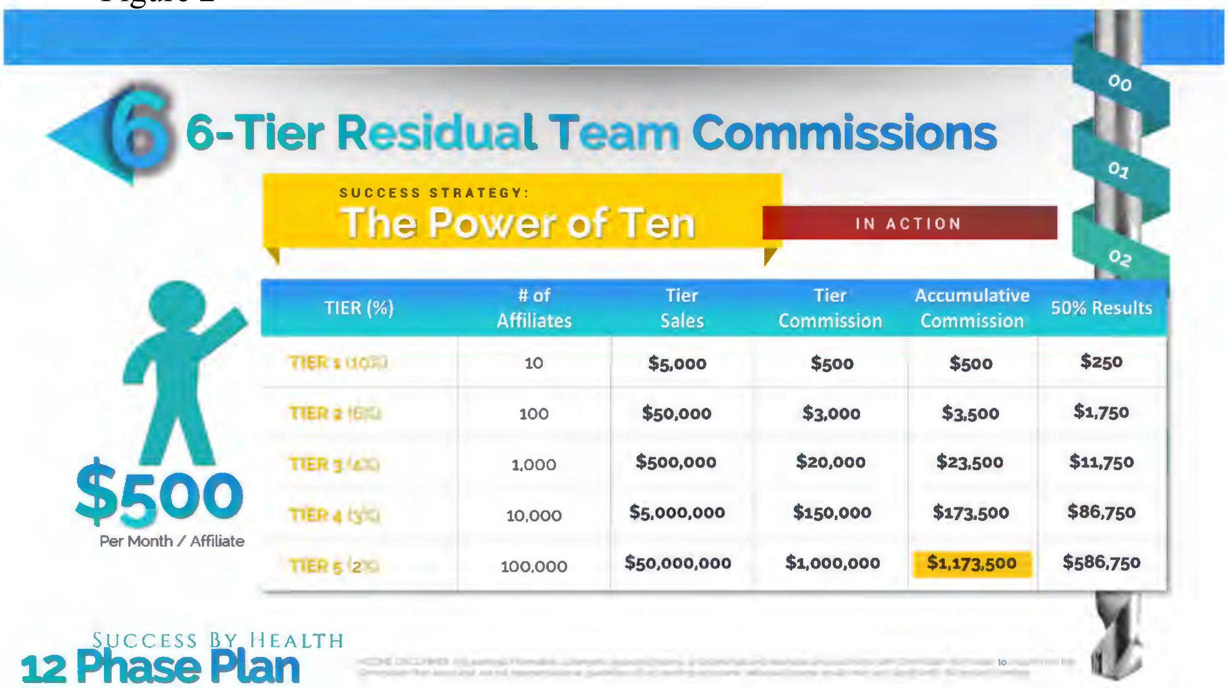
Noland and SBH train Affiliates to follow "Four Steps to Success," depicted in the visual below (PX 1 at 483 (Att. 52)). Tellingly, not one of the four steps mentions sales to actual users. Instead, they tell Affiliates to (1) buy products themselves (preferably packages that costs $500 or $1,995), (2) "be a product of the product" by setting a monthly auto-order of at least $60 (or $500 if seeking "financial freedom") – again buying products themselves, (3) build a team (*i.e.*, recruit), and (4) duplicate their own efforts by teaching their downline team to follow the same steps (*i.e.*, buying products for themselves and recruiting others to do the same). *Id.* at 483 (Att. 52), 363 (Att. 39), 1093 (25:1-4) (Att. 127). As part of the third step, they tell Affiliates to enroll two new Affiliates within 48 hours if they want financial freedom or within one week if they are replacing their job income. *Id.* at 366 (Att. 39). The fourth step, "duplication," is the "key to long term success as an SBH Affiliate." *Id.* at 347 (Att. 39).

Figure 1

Noland and SBH describe recruiting 10 new Affiliates who will duplicate that amount of recruiting as the key to attaining financial freedom. For example, they highlight a "Power of 10" "success strategy" in which "Affiliates need to get 'their 10' Affiliate Team Members" and then teach new recruits to "do the same thing." PX 1 at 468 (Att. 52). Affiliates achieve the "Power of 10" by recruiting ten new Affiliates as their "Tier 1," each of whom recruit ten new Affiliates as the original Affiliate's "Tier 2," and so on through Tiers 3-5. *Id.* at 469-70. This creates an exponential pyramid of

Affiliates: Tier 1 has 10 Affiliates, Tier 2 has 100, Tier 3 has 1,000 Affiliates, Tier 4 has 10,000 Affiliates, and Tier 5 has 100,000. *Id.* SBH's marketing materials below shows Affiliates they will make $1,173,500 when each team member spends $500 per month. *Id.* at 470. For *one* person to get the $1.2 million monthly payment, 110,000 people must each purchase or induce others to purchase $500 per month in SBH products.

Figure 2



TIER (%)	# of Affiliates	Tier Sales	Tier Commission	Accumulative Commission	50% Results
TIER 1 (10%)	10	$5,000	$500	$500	$250
TIER 2 (6%)	100	$50,000	$3,000	$3,500	$1,750
TIER 3 (4%)	1,000	$500,000	$20,000	$23,500	$11,750
TIER 4 (3%)	10,000	$5,000,000	$150,000	$173,500	$86,750
TIER 5 (2%)	100,000	$50,000,000	$1,000,000	$1,173,500	$586,750

Noland's references to "getting ten" are ubiquitous and aggressive. He told Affiliates: "***If you're not creating a ten-by-ten, you're not doing your job*** . . . . [A]nybody that tells me that they want financial freedom and will not go do [sic] to get these ten, they are an enemy." PX 1 at 1014 (34:6-12) (Att. 110) (emphasis added). In a video training session about "how to be a millionaire in SBH," Noland declared: "You don't need everybody. . . . You only need ten!" *Id.* at 39 (¶ 57(m)). On a millionaire mentorship training, Noland told Affiliates, "All you gotta do is build a ten-by-ten-by-ten." *Id.* at 36 (¶ 57(b)).

At times, Noland is more explicit, directing Affiliates to focus on recruiting instead of sales. For example, he told Affiliates the goal of one promotion was to focus them on "what you should be focusing on right now, which is new people getting into the company." PX 1 at 850 (24:18-21) (Att. 86). He later stressed that recruits must recruit:

> See the most important thing in this industry if you want residual income, you have to recruit inviters. If you don't recruit inviters, you still have a job.

Id. at 41 (¶ 59). SBH employees echo this theme. *E.g.,* PX 1 at 663 (20:12-21:6) (Att. 68) ("recruiting is key;" build a "10x10x10x10x10").

b. SBH's Compensation Scheme Prioritizes and Rewards Recruiting Over Retail Sales to Actual Product Users

SBH's compensation plan reinforces the message that Affiliates should spend their time recruiting rather than selling products. It does so in two key ways: (1) paying cash bonuses and lucrative rewards for recruiting and (2) failing to reward retail sales and obstructing the ability to retail meaningfully.

i. SBH Offers Cash Rewards for Recruiting

SBH pays Affiliates at least four types of lump-sum cash recruiting bonuses for enrolling new Affiliates who buy expensive products. The bulk of SBH's rewards, however, are for Affiliates who recruit large pyramids.

First, SBH's "Accelerator Bonus" pays a one-time $75 bonus to any Affiliate who enrolls a recruit who buys a $500 pack of SBH products. The company pays smaller bonuses for further downline recruiting. PX 1 at 554 (Att. 55).

Second, SBH's "Power 500" and "Power 1000" bonuses reward rapid spending and recruiting upon joining SBH. Affiliates receive a $500 or $1000 bonus if they buy product packs of $125 or more and then, within 14 days, recruit new members who do the same and meet certain other purchase thresholds. *Id.* at 557 (Att. 55).

Third, SBH theoretically pays lump-sum "BAM" bonuses up to $5 million for building the "Power of 10" structure described above. If an Affiliate completes that structure through Tier 2 (by recruiting 10 Affiliates who each recruit 10 Affiliates) and each of the 110 downline Affiliates purchases at least $100 per month, the Affiliate receives a "BAM Bonus" of $1,000. *Id.* at 566 (Att. 55). The bonus reaches $5 million for a five-tier pyramid in which all 111,110 Affiliates spend $500 per month. *Id.* (As of April 2019, however, no one had even completed Tier 2. *Id.* at 1010 (20:2-9) (Att. 110).)

Fourth, SBH offers time-limited "promotions" that pay Affiliates cash for recruiting. For example, SBH's "5x5 bonus" paid up to $10,000 for recruiting five new Affiliates, each of whom purchased a product pack and recruited five new Affiliates who also purchased packs. *Id.* at 889 (Att. 92).

Beyond these targeted cash payments, Affiliates must build extensive pyramids to obtain any meaningful income and access the bulk of SBH's rewards. Affiliates earn "residual team commissions" based on purchases made through their own or their downline's Affiliate websites or "back offices."[5] In the example in SBH's main

[5] "Back offices" are password-protected websites managed by SBH through which Affiliates can access materials, track commissions, and buy products. PX 1 at 19 (¶ 36(a)).

recruiting pitch, Figure 2, *supra,* 85% of earnings occur at Tier 5 (which contains the Affiliate's recruits' recruits' recruits' recruits' recruits), and 98% of earnings occur at Tiers 4 and 5 combined. In the scenario in Figure 2, 90% of Affiliates in the pyramid (the 100,000 in Tier 5) will *lose* money because they have no downline from which to recoup their costs. *See* PX 3 at 33-35.

ii. Noland and SBH Undermine, and Fail to Reward, Retail Sales to Users of the SBH Products

Affiliates can sell products in-person or online through their SBH website, but Noland and SBH de-emphasize, and discourage, these sales in at least five ways.

First, Noland and SBH make any meaningful amount of in-person sales all but impossible. They do so by selling products to the public at the same "wholesale" price at which Affiliates buy. *See, e.g.*, PX 1 at 408 (Att. 50). Thus, although they tell Affiliates to buy at "wholesale," apply a markup, and sell at a higher "retail" price, *id.*, consumers have no reason to pay "retail" prices when they can simply pay the "wholesale" price to SBH. Indeed, SBH instructs its Affiliates to tell their "retail" customers to do just that. *See* PX 1 at 378 (Att. 43).

Second, SBH does not reward Affiliates for the limited in-person sales that may occur. There is no tracking or reporting of those sales. PX1 at 46-47 (¶ 65(k)). Instead, Affiliates simply earn whatever profit they can by applying a retail "markup," *see* PX 1 at 408 (Att. 50), which as just indicated is not economically feasible.[6]

---

[6] Although SBH treats in-person sales as part of its commission plan, anyone can buy SBH's products at "wholesale" and resell them.

Third, SBH encourages Affiliates to meet purchase thresholds for SBH ranks[7] by buying expensive products themselves rather than selling products. For example, with just under four hours left in one 30-day qualification period, Noland told Affiliates with $500 in volume to buy $14,500 in products so they could reach a higher rank and thus be eligible for more rewards. PX 1 at 976 (10:5-24) (Att. 106). Similarly, Noland instructs Affiliates that a "great way for you to rank advance is through your own personal purchases." *Id*. at 20-21 (¶ 36(b)(iii)). SBH's president, Scott Harris, bragged he and Noland carried around "$25,000 or more in products," and used to spend $2,000-3,000 at a time to qualify for the next rank. *Id.* at 684 (30:11-22) (Att. 70), 31 (¶ 54(b)).

Fourth, to the extent Noland or SBH promote selling to non-Affiliates, they do so as a recruiting strategy, not as a sustainable income strategy. They repeatedly urge Affiliates to convert customers to Affiliates. *See, e.g*., PX 1 at 366 (Att. 39), 792 (26:16-27:4) (Att. 80), 829 (23:21-24:3) (Att. 84).

Fifth, Noland admits the obvious: the products are irrelevant. He explained to consumers "you can plug any company or product into [his] process, and you can be free financially if you want to be." PX 1 at 235 (19:4-6) (Att. 27). He later told Affiliates not to complain about delayed products because they should simply "sell the vision" (*i.e*., the business opportunity). PX 1 at 37 (¶ 57(f)); *see also id.* at 38-39 (¶ 57(j)) (Noland: "the bigger vision you sell, the bigger paycheck you get").

[7] Affiliates only become eligible for certain rewards by achieving certain "ranks" within SBH. *See, e.g.*, PX 1 at 507-08 (Att. 54).

5. Affiliates Make 95% of Purchases from SBH

Noland's instructions and the incentives in SBH's commission plan result in a system where practically all of SBH's sales are to Affiliates. Over 95% of product purchases from SBH, by value, are by Affiliates. PX 5 at 18 (¶ 30). Significantly, the average purchase doubles on the last day of the rank-qualification period, suggesting that Affiliates buy products to hit ranks. *See* PX 5 at 18-19 (¶¶ 31(a), 33).

Online purchases by non-Affiliates—on which Affiliates receive an 8-10% commission—are an afterthought within SBH, and thus rare. In fact, such sales were not even available until September 2018, a year after SBH began operations. PX 1 at 35 (¶ 56(d)) (announcing start of these sales). Until that time, non-Affiliates could only obtain the product from SBH directly (in which case no Affiliate receives credit) or in offline purchases from Affiliates (which are not tracked).

6. Affiliates Do Not Earn Substantial Income

No Affiliates have received substantial net income, PX 5 at 17 (¶ 28), and very few, if any, could ever do so. Dr. Stacie Bosley, a Ph.D. in Applied Economics and an expert on multilevel marketing who has testified in that capacity in this District, reviewed the SBH compensation plan, marketing materials, and Noland's statements. *See* PX 3. She determined the plan creates a perpetual chain of recruitment and that, as a result, is simply a "money-transfer scheme that siphons money from later entrants to compensate earlier entrants, delivering easily foreseen losses (from a structural perspective) to the vast majority of participants." *Id.* at 4 (¶ 10). According to Dr. Bosley's modeling, 90% of people must be losing money at any given time in SBH. *Id.* at 33-35.

Consumers' actual results support Dr. Bosley's conclusions. An FTC data analyst reviewed payments to and from SBH for a two-year period, from July 1, 2017 through June 30, 2019. PX 5.[8] The data shows that SBH's nearly 5,000 Affiliates received a total of $1.03 million (just over $200 per Affiliate), an especially paltry sum because those Affiliates purchased over $5.7 million (over $1,100 per Affiliate) in SBH products and trainings to earn those payouts. *Id.* at 17 (¶ 28). Less than two percent of the approximately 5,000 Affiliates received more from SBH than they paid to SBH. *Id.* at 22 (¶ 37). That "lucky" two percent received, on average, a net $2,297 over an average period of 283 days (about $245 per month). *Id.* Even the ten Affiliates who netted the most from SBH averaged just under $14,000 over an average of 568 days between their first and last transactions (about $770 per month)—a far cry from the $1,173,500 per month Noland and SBH repeatedly emphasize. *Id.* Noland, meanwhile, received $770,533 through accounts he controls. *See* PX 5 at 15-16 (¶ 26).

7. Noland Uses "Training" Events to Extract More Money from Affiliates

Noland consistently pressures Affiliates to pay hundreds or thousands of dollars to attend his "training" events. Over a two-year period, consumers paid more than $1.2 million to attend these trainings—approximately 25% of all money they paid to SBH.

[8] The FTC did not have direct access to SBH's accounting software, so instead replicated payments based on records subpoenaed from companies SBH uses. The FTC analysis represents approximately 90% of all payments involving consumers to or from SBH's main bank account; an FTC data analyst developed a methodology to identify whether or not a consumer is an Affiliate and whether they were paying for a product or a training. "Affiliates" in this dataset excludes the four individual Defendants. PX 5 at 14-15 (¶¶ 23-25). Affiliate income excludes amounts accrued but not yet disbursed, which stood at $153,434.16, collectively, as of December 31, 2018. *Id*. at 15 (¶ 25).

See PX 5 at 17 (¶ 28). During these events, Noland uses intense emotional appeals with bright lights, loud music, and flashy visuals to extract more money from consumers.

The pressure to attend events take a variety of forms. In a "1 YEAR COMMITMENT FORM," for example, new Affiliates agree to attend "all Major Corporate Events." PX 1 at 372 (Att. 41). Similarly, SBH's "Million Dollar Contract" requires Affiliates to "attend all SBH corporate trainings and events no matter what." *Id*. at 885 (Att. 91). An SBH executive said of one event—with $3,000-$5,000 tickets—"[t]here's no way you can fail if you utilize the training that Mr. Noland is going to give us . . . ." *Id*. at 700 (8:20-22) (Att. 72). Noland agreed, saying the only way Affiliates could fail to get wealthy if they and their downline teams attended was "to shoot yourself in the head." *Id*. at 31-32 (¶ 54(c)).

Noland and SBH also pressure Affiliates to take on debt to buy from SBH. Prior to a Florida event, SBH's president told Affiliates they should max out credit cards and take loans because attending "is what it takes . . . to make it to the top." PX 1 at 934 (6:20-7:9) (Att. 102); *see also id*. at 32 (¶ 54(d)) (another SBH executive boasted consumers "are using multiple credit cards to get to Icon"); *id.* at 1323 (Att. 162) (Noland encourages using "OPM," "other people's money," *i.e.,* credit cards).

8. Noland and SBH Discourage, Dismiss, and Do Not Respond to Consumer Complaints

As if the pyramid scheme were not bad enough, SBH and Noland frequently fail to ship products or honor their own commission plan, and then discourage, dismiss, or do not respond to consumer complaints because complaints are against "the rules."

SBH maintains an online complaint-reporting tool (www.sbmsupport.com) and a 1-800 number through which consumers complain, but using either tool is discouraged and complaints go unanswered. *See* PX 1 at 293 (Att. 33), 40 (¶ 57(o)), 47 (¶ 57(f)), 34 (¶ 56(c)) (Harris directing complaints to be sent to private gmail accounts). SBH instructs Affiliates it is "IMPORTANT" first to go to the person who recruited them with a complaint, and if they cannot answer, "then[sic] only then" may an Affiliate use the reporting tool. PX 1 at 293 (Att. 33). In practice, often no one responds. An undercover FTC investigator, for example, made purchases entitling him to at least a $20 commission. PX 1 at 47 (¶ 67), 49-50 (¶ 79). SBH, however, never paid that commission, and then ignored his email about the "error." *Id.* at 51-53 (¶¶ 75-76, 79).

Noland sets a stark tone from the top, calling people who complain, "little gnats," and repeatedly telling Affiliates *not* to report problems, or be kicked out of the company (along with the Affiliates who recruited them) and thus be denied the opportunity to make the perpetual millions he promises. *See, e.g.,* PX 1 at 40 (¶ 57(o)) ("gnats"); PX 1 at 1066 (36:15) (Att. 123) ("It makes no sense for a person to call the company number, or send in a support ticket. It's asinine to do it right now. Stupid. Because it's a waste of time."). Noland blames dissatisfied consumers on "terrible leadership," not by himself, but by Affiliates, and threatens to terminate anyone if they or their downline complain:

> ***We're having just a crazy amount of people calling our 800 number asking where their orders are at. That means just terrible leadership. So whoever's referring those people, they're doing a terrible job,*** and we're researching that out right now. . . . There's just gonna be some people, they can't be a part of SBH anymore . . . . I've got to do what's called pruning . . . which means we've gotta pluck some people out that just don't get it.

PX 1 at 40 (¶ 57(o)) (emphasis added); *see also id.* at 38 (¶ 57(i)) ("If you complain, great chance you're going to be terminated. Out. Bam! . . . Can't complain, it's one of the rules."). When Affiliates complained about undelivered products and sought chargebacks from their credit card company, Noland sued them. PX 2 at 148, 151, 152 (Att. 8).

II. LEGAL STANDARD

The Court has the inherent power to enforce its orders through civil contempt, *Shillitani v. United States*, 384 U.S. 364, 370 (1966), and the FTC, as a party to the action, may move for such relief, *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444-45 (1911).

The standard for finding a party in civil contempt is well-settled. The moving party has the burden to show by clear and convincing evidence, (1) a specific and definite order of the court, and (2) that the contemnor violated it. *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999) (citation omitted). "The burden then shifts to the contemnors to demonstrate why they were unable to comply." *Id.* at 1239. The FTC need not establish that a party willfully violated the order. *United States v. Asay*, 614 F.2d 655, 661 (9th Cir. 1980). Furthermore, injunctions are enforceable against any party or nonparty with "actual notice" of the order who acts "in active concert or participation" with a party to violate it. Fed. R. Civ. P. 65(d)(2)(C). The "specific and definite order of the court," *Affordable Media*, 179 F.3d at 1239, may be dealt with summarily. The Final Order imposes specific obligations on Noland. For the reasons set out below, Noland and Success By Media are bound by and violated the Final Order.

III. NOLAND AND SUCCESS BY MEDIA ARE IN CONTEMPT OF THE FINAL ORDER

A. The Final Order Binds Noland and Success By Media

The Final Order binds Noland because he had actual notice of it. A party who "receives actual notice of [an order]" is bound by it. Fed. R. Civ. P. 65. The Court entered a stipulated order Noland had signed, and he subsequently acknowledged receiving the Order by notifying the FTC (in one instance) when he moved, as required by Section IX of the Final Order. *See* Final Order; PX2 at 45, 59 (Att. 5) (Noland Order signature); PX2 at 61 (Att. 6) (Noland address notice). Noland even frequently alludes to the Final Order in speaking to potential pyramid participants. *E.g.*, PX 1 at 249 (74:9-18) (Att. 27) ("[The Government] delivered me paperwork, and they said you cannot tell people how much you make"); *id*. at 41 (¶ 59) (same); *id*. at 36 (¶ 57(d)) (same).

SBM LLC and SBM Holdings are bound by the Final Order because (1) Noland controls them and (2) they are indistinct from him. The Supreme Court has long recognized that an injunction not only binds party defendants "but also those identified with them in interest, in 'privity' with them, represented by them *or subject to their control*." *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945) (emphasis added). Separately, an entity is deemed to have knowledge of an order where the entity is "is indistinct" from the defendant who used it to act in concert with his contemptuous acts. *See FTC v. Gill*, 183 F. Supp. 2d 1171, 1185 (C.D. Cal. 2001). This follows the widely recognized principle that "the knowledge of a corporate officer within the scope of his employment is the knowledge of the corporation." *FTC v. Data Med. Capital, Inc.*, no.

SACV 99-1266-AHS(EEX), 2010 WL 1049977, at *19 (C.D. Cal. Jan. 15, 2010) (knowledge of order by contemnor and *de facto* corporate officer imputed to company) (quoting *Bank of New York v. Fremont Gen. Corp*., 523 F.3d 902, 911 (9th Cir. 2008)); *see also* Restatement (Third) Of Agency § 5.03 (2006) (agent's knowledge of material fact imputed to principal).

Substantial evidence confirms that Noland controls the Success By Media parties and they are indistinct from him: (1) Noland owns 71% of SBM Holdings and is its CEO and the CEO of SBM LLC and SBH; (2) Noland created the companies to sell products he sold through a prior company he owned: (3) SBH licenses all its products from another company Noland wholly owns; (4) Noland and his wife are the only directors or managing members of the Success By Media parties; (5) Noland and his wife are the only signatories on Success By Media's bank accounts, which are comingled; and (6) Noland and his wife are the sole administrators of the SBH Affiliates-only Facebook page. *See supra,* Section I.B.1. Because of Noland's control of the Success By Media parties, and, separately, because they are indistinct from him, the companies are bound by the Final Order, subject to this Court's jurisdiction, and, as contemnors, subject to sanctions. *See, e.g.*, *FTC v. Leshin,* 618 F.3d 1221, 1237 (11th Cir. 2010) (sanctioning nonparty contemnor).

B. Noland and Success By Media Are Violating Section I by Running a Prohibited Marketing Scheme

The Final Order prohibits Noland from "engaging, participating or assisting in any manner or capacity whatsoever, directly, or in concert with others, or through any business entity or other device, in any prohibited marketing scheme." Final Order at 3-4. The Final Order's two-part test mirrors the Ninth Circuit's test for a pyramid scheme by defining "prohibited marketing scheme" as:

> a pyramid sales scheme[,] chain marketing scheme, or other marketing plan or program characterized by the payment by participants of money to the program in return for which they receive: (1) the right to sell a product or service; and (2) the right to receive, in return for recruiting other participants into the program, rewards which are unrelated to the sale of products or services to ultimate users.

Id. at 3; *see FTC v. BurnLounge, Inc.*, 753 F.3d 878, 880 (9th Cir. 2014) (same test) (citing *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1178, 1181 (1975)).

1. Consumers Pay SBH for the Right to Sell SBH Products

SBH requires consumers pay a $49 annual fee to join SBH, which entitles them to sell SBH products through an SBH-controlled website. PX 1 130 (Att. 8). This satisfies the first element of the Final Order test.

2. SBH Pays Rewards that are Unrelated to the Sale of Products or Services to Ultimate Users

SBH readily meets the Final Order's second element of a prohibited marketing scheme because nearly all SBH rewards are unrelated to sales to ultimate consumers. The Final Order states "rewards are unrelated to the sale of products or serves to ultimate users if rewards are not based primarily on revenue from retail sales." In turn, the Order states "retail sales" do not include "sales made by participants in a multi-level marketing program to other participants or recruits or to such a participants own account." Final

Order at 3.[9] In other words, Noland and his companies may only pay rewards if sales are primarily to non-Affiliates and non-recruits. However, more than 95% of all SBH purchases, by value, are to Affiliates. PX 5 at 18 (¶ 30). Moreover, Noland and SBH instruct Affiliates to try to convert every consumer into an Affiliate at each sale. *See, e.g.*, PX 1 at 366 (Att. 39), 792 (26:16-27:4) (Att. 80), 829 (23:21-24:3) (Att. 84). Thus, virtually all sales are to Affiliates or recruits. SBH pays its rewards based on that revenue, and therefore, is in blatant violation of the court's Final Order. *See* Final Order at 3.

This undeniable fact is further supported by SBH's structure that ensures rewards are based primarily on recruiting rather than on retail sales to actual users. *See BurnLounge*, 753 F.3d at 884 (finding pyramid scheme to exist where the "mere structure of the scheme suggests that [the company's] focus was in promoting *the program* rather than selling *the products*"). SBH ensures that the bulk of Affiliates' rewards come from recruiting rather than retail sales by (1) paying rewards based exclusively on *purchases from* SBH, rather than *sales to* ultimate users, which are not even tracked, and (2) incentivizing recruiting over retail and encouraging Affiliates to buy products to achieve certain "ranks" rather than for personal consumption.

[9] The FTC succeeds on the merits even without the benefit of these added restrictions, as shown in the FTC's application for a temporary restraining order in *FTC v. Noland*, which does not rely on the Final Order's restrictions.

C. Noland and Success By Media Are Violating Section II by Misrepresenting Potential Income to Consumers

The Final Order prohibits Noland, and all parties "in active concert or participation" with him "in connection with the advertising, promoting, offering for sale, sale, or distribution of any multi-level marketing program," "from marking or assisting in the making of . . . any false or misleading statement or misrepresentation of material fact," including about the "potential earnings or income" or "benefits" of such a program. Final Order at 4. SBH is a multi-level marketing program and Noland and his companies routinely misrepresent material facts about the potential benefits available through SBH.

First, under the Final Order, a "multi-level marketing program" is any program in which participants pay money to the program promoter in return for the right to: (1) recruit additional participants, (2) sell goods or services, and (3) receive payment or other compensation based upon the downline's sales. Final Order at 2-3. SBH meets this standard. Affiliates pay a $49 annual fee in return for the right to recruit participants, sell SBH products through their SBH Affiliate websites, and receive commissions based on downline sales.

Second, Noland and SBH make false and misleading statements and misrepresent material facts about the potential earnings, income, and benefits of the SBH program. Noland and SBH promise that if consumers enroll in SBH and follow their instructions, they likely will make substantial income, becoming financially free in 18 months and reaping million-dollar monthly or yearly payouts. *See supra* Section I.B.2. These claims are false. Not only are consumers unlikely to obtain financial freedom, but the vast majority of them (over 90%) are doomed to lose money no matter how hard they work. *See supra* Section I.B.6. Purchasing and commission data support this fact. *See id.*

Third, Noland's and SBH's misrepresentations are material. A claim is material "if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Courts presume express claims to be material. *Patron I*, 33 F.3d at 1095-96 (express claims). Implied claims are also presumed material if they are "deliberately made," *FTC v. Natural Solution, Inc.*, 2007 WL 8315533, at *3 (C.D. Cal. Aug. 7, 2007), or if they "pertain to the central characteristics of the products or services being marketed," *FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1076 (C.D. Cal. 2012). "Courts consistently conclude that misrepresentations regarding income potential are material." *FTC v. Vemma Nutrition Co.*, No. 15-cv-1578-PHX-JJT, 2015 WL 11118111, at *5 (D. Ariz. Sept. 18, 2015).

Here, Noland and SBH make express claims, which relate to a "central characteristic" of SBH—consumers' projected incomes. Thus, the claims are presumed material. Even without this presumption, Defendants' claims are material because their promises of substantial income plainly affect consumers' purchasing decisions.

D. Noland and Success By Media Are Violating Section III By Providing the Means and Instrumentalities to Others To Violate the Final Order

The Final Order prohibits Noland, "in connection with . . . any multi-level marketing program, from providing to others the means and instrumentalities with which to make any false or misleading representation, or representation that omits any material fact." Final Order at 4-5. As just described, SBH is a multi-level marketing program and Noland and SBH make repeated false and misleading representations. They provide materials with misrepresentations to Affiliates to recruit more people. This includes videos on Youtube and Facebook, recorded calls, marketing materials, and training scripts. *See, e.g.,* PX 1 at 8 (¶ 25), 19-42 (¶¶ 36-61).

E. Noland and Success By Media Are Violating Section V by Failing to Monitor and Ensure Compliance with the Final Order and by Not Investigating and Resolving Consumer Complaints

Finally, under the Final Order, Noland must take steps to monitor others to ensure compliance with certain parts of the Order and to investigate and promptly resolve consumer complaints. Specifically, in any multi-level marketing program in which Noland "is a participant, has an ownership interest or is a director [or], officer . . . of," he is enjoined from "[f]ailing to take reasonable steps sufficient to monitor and ensure that all [of his] agents, representatives, employees, or independent contractors comply with Paragraphs I, II, and III of [the Final] Order." Final Order at 6. Those steps must include "establishing and maintaining a compliance program which includes random, blind testing of the oral representations made by any representative or independent contractor; spot checking of consumers to ensure that no misrepresentations were made; and ascertaining the number and nature of any consumer complaints." *Id*. The Final Order also enjoins Noland from "[f]ailing to investigate and resolve promptly any consumer complaint received by [Noland], his agents, servants, employees" regarding any multi-level marketing program and "to notify the consumer of the resolution of the complaint and the reason therefore." *Id.* at 7.

At a minimum, Noland fails to take steps expressly called for by the Final Order by not monitoring Affiliates' representations or obtaining the number and nature of complaints. Nor does he, or SBH, investigate and resolve those complaints. To the contrary, Noland actively discourages complaints, telling Affiliates they "can't complain, it's one of the rules," and directs that Affiliates instead first go to other Affiliate team members, without any apparent method to track those complaints. *See supra* Section I.B.8. He otherwise dismisses, and does not respond to complaints that reach SBH. *Id.* He even threatens to kick out Affiliates for raising legitimate concerns and has sued those that sought refunds. *Id.*

IV. NOLAND AND SUCCESS BY MEDIA ARE LIABLE FOR CONSUMERS' FULL LOSSES

The Court has broad authority to order that contemnors compensate the FTC and consumers for their losses. *See United States v. United Mine Workers of Am.,* 330 U.S. 258, 303-04 (1947); *FTC v. EDebitPay, LLC*, 695 F.3d 938, 945 (9th Cir. 2012). The FTC is entitled to "full remedial relief," *McComb v. Jacksonville*, 336 U.S. 187, 193 (1949), including full refunds for consumers, *EDebitPay*, 695 F.3d at 945 (using "consumer loss to calculate sanctions for civil contempt of an FTC consent order"). Consumers are entitled to full refunds—not withstanding that the products they bought may have had some value—because Noland's misrepresentations and other Order violations tainted their purchasing decisions. *See FTC v. Figgie, Int'l*, 994 F.2d 595, 606 (9th Cir. 1993) (rejecting argument that consumers' losses should be offset against value of product received because "[t]he fraud is in the selling, not the value of the thing sold"); *FTC v. BlueHippo Funding, LLC*, 762 F.3d 238, 244-45 (2d Cir. 2014).

Noland and his companies must compensate the victims of his contempt for the harm caused by his contumacious acts. Because his material misrepresentations and pyramid scheme were widespread (consumers in 49 U.S. states and D.C.), PX 5 at 18 ¶ 29, it is presumed that all consumers relied upon, and were therefore injured by them. *See McGregor v. Chierico*, 206 F.3d 1378, 1388-89 (11th Cir. 2000); *FTC v. Trudeau*, 579 F.3d 754, 773 n.15 (7th Cir. 2009). Moreover, because Noland "disregarded the core provisions of the Final Order" and "consumers lost far more than Defendants gained," he should be sanctioned in the full amount of consumer losses. *See EDebitPay,* 695 F.3d at 945; *see also Figgie,* 994 F.2d at 606. Although the FTC has yet to determine the precise amount of harm, it is almost certainly more than $7 million. Therefore, the FTC asks the Court to hold Noland and the Success By Media parties in contempt while allowing the FTC to collect additional evidence to prove the full extent of consumer harm.[10]

The Success By Media parties are jointly and severally liable with Noland for the full amount of monetary relief because they acted as a unified operation to carry out the order violations. *Leshin*, 618 F.3d at 1237 ("Where . . . parties join together to evade a judgment, they become jointly and severally liable for the amount of damages.") (quoting *NLRB v. AFL-CIO*, 882 F.2d 949, 955 (5th Cir. 1989)).

---

[10] The FTC will be able to use discovery and, under the TRO, will have access to the contemnors' accounting system to determine the full magnitude of the deception. The FTC need only prove compensatory sanctions by a preponderance of the evidence. *See FTC v. Dayton Family Prods*., No. 2:97-cv-00750, 2016 WL 1047353, at *9 (D. Nev. Mar. 16, 2016), *aff'd sub nom., FTC v. Burke*, 699 F. App'x 669 (9th Cir. 2017).

V. CONCLUSION

For the foregoing reasons, the FTC requests the Court grant the requested relief.

Dated: January 17, 2020

Respectfully submitted,

s/ Jonathan W. Ware

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

Attorneys for Plaintiff
FEDERAL TRADE COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2020, I directed service of the foregoing document by U.S. mail, unless otherwise indicated, on the following, who are not registered participants in the CM/ECF System:

/s Jonathan W. Ware
Jonathan W. Ware

DEFENDANTS

Richard Slaback
14286 Beach Blvd., Apt. 265
Jacksonville Beach, FL 32250

Darin Epps
6253 Catalina Drive, Unit 1832
North Myrtle Beach, SC 29582

Edward Lamont
136 W. 5th St.
Emporium, PA 15834

Netforce Seminars
c/o Darin Epps
6253 Catalina Drive, Unit 1832
North Myrtle Beach, SC 29582

James D. Noland, Jr.
1766 Amarone Way
Henderson, NV 89012

TEMPORARY RECEIVER for DEFENDANTS SUCCESS BY MEDIA HOLDINGS INC. AND SUCCESS BY MEDIA LLC (by email):

Kimberly Friday, Esq.
c/o Osborn Maledon L.P.
2929 North Central Avenue, 21st Floor
Phoenix, Arizona 85012