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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-00-2260-PHX-DWL **PLAINTIFF FEDERAL TRADE COMMISSION'S MOTION FOR CONTEMPT SANCTIONS AGAINST JAMES D. NOLAND, JR., SCOTT HARRIS, THOMAS SACCA, SUCCESS BY MEDIA HOLDINGS INC., AND SUCCESS BY MEDIA LLC**

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Defendant James D. Noland, Jr. ("Noland"), along with co-contemnors Scott Harris, Thomas Sacca, Success By Media LLC ("SBM LLC"), and Success By Media Holdings Inc. ("SBM," collectively, "Contempt Defendants") violated multiple terms of this Court's 2002 Stipulated Final Judgment and Permanent Injunction ("Final Order") (Doc. 66). Until the Court imposed preliminary relief in January 2020, they ran two pyramid schemes—Success By Health ("SBH") and VOZ Travel—using false earnings claims to bilk thousands of consumers out of $7 million. The FTC, therefore, requests the Court find them in contempt and award civil compensatory sanctions.[1]

The FTC's 2000 lawsuit against Jay Noland for making deceptive claims and promoting a pyramid scheme (Doc. 1 at ¶¶ 6-7, 22-24) resulted in the Final Order. It bars him from certain marketing schemes, bars him from making misrepresentations related to a multi-level marketing program ("MLM"), and bars him from providing the means and instrumentalities to others to make misleading statements or omissions. (*Id.* at 3-5.) Finally, it bars him from failing to take reasonable steps relating to a compliance program. (*Id.* at 6-7.) Anyone with notice of the Final Order who acts in concert with Noland is also bound by it. (*Id.* at 3-7; Fed. R. Civ. P. 65(d)(2).)

The facts relating to Contempt Defendants' contumacious conduct are the same as those in the parallel *FTC v. Noland* action, with two notable distinctions. ***First***, the Final Order has more restrictions on the type of sales for which Contempt Defendants may pay commissions. ***Second***, the Final Order imposes compliance program requirements.

I. 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). The standard for finding 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) the contemnor

[1] The FTC herein cites evidence filed in *FTC v. Noland, et al.*, No. CV-20-0047-PHX-DML (D. Ariz.) as "Noland Doc. _" and exhibits continue by starting at 200.

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 a willful violation. *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).

Ninth Circuit law is clear that the Court need not always hold an evidentiary hearing to make a contempt finding. *See, e.g.*, *United States v. Ayres*, 166 F.3d 991, 995 (9th Cir. 1999). Where a defendant fails to "present any arguments which created any material issue of fact," due process [does] not require an evidentiary hearing." *Id.* at 996 (cleaned up); *see also Sec. Life Ins. Co. of Am. v. Duncanson & Holt, Inc.*, 11 Fed. App'x 926, 927 (9th Cir. 2001). Here, there is no such issue, and no hearing is needed.

II. STATEMENT OF FACTS

A. Noland's and Harris' History of Pyramid Schemes and Deception.

Harris met Noland in the 1990s, when they each participated in their first pyramid scheme, Equinox. (Noland Docs. 287-6 at 52:4-11, 57:10-18, 56:9-57:9; 287-4 at 10-11.) A court found Equinox likely a pyramid scheme and imposed a preliminary injunction on the company. *FTC v. Equinox Int'l Corp*., 1999 WL 1425373 (D. Nev. Sept. 14, 1999). Harris then joined Noland at Bigsmart, the pyramid scheme that gave rise to the Final Order. (Noland Doc. 287-6 at 74:22-25; Doc. 1 at 2-3.)[2]

Thereafter, Harris took a pyramid scheme hiatus, but continued deceptive conduct. He became a manager of Allied Energy around 2003, then an officer in 2005 and CEO from 2011-2016. (Noland Docs. 287-6 at 88:12-19; 203-3 at 3.) Regulators found Allied Energy and/or Harris engaged in deceptive acts. (Ex. 209 (TX 2004); Ex. 210 (KY 2007);

[2] The FTC sued a third pyramid scheme in which Noland participated (now five including the two at issue here). *FTC v. NexGen3000.com, Inc.*, No. 03-cv-0130 (D. Ariz.). (Noland Doc. 8-20 at 72-73 (9:23-10:9), 119-20 (56:7-19).)

Ex. 211 (AL 2007); Ex. 212 (CA 2007; Harris individually); Ex. 214 (AR 2015; signed by Harris).) California found Harris "**willfully violated**" a prior order and "**willfully violated**" state law "by misrepresenting or omitting material information." (Ex. 215 at 18 (2018) (emphasis added); *see also* Noland Doc. 287-6 at 297:6-300:20.)

Harris told Noland about these orders, yet Noland put him in charge of Final Order compliance. (Noland Doc. 287-6 at 301:15-302:23; Docs. 82-1 at 3-4, 82-3 at 6.) Three months after Harris was found to have willfully violated state law and a prior order, he became an SBM director, and in May 2019, its president, having been SBM LLC's vice president since September 2017. (Ex. 232 at 95:7-98:1, 99:9-18.)[3]

Noland and Harris boast of their pyramid proclivity. Noland told an audience he builds pyramids and they can, too:

> ***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.

(Noland Doc. 8-27 at 52:25-53:8 (emphasis added); *see also* Noland Docs. 285 at 15 (Harris: when people ask him "Is this one of those pyramid things?" he says, "[H]ell, yeah it is. If it wasn't, I wouldn't be doing it. Do I look dumb enough to go get a job again?"); 289-6 at 7:7-11 (Harris: "people ask stupid questions, like, is this one of those pyramid things? I'm like, hell, yeah. If it wasn't, I wouldn't be doing it.").) Yet even Noland's truthful bragging is wrapped in a lie—his "700,000" distributors included 694,000 from a former scheme, Organo Gold. In fact, Noland only had 6,000 distributors at the time. (Noland Doc. 287-4 at 70:8-23, 200:19-202:8; *cf.* Noland Doc. 224 at 11 (Court: "'Our company' is not the same thing as 'a different company that one of our company's principals operated six years ago.'").

[3] While Harris was an officer of the Success By Media parties they repeatedly omitted his state law securities orders and failed to identify him as an officer or director, as required, in 10 federal securities offerings. (*See* Ex. 235 ¶ 6; Exs. 200-208.)

B. Contempt Defendants' Schemes

The FTC detailed Contempt Defendants' pyramid schemes and deceptive acts in support of those schemes in its pending Motion for Summary Judgment. (Noland Doc. 285.) However, as if that conduct was not bad enough, Contempt Defendants further violated the Final Order by erecting barriers to consumers raising legitimate complaints, and not tracking or responding to them. Noland's mantra was "no complaints." They emboldened their lawlessness by not creating any written compliance materials. (Noland Docs. 106 at 14; 287-8 at 209:21-210:6.) They lacked basic compliance knowledge and did not investigate the many deceptive claims being made.

1. Contempt Defendants Do Not Track Consumer Complaints.

SBH has a complaint-reporting tool (www.sbmsupport.com) and 1-800 number for consumers to complain. (Noland Doc. 8-4 at 44). However, to insulate themselves from complaints, Contempt Defendants required affiliates to raise complaints *first* with other affiliates, *then* SBH senior field advisors, before contacting SBH in a tracked manner. (Ex. 216) ("Any issues, call your up-team / don't call the customer service number. Up-team will help you solve any issues through senior field advisors."); Noland Docs. 287-6 at 201:4-20, 285-3 at 7, 285-5 at 7).) Affiliates' learned this from the outset. SBH's introductory email instructs it is "IMPORTANT" to take complaints "first" to the affiliate's recruiter. (Noland Doc. 8-4 at 44.) Harris insisted the second step had to use private Gmail accounts (not SBH emails). (Noland Doc. 8-1 at 35 (¶ 56(c)); Docs. 82-1 at 4, 82-2 at 4.) Contempt Defendants never collected the complaints handled by affiliates and field advisors. (Noland Docs. 287-6 at 204:14-23 (Harris: "[t]here was no need"), 213:5-14; 285-5 at 7.) By diverting complaints in this way, Defendants keep themselves purposefully ignorant. Notably, Harris, despite his compliance responsibilities (Doc. 82-1 at 3), had no idea how many complaints SBH received or if they were tracked. (Noland Doc. 287-6 202:7-19.)

Consumers made multiple disturbing and untracked complaints to SBH about

health issues after taking SBH products. For example, Harris received complaints of: nausea, stomach "pain and inflammation," vomiting, and diarrhea from G-FYX; and "mental and physiological issues" from other products. (Exs. 217, 226.) Others complained of "heart palpitations," hospitalization from SBH's G-Burn, "heart issues after drinking the latte," and other internal medical issues. (Noland Docs. 285-5 at 7, 286-2 at 9.) Harris explained his practice was not always to seek input from "doctors because if you drink it and it makes you sick, you should stop drinking it," and there would be "no point" in him storing such complaints; they were logged "[o]nly if they submitted them . . . in the support ticket." (Ex. 232 at 210:10-219:13.)[4]

Affiliates confirm fielding complaints, which they never reported to SBH because of the instructions and threats to kick them out of the company if they did. (*E.g.,* Noland Docs. 285-5 at 7 (did not send complaints to SBH "because Jay made clear to us that we had to manage expectations and deal with any problems ourselves"); 286-10 (46:21-47:5) ("All the time," Noland told affiliates "no complaints. Never complain, it just shows weakness" and "I'll kick you out"); 285-6 at 5 ("[r]aising concerns or complaints about SBH's system, products, or late delivery was a no-no.").)

Contempt Defendants even deleted legitimate complaints from the SBH Facebook page. (Doc. 285-6 at 5.) If an affiliate posted complaints about SBH products, like it caused "vomiting, and . . . diarrhea," it would be deleted for being "negative." (Ex. 233 at 216:19-217:10, 219:5-16); *see also* Noland Doc. 222 ¶¶ 1, 18 (admitting SAC ¶ 41) (Noland manages SBH Facebook page); Ex. 217.)

2. Contempt Defendants Discourage Consumer Complaints.

Contempt Defendants unabashedly discourage complaints, no matter how legitimate and serious. Noland set a stark tone from the top, calling people who

[4] Complaints that were logged—*e.g.,* a woman trying to get pregnant "vomited when [she] ingested the [SBH] product" (Ex. 229), and another complained SBH "pills are making [me] very sick and throwing up and passing out" (Ex. 227)— fared no better. (Ex. 232 at 212:11-213:14.)

complain, "little gnats," and repeatedly telling affiliates *not* to report problems, or be kicked out (along with the affiliates who recruited them) and thus be denied the opportunity to make the millions he promises. *See, e.g.,* Ex. 219 at 7:14-8:22 ("gnats"); Noland Doc. 288-1 at 29:25-30:3 ("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 the dissatisfied on "terrible leadership," not by him, but by affiliates, and threatens to kick them out:

> ***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.

(Ex. 219 at 5:23-7:4 (emphasis added); *see also* Ex. 218 at 20:4-15 (Noland: "If you complain, great chance you're going to be terminated, out, bam . . . . Can't complain, it's one of the rules.").)

Contempt Defendants buttressed Noland's "can't complain" edict with demands not even to raise complaints with affiliates or field advisors. (Ex. 216 ("Everyone in the company can't e-mail senior field advisers."); *see also* Ex. 225 ("Don't contact Mr Noland"); Noland Doc. 287-6 at 178:14-19. Contempt Defendants suspended one affiliate's membership "pending Termination" because, "you reached out to another SBH Affiliate and complained about not receiving your pre-Order of Chai Tea among other things," which violated the company's "very strict stance against negativity in any shape, form, or fashion." (Ex. 224.)

When affiliates asked about undelivered products and sought chargebacks from their credit card company, Contempt Defendants sued them and threatened to refer them for prosecution. (Noland Docs. 8-20 at 89, 92-93; 285-6 at 5 (Noland "would scold us [affiliates] when we asked about delays"); Ex. 235 ¶ 21(e) (criminal referral for

chargebacks on undelivered product).) A Founder who waited "several weeks" for a late shipment finally reached Harris who "used an expletive and told me not to ask about it again." (Noland Doc. 285-2 at 6.)

From the first few months, affiliates who were Founders, *i.e.*, leaders who SBH told to be the first line for complaints, understood this—with one "dead serious" in telling a senior field advisor, "I'm never going to complain about anything." Ex. 235 ¶ 16. Founders heeded that diktat. (*See* Noland Docs. 286-10 at 46:21-47:5, 285-5 at 7, 285-6 at 5; Ex. 236 (telling Harris and Sacca "most of my team is" "scared of Jay" about "the truth" in delays 14-months in).)

Overall, these extreme tactics worked: Harris proudly testified, "there weren't that many people that made complaints." (Noland Doc. 287-6 201:16-202:6.)

3. Contempt Defendants Do Not Respond to Many of the Few Complaints that Make It Through Their Anti-Complaint Gauntlet.

In practice, often no one responded to consumer complaints. An undercover FTC investigator, for example, made purchases entitling him to at least a $20 commission. (Noland Doc. 8-1 at 48 (¶ 67), 50-51 (¶ 79).) SBH never paid or credited it, and ignored his email about the error. (*Id.* at 52-54 (¶¶ 75-76, 79).) Other affiliates report the same. *See, e.g.,* Noland Docs. 285-6 at 6 (never corrected billing errors); 285-7 at 6 ("never responded to my follow-up complaints for a refund"); 285-10 ("no response").

4. Contempt Defendants Do Not Investigate Claims Promoting the Scheme.

Unsurprisingly, while Contempt Defendants stifled complaints about negative health issues from using their products, they never sought and obtained support for their myriad positive claims. (*See* Noland Doc. 139-1 at 4-6; Ex. 230.)

The backbone of Contempt Defendants' scheme was their claims that Noland is a multi-millionaire, the "millionaire maker," for training others to become rich like him. (Noland Doc. 285 at 8-10.) Harris and Sacca, who passed the big lie along, purposefully avoided questions that would have easily shown the emperor had no clothes. (Noland

Doc. 287-6 at 41:24-45:12 (Harris: "It's not my business to ask things like that."), 183:18-192:14 (Harris: "I didn't ever ask him"); Noland Doc. 287-8 at 81:13-15 (Sacca: "I never asked [Noland] about his personal financial dealings or anything like that.").)

Similarly, Contempt Defendants paraded a handful of supposed top-earning affiliates as success stories, yet never inquired into whether they were actually making money. (*E.g.,* Noland Docs. 287-6 at 80:21-85:25 (Harris: "it's not like I was out asking people what they made"; "I never really discussed, 'How much money have you made' . . . It's personal"); 287-8 at 149:1-157:10; 106 at 23 (detailing claim in "SBH's official magazine" of affiliate who actually had over $9,000 in losses from her SBH experience); 287-6 (Harris reviewed data on affiliate earnings "once" or "at least twice").)

5. Contempt Defendants Lacked Even a Basic Understanding of the Final Order, and Did Not Monitor Compliance.

Unsurprisingly, Contempt Defendants have not been monitoring compliance with the Final Order. Despite the Order's clear definition, Harris and Sacca gave nonsensical definitions of "pyramid scheme." (Noland Docs. 287-8 at 105:9-107:1 (Sacca: pyramid is "no product is being sold" and "you can't out earn the person above you"); 287-6 at 29:3-17 (Harris: pyramid is "only the people at the top can make money" and the owners are "trying to hurt people"); Ex. 223.) Beyond that, Sacca misrepresented the Final Order, telling prospective affiliates it was limited to 5 years of record keeping and "to not make income claims." (Noland Doc. 287-8 at 107:23-109:24; Ex. 223.) Noland told affiliates the same—its extent is that Noland "cannot tell people how much [he] make[s]." (Noland Doc. 8 at 8-9.) Harris agreed with that. (Noland Doc. 287-6 at 318:8-11 (Harris: the Final Order "says, like, no-income claims").) Shockingly, Sacca admitted he "read bits and pieces" of the Final Order and "did not read the whole thing," while Harris admitted, "I haven't actually read it." (Noland Docs. 287-8 at 109:9-14; 287-6 at 317:20-318:6.)

Lacking any written compliance program, Contempt Defendants had no plan for random, blind testing of the oral claims by affiliates or spot checking of consumers.

Harris joined some affiliate calls when asked but had no recollection of reaching out to monitor affiliates' recruiting events or calls. (Noland Doc. 287-6 at 118:25-119:13.)

In screening for top leadership roles, Contempt Defendants did not ask about past deceptive criminal acts and took no remedial steps upon learning of such conduct. (*See* Noland Doc. 287-8 at 291:9-13.) They thus failed to detect top affiliate Ann Giles' 5-year state prison sentence for theft by deception. (*Id.* at 291:22-294:13; Noland Doc. 296-1.) Sacca said Giles is one of the SBH "leaders," a Founder, and one of the very few selected for reward trips to Hawaii and Aruba. (Noland Doc. 287-8 207:14-208:11, 255:13-256:17, 149:1-151:24.) Noland praised Giles in a March 2018 SBH Facebook video for all affiliates as one of just three non-Defendant affiliates on track to "never, ever have to work again" by the end of that year (Ex. 234 (Interrogatory #16).) Of SBH's 7,000 affiliates, Giles is #3 in commissions and Lu Ann Wallace is #11, excluding Defendants. (Ex. 235 ¶ 23). Giles had at least 55 direct recruits into SBH—meaning Contempt Defendants expected those 55 and all those in their downlines to go to Giles and those she trained about compliance issues before ever contacting SBH. (*Id.* ¶ 24.) In June 2019, the Government named Giles and Wallace in a 37-count indictment for criminal conspiracy to defraud the United States. Sacca spoke to them about the indictment soon after, and with Harris and Noland. (Noland Doc. 287-8 at 285:1-288:25.) Sacca had a "personal connection with Giles," and no knowledge of any effort to increase monitoring of Giles's and Wallace's conduct on SBH's behalf following their indictment. (Noland Doc. 287-8 at 284:19-289:13.)[5]

Contempt Defendants' farcical façade of compliance is laid bare when contrasted to the one thing they truly cared about stopping—the truth. When an affiliate posted truthful facts showing Noland's tremendous tax debts and liens, home foreclosure, and

[5] Giles and Wallace pled guilty and were sentenced to 30 months and 33 months in prison, respectively, and assessed $1.6 million in criminal penalties. (Noland Doc. 287-8 at 36 (289:16-291:8); Ex. A, 231.)

lack of property ownership, Contempt Defendants *immediately* held a board meeting—the only recorded SBM board minutes ever—to address the "negativity." (Noland Docs. 287-6 at 208:18-210:04, 298-9 ("The concern is . . . dropped sales" as such "negativ[ity]" "in the past brought in drastically lower sales and defecting of wholesale Affiliates.").) Noland then used the board minutes to tell the IRS, under oath, that SBM's "independent and very aggressive and responsible board"—which consisted of Noland, his wife, his personal accountant, and his multi-pyramid scheme partner (Harris)—demanded Noland's public tax liens be hidden as they were harming his reputation and the company's. (Noland Docs. 293-4, 287-5 at 105:9-107:5; 114:1-118:21.)

III. CONTEMPT DEEFENDANTS ARE IN CONTEMPT OF THE FINAL ORDER

The Final Order satisfies the "specific and definite order of the court," *Affordable Media*, 179 F.3d at 1239, element of contempt. The other elements – who is bound and the violations – are addressed below.

A. The Final Order Binds the Contempt Defendants.

The Contempt Defendants are bound by the Order as parties to it or because they worked in active concert or participation with Noland and had knowledge of the Order.

First, the Final Order obliges Noland as a party. The Court entered a stipulated order Noland had signed; he later acknowledged receiving the Final Order; and he often alluded to it (misleadingly) in recruiting potential pyramid participants. (Doc. 78 at 20.)

Second, Harris and Sacca freely admitted their knowledge and roles. They swore they knew of the Final Order prior to starting SBH and that they were responsible for ensuring compliance with it. (Doc. 82-1 ¶¶ 4, 11; Doc. 82-2 ¶¶ 4, 11; *see also United States v. Baker,* 641 F.2d 1311, 1316-17 (9th Cir. 1981) (mere knowledge that an order exists is sufficient to prove actual notice); Fed. R. Civ. P. 65(d)(2).) They also admitted facts showing they worked in active concert and participation with Noland. (*See* Docs. 82-1, 82-2, 91 at 3-5; Noland Doc. 222 at ¶ 6-7 (admitting ¶¶ 14-15 of the FTC's Second Amended Complaint, Noland Doc. 205); Fed. R. Civ. P. 65(d)(2)(C).)

Third, SBM and SBM LLC are bound by the Final Order because Noland controls them. It is 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). This follows the principle that "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, 2010 WL 1049977, at *19 (C.D. Cal. Jan. 15, 2010) (knowledge of order by contemnor and *de facto* 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 imputed to principal).

The evidence confirms that Noland controls the Success By Media parties. *See* (Doc. 78 at 4-5, 20-21; Noland Doc. 106 at 6.) Therefore, the Final Order binds the companies, rendering them subject to this Court's jurisdiction, and subject to sanctions. *See, e.g.*, *FTC v. Leshin,* 618 F.3d 1221, 1237 (11th Cir. 2010) (sanctioning nonparty).

B. Contempt Defendants Violated Section I by Running Prohibited Marketing Schemes

The Final Order prohibits Contempt Defendants 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," which includes "a pyramid sales scheme." (Final Order at 3-4.) The Final Order defines a pyramid scheme by mirroring the Ninth Circuit's two-step test and prohibiting any:

> 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; *cf. FTC v. BurnLounge, Inc.*, 753 F.3d 878, 880 (9th Cir. 2014) (same test). The FTC's Motion for Summary Judgment establishes that SBH and VOZ Travel are each

pyramid schemes under the identical Ninth Circuit test, which matches this definition. (Noland Doc. 285 at 6-26, 30-36.) The evidence of that is beyond clear and convincing.

The Final Order elucidates its definition of a prohibited marketing scheme (*i.e.*, a pyramid scheme) in a way that makes Contempt Defendants' violations even more clear. It defines four terms ("unrelated" rewards; "ultimate users"; "retail sales"; and "multi-level marketing program"). First, rewards are "unrelated to the sale of products or services to ultimate users if those rewards are not based primarily on revenue from retail sales." (Final Order at 3.) Defendants agree that "primarily" means "first of all" or "more than other alternatives." (Doc. 82 at 6.) Therefore, permitted revenue from "retail sales" must exceed revenue from any other basis for affiliate rewards.

Second, the Final Order clearly states "retail sales" must be made to "third part[ies]" and do not include sales to an MLM "participant's own account." (Final Order at 3.) Last, it defines an MLM as where 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 compensation based on the participant's downline sales. (Final Order at 2-3.) There is no serious dispute that SBH and VOZ Travel meet this standard. (*See* Noland Doc. 285 at 6-17, 22-25; *see also* Ex. 234 (Answer #35, admitting "SBH operated as a multi-level marketing business").))

In other words, Contempt Defendants may only pay rewards primarily based on sales made to non-affiliates. However, SBH paid commissions based on *all* sales, 95% of which were to affiliates. (Noland Doc. 286-4 at 7 (¶ 15); Ex. 234 (Interrogatory #2: purchases "from SBH's website [had] the default affiliate ID [as] Jay Noland's," the "top affiliate").)[6] Therefore, they cannot be paying rewards based primarily on sales to third

[6] Contempt Defendants did not base rewards on or even track offline sales by affiliates from their personal inventory to ultimate users of products. (Noland Docs. 222 at ¶ 34 (not denying, thus admitting, ¶ 64 of Noland Doc. 205 that "SBH does not separately track sales made by Affiliates to ultimate users of SBH products"); 287-8 at 160:20-162:18.)

parties. SBH thus squarely meets the definition of a prohibited marketing scheme in the Final Order, placing the Contempt Defendants in violation of it.

C. Contempt Defendants Violated Section II by Misrepresenting Potential Income to Consumers

The Final Order prohibits Contempt Defendants "in connection with the advertising, promoting, offering for sale, sale, or distribution of any [MLM]," "from making 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 and VOZ Travel are MLMs. *See supra* at 12. Contempt Defendants routinely misrepresent material facts about the potential income to consumers available through SBH and VOZ Travel, as explained in the FTC's Motion for Summary Judgment. (Noland Doc. 285 at 6-28.)

D. Contempt Defendants Violated Section III by Providing the Means and Instrumentalities to Others To Violate the Final Order.

The Final Order prohibits Contempt Defendants, "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 described above, SBH and VOZ Travel are MLMs. The FTC's Summary Judgment Motion details how Contempt Defendants make repeated false and misleading representations, such as claims that affiliates are achieving "financial freedom" now and that such wealth is "achievable for the masses." (Noland Doc. 285 at 6-25.) Contempt Defendants provide materials with those (and other) misrepresentations to affiliates to recruit more people, including videos, marketing materials, and training scripts. (*Id.* at 6-25, 37-38.)

E. Contempt Defendants Violated Section V by Failing to Monitor and Ensure Compliance with the Final Order and by Not Investigating, Tracking, and Resolving Consumer Complaints.

Finally, under the Final Order, Contempt Defendants must take steps to monitor

others to ensure compliance with certain parts of the Order, and to investigate, track and promptly resolve consumer complaints. Specifically, in any MLM in which any Contempt Defendant "is a participant, has an ownership interest or is a director [or], officer," they are enjoined from "[f]ailing to take reasonable steps sufficient to monitor and ensure that all [of their] agents, representatives, employees, or independent contractors comply with Paragraphs I, II, and III of [the Final] Order," which prohibit pyramid schemes, misrepresentations, and providing the means and instrumentalities to make misrepresentations. (Final Order at 6.) The Order requires those steps to 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 Contempt Defendants from "[f]ailing to investigate and resolve promptly any consumer complaint received by [Contempt Defendants], 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.)

Contempt Defendants had no written compliance program and those responsible for compliance—Noland, Harris, and Sacca—had no accurate understanding of the Final Order (Harris and Sacca had not even read it). *Supra* at 8. These are not "reasonable steps sufficient to monitor and ensure . . . comp[liance]," which "shall include" a compliance program. Final Order at 6; *cf. FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1079 (C.D. Cal. 2012) (finding FTC Rule violation where "Defendants failed to set up a meaningful compliance program; lack written procedures; and do not appear to train their staff in a meaningful way"). This is especially true for a company operating in multiple countries, selling dozens of products for human consumption, and that knew its business was "high risk" and subject to an injunction. (Noland Docs. 8-2 at 35, 8-4 at 47-48; Ex. 221 ("high risk"); Ex. 222 (same).)

By their own admission, Contempt Defendants also failed to take "minimum" steps the Court ordered, such as "random, blind testing" of oral representations, "spot checking of consumers," and obtaining the number and nature of complaints. (Final Order at 6-7; *supra* at 4-10.) Nor do Contempt Defendants "investigate and promptly resolve" all complaints and then "notify the consumer." (Final Order at 6-7.) To the contrary, they actively discourage complaints, telling affiliates they "can't complain, it's one of the rules," and instead direct affiliates go to other affiliates and not track any of it. *Supra* at 6. Contempt Defendants otherwise dismiss and do not respond to complaints that reach them. (*Id.*) They even threatened to kick out affiliates for raising legitimate concerns and sued those that sought refunds for non-delivery. (*Id.*)

IV. CONTEMPT DEFENDANTS ARE LIABLE FOR CONSUMERS' LOSSES

The Court has broad authority to order that contemnors compensate consumers for their losses. *See U.S. 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 consumer refunds, *EDebitPay*, 695 F.3d at 945 (using "consumer loss to calculate sanctions for civil contempt of an FTC consent order"). As the Court recognized, this authority is "untouched" by the Supreme Court's *AMG* decision. (Noland Doc. 242 at 7.)

Contempt Defendants must compensate the victims of their contumacious acts. Because their Order-violating material misrepresentations and pyramid schemes were widespread, (*e.g.,* Noland Docs. 8-23 at 18-19; 8-1 at 7-56), it is presumed that all consumers relied upon, and were therefore injured by them. *See FTC v. Figgie, Int'l*, 994 F.2d 595, 606-06 (9th Cir. 1993); *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). Contempt Defendants should be sanctioned in the full amount of consumer losses. *See EDebitPay,* 695 F.3d at 945; *Figgie,* 994 F.2d at 606; Noland Docs. 286-5 at 6 (Individual Defendants gained $1.7 million), 285 at 26-28 (over 90% of consumers had to lose), 286-

4 at 6 (over $6 million in consumer losses). Consumers are entitled to full refunds—notwithstanding that the products they bought (*e.g.*, coffee, tea) may have had some value—because the misrepresentations and Order violations tainted the purchasing decisions. *See Figgie,* 994 F.2d at 606 (rejecting argument that 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).

To calculate consumers' loss, the FTC's forensic accountant reviewed SBM LLC's bank records for July 1, 2017 through January 14, 2020. (*See* Doc. 286-5 at 1-7.) The main account received $8,563,833.63 (net of refunds and chargebacks) from payment processors, *i.e.*, entities that process consumer credit card transactions. (Ex. B ¶ 9.) It also received $389,230.98 in wire transfers, excluding those not for consumer purchases. (*See id.* ¶ 10.) Offsetting the sum of those figures by $1,940,151.36 paid in commissions to consumers, yields total harm as $7,012,913.25.[7] (*Id.* ¶ 13.)

Having established the harm amount, the burden shifts to defendants to prove offsets, if any. *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603-04 (9th Cir. 2016). Such offsets must occur on a transaction-by-transaction basis. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359 369 (2d Cir. 2011).

Finally, Contempt Defendants are jointly and severally liable for the full amount of monetary relief because they acted together to violate the Final Order. *Leshin*, 618 F.3d at 1237 ("Where . . . parties join together to evade a judgment, they become jointly

[7] This is for SBM. As the Court found, "SBM doesn't follow corporate formalities and allows several different 'verticals' . . . to comingle funds in the same bank account as SBH;" those 'verticals' "are hopelessly entangled with SBH." (Noland Doc. 106 at 27.) The non-SBH "verticals" consist of "training." (Noland Doc. 72-1 at 3 ¶¶ 5, 7.) The Court found "Affiliates are pressured to attend every training." (Noland Docs. 106 at 5, 224 at 14.) The trainings were filled with false income claims. (*See* Noland Doc. 285 at 16-17.) Overall, affiliates account for 94.7% of SBM purchases. (Noland Doc. 286-4 at 7; *see also* Noland Doc. 79-1 at 8 (affiliates made 96.7% of "training" purchases by value).) At times, all attendees were affiliates. Ex. 235 ¶ 22.

and severally liable for the amount of damages.") (quoting *NLRB v. AFL-CIO*, 882 F.2d 949, 955 (5th Cir. 1989)); *cf. FTC v. Gill,* 265 F.3d 944, 954, 958–59 (9th Cir. 2001) (joint and several liability for defendants violating the FTC Act).

V. CONCLUSION

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

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Respectfully submitted,

s/ Jonathan W. Ware

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