Nos. 19-56397 & 20-55066

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

FEDERAL TRADE COMMISSION,
*Plaintiff-Appellee,*

v.

JACQUES POUJADE,
*Objector-Appellant,*

TRUE PHARMASTRIP, INC.,
*Movant-Appellant,*

JASON CARDIFF, *et al.*,
*Defendants.*

On Appeal from the United States District Court
for the Central District of California
No. 5:18-cv-02104-DMG-PLA
The Honorable Dolly M. Gee

# ANSWERING BRIEF OF THE FEDERAL TRADE COMMISSION

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## INTRODUCTION

These consolidated interlocutory appeals arise from ongoing district court proceedings involving a wide-ranging scheme of fraud and deception perpetrated by Defendants Jason and Eunjung Cardiff through companies that they own. In No. 19-56397, non-party Jacques Poujade, a business partner of the Cardiffs, seeks review of district court orders holding him in contempt for helping the Cardiffs avoid an asset freeze and for violating expedited discovery obligations. Poujade has since purged the contempt relating to the asset freeze by transferring assets to a court-appointed receiver. As for his response to the expedited discovery provision and contempt orders, Poujade produced some documents on July 10, 2020, but it is not yet known whether he has, in fact, fulfilled his obligations.

Meanwhile, True Pharmastrip, Inc. (TPI), for which Poujade currently serves as CEO, sought to intervene in the district court proceedings in order to lay claim to the assets Poujade transferred to the Receiver. The district court denied intervention, finding that TPI could protect any interest in the assets during post-judgment proceedings following any ruling that the Defendants broke the law. In No. 20-55066, TPI appeals the district court's denial of the motion to intervene.

This Court should dismiss Poujade's appeal in No. 19-56397 for lack of jurisdiction. The contempt order from which he appeals merely established conditions for Poujade to purge his violation. It imposed no sanction and is thus

non-appealable. Separately, Poujade's challenge to the contempt finding regarding evasion of the asset freeze is moot, since Poujade purged the contempt by transferring the assets as required. Should the Court reach the merits, it should affirm the district court's contempt findings, which plainly applied to Poujade and which he does not dispute he violated.

The Court should also affirm the district court's denial of TPI's motion to intervene. The motion was untimely, which alone provides sufficient grounds for affirmance. In addition, TPI has no significant protectable interest in the ongoing proceedings; its asserted ownership of the transferred assets presents a separate issue, independent from the merits of the underlying case, that TPI will be able to protect in any post-judgment proceedings.

## JURISDICTION

### A. Jacques Poujade (No. 19-56397).

For the reasons set forth in Argument Section I.B. below, this Court lacks jurisdiction over Jacques Poujade's appeal.

### B. True Pharmastrip, Inc. (No. 20-55066).

The FTC does not contest this Court's jurisdiction over TPI's appeal.

## QUESTIONS PRESENTED

1. Whether the Court has jurisdiction over an interlocutory appeal (Case No. 19-56397) from a district court contempt order that did not impose sanctions.

2. Whether the Court may consider the appeal (Case No. 19-56397) of a contempt order where the contemnor has purged his contempt.

3. Whether the district court correctly held Poujade in contempt for failing to comply with its order to transfer Receivership Assets to the Receiver.

4. Whether the district court correctly held Poujade in contempt for failing to produce communications as required by multiple district court orders.

5. Whether the district court correctly denied an untimely motion to intervene to protect property interests, when the grounds for intervention did not involve the subject matter of the case, and any ownership interest could be fully assessed post-trial.

## STATUTES AND REGULATIONS

Fed. R. Civ. P. 24 provides:

> (a) INTERVENTION OF RIGHT.
>
> On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) PERMISSIVE INTERVENTION.
>
> (1) In General. On timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a

federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact.

(2) By a Government Officer or Agency. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on: (A) a statute or executive order administered by the officer or agency; or (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

## STATEMENT OF THE CASE

### A. The FTC's Enforcement Action and the TRO/PI.

In October 2018, the FTC sued the Cardiffs along with a handful of other individual and corporate defendants for running a wide-ranging scheme of fraud and deception that violated the FTC Act, 15 U.S.C. §§ 45(a), 52, the Restore Online Shoppers' Confidence Act, 15 U.S.C. § 8404, the Electronic Fund Transfer Act, 15 U.S.C. § 1693o(c), and the Telemarketing and Consumer Fraud and Abuse Prevention Act, 15 U.S.C. § 6105.[1] ER96. The complaint alleges that the scheme encompasses, among other things, false and unsubstantiated claims that Defendants' oral dissolvable thin film strips would help smoking cessation,

[1] Besides Jason Cardiff and Eunjung Cardiff (a/k/a Eunjung Lee, a/k/a Eunjung No), Defendants include Danielle Cadiz, a/k/a Danielle Walker; Redwood Scientific Technologies, Inc. (California); Redwood Scientific Technologies, Inc. (Nevada); Redwood Scientific Technologies, Inc. (Delaware); Identify, LLC; Advanced Men's Institute Prolongz LLC; Run Away Products, LLC; and Carols Place Limited Partnership. ER96-98.

facilitate weight loss, and improve male sexual performance. It also charged a related unlawful auto-ship continuity program that resulted in unauthorized shipments and charges, abusive telemarketing through robocalls, and unsubstantiated earnings claims for a multi-level marketing scheme.

The district court entered a TRO against Defendants, SER 355, extended it once, SER 353, and then entered a PI against them. SER 316. The TRO and PI contained a number of provisions designed to secure and preserve assets that could be used to provide equitable monetary relief if the district court held Defendants liable for violating the FTC Act.

In particular, the orders froze Defendants' assets and appointed a Receiver over the assets. SER 365-366, 372-373; SER 329-330, 337. They defined "Assets" as "any legal or equitable interest in, right to, or claim to, any property, wherever located and by whomever held." SER 358; SER 322. The orders defined "Receivership Entities" as "Corporate Defendants as well as any other entity that has conducted any business related to Defendants' marketing and sale of dissolvable firm strips … and that the Receiver determines is controlled or owned by any Defendant." SER 360; SER 324. They defined "Receivership Property" as "any Assets, wherever located, that are: (1) owned, controlled, or held by or for the benefit of the Receivership Entities, Jason Cardiff, or Eunjung Cardiff, in whole or in part; (2) in the actual or constructive possession of the Receivership Entities,

Jason Cardiff, or Eunjung Cardiff; or (3) owned, controlled or held by, or in the actual or constructive possession of, or otherwise held for the benefit of, any corporation, partnership, trust, or other entity directly or indirectly owned or controlled by the Receivership Entities, Jason Cardiff, or Eunjung Cardiff…." SER 360; SER 324.

Other relevant provisions include:

- An Asset Freeze (Section VII) that prohibits Defendants and "all other persons in active concert or participation with any of them, who receive actual notice of this Order," from, among other things, "transferring, liquidating, converting, encumbering, pledging, loaning, selling, concealing, dissipating, disbursing, assigning, relinquishing, spending, withdrawing, granting a lien or security interest or other interest in, or otherwise disposing of" any Assets that are "[o]wned or controlled, directly or indirectly, by any Defendant, including but not limited to, those for which any Defendant is a signatory on the account." SER 366; SER 329.

- Duties of Asset Holders and Other Third Parties (Section VIII) that require any person who received actual notice of the orders to hold, preserve, and retain within its control and prohibit the withdrawal, removal, alteration, assignment, transfer, pledge, encumbrance, disbursement, dissipation, relinquishment, conversion, sale, or other disposal of the Defendants' assets. SER 367; SER 331-332.

- Foreign Asset Repatriation (Section X) that requires, among other things, transfer to the territory of the United States and delivery to the Receiver of Assets located in foreign countries that are "under the direct or indirect control, whether jointly or singly, of any Defendant." SER 369-370; SER 334.

- Non-Interference with Asset Freeze and Repatriation (Section XI) that prohibits all persons with actual notice of the orders

from taking any action, directly or indirectly, which may result in the encumbrance, transfer, relocation, or dissipation of domestic or foreign assets, or in the hindrance of the repatriation required by the orders. SER 370-371; SER 335.

- Transfer of Receivership Property to Receiver (Section XVII) that requires Defendants and "any other person with possession, custody or control" of the "Assets" of the Cardiffs with notice of the orders to "fully cooperate and assist the Receiver in taking and maintaining possession, custody, or control of … the Assets of" the Cardiffs and to transfer them to the Receiver. SER 380; SER 344.

- Non-Interference with the Receiver (Section XX) that prohibits all persons with actual notice of the order from interfering with the Receiver's efforts to manage, or take custody, control, or possession of, the Assets subject to the Receivership. SER 382-383; SER 347.

The TRO/PI also authorized the FTC and Receiver to conduct expedited discovery "for the purpose of discovering: (1) the nature, location, status, and extent of Defendants' Assets; or (2) compliance with this Order." SER 387-388; SER 350. The orders further directed that: "Any expedited discovery taken pursuant to this Section is in addition to, and is not subject to, the limits on discovery set forth in the Federal Rules of Civil Procedure and the Local Rules of this Court." SER 388; SER 351. In accordance with these provisions, the FTC served Poujade with a subpoena, via his counsel, on April 10, 2019. ER 359-367. In response, Poujade produced some documents but largely failed to comply with the subpoena.

### B. Poujade, TPI, and the Transfer of Assets in Violation of the TRO/PI.

Poujade, though not a defendant, was (and may still be) the Chief Financial Officer and a Director of Defendant Redwood Scientific Technologies. SER 392; SER 294, 298-301. Redwood is owned and operated by Defendants Jason and Eunjung Cardiff. ER 104-107.

Jason Cardiff formed TPI in July 2018, though the company was originally known as Clover Cannastrip Thin Film Technologies Corp. ER 439. It had three founding directors: Eunjung Cardiff, Jason Cardiff, and Jacques Poujade. SER 271-274. TPI operates through a wholly owned subsidiary, Pharmastrip Corp., of which Jason Cardiff at one time was president and CEO. SER 304. (Poujade and TPI maintain, however, that Jacques Poujade's brother, Richard Poujade, served as Pharmastrip's president and sole director. Br. 9.)[2] Similar to Defendant Redwood Scientific, TPI is in the business of selling oral dissolvable thin film strips, though its strips contain THC, the active substance in marijuana.[3]

[2] Before the district court, Jason and Eunjung Cardiff moved for the return of their passports, which the district court had previously ordered them to relinquish. In support of that motion, the Cardiffs represented that Richard Poujade, on behalf of Pharmastrip, offered Jason Cardiff a job, but the evidence showed that the job offer was a sham to mask Jason Cardiff's continuing leadership of TPI. SER 131-132, 135.

[3] In this brief, "TPI" refers to TPI itself, Clover Cannastrip Thin Film Technologies and Pharmastrip, unless otherwise indicated for clarity.

In August 2018, Jason Cardiff traveled to Toronto, Canada, to meet with TPI's investment advisor, Haywood Securities, as well as potential investors. SER 100; SER 275. At least two investors agreed to invest in TPI, SER 264-266, 278-285, and in early September 2018, nearly $2 million CAD was deposited in an account, the "3745 account," held by TPI at TD Canada Trust Bank. ER 375; ER 431. Jason Cardiff had opened the account on August 31, 2018, ER 375, and Jason and Eunjung Cardiff were its sole signatories. ER 422-430. In addition, on October 4, 2018, the Cardiffs executed a banking and services agreement associated with the account and identified themselves as TPI's President and Manager, respectively. *Id*.

On October 10, 2018, the district court entered the TRO, which froze Defendants' assets, including approximately $1.56 million CAD in the 3745 account, which as mentioned was controlled by Jason and Eunjung Cardiff. SER 305-306, 367-368; ER 374. On October 12, 2018, Poujade learned of the TRO and asset freeze when Jason Cardiff called him to tell him that "all of [Cardiff's] assets were seized" and "that the injunction completely prohibited him from having a bank account," SER 96-97; SER 314-315; SER 395, 405-407, 409.

Despite the asset freeze, on October 16 and 18, 2018, Jason Cardiff and Jacques Poujade cooperated to transfer $1.56 million CAD out of the 3745 account. ER374, ER 503. Of that amount, they wired $1.2 million CAD to a TPI

trust account at Sui & Co., ER 443, ER 503, SER 303, and wired another $360,000 CAD to Richard Poujade (Pharmastrip's titular president), ER 503, ER 374. A week later, Sui & Co. wired $1.2 million CAD from the trust account to another TPI bank account. SER 303. Thereafter, TPI transferred approximately $490,000 USD to a Jacques Poujade-owned company (Br. 1), Alphatech (Br.12, SER 136-137). At least $211,000 USD of the $490,000 USD was used to pay the Cardiffs' personal expenses. Br. 13; ER 240; SER 404; SER 219-226.

### C. The Contempt Orders.

When the FTC learned of those evasions of the district court's order, it filed a motion on June 17, 2019, for an order to show cause why the Cardiffs and Jacques Poujade should not be held in contempt for transferring assets out of the 3745 account controlled by Jason Cardiff and failing to transfer the money to the Receiver. SER 307. Among other things, the FTC showed that Poujade:

- Violated the TRO/PI Asset Freeze (Section VII) by cooperating with the Cardiffs to transfer, loan, conceal, and disburse the Assets controlled by the Cardiffs, specifically, $1.56 million CAD in the 3745 account;
- Violated the TRO/PI Duties of Asset Holders and Third Parties (Section VIII) by failing to hold, preserve, and prohibit the disbursement, dissipation, or other disposal of the $1.56 million CAD;
- Violated the TRO/PI's requirement of Non-Interference with Asset Freeze and Repatriation (Section XI) through actions that dissipated foreign Assets and hindered the repatriation of those Assets; and

- Violated the requirement to Transfer Receivership Property to Receiver (Section XVII) by failing to deliver the $1.56 million CAD to the Receiver.

The FTC also requested that the Cardiffs and Poujade be held in contempt for failing to comply with the Expedited Discovery provisions of the TRO/PI. SER 307, 310.

The district court issued an Order to Show Cause on June 24, 2019, SER 267, in response to which Poujade filed numerous pleadings and declarations in opposition, ER 432, SER 261; SER 227; SER 211; SER 193; SER 191; SER 159; SER 157.

From July 29 to 31, 2019, and on August 27, 2019, the district court held a four-day hearing at which Poujade testified and was represented by counsel. SER 103; SER 102; SER 101; SER 18. Poujade swore under oath that he did not learn that he was not a signatory on the 3745 account until July 11, 2019, some ten and a half months after it had been opened, ER 499, and that he did not know the identities of the payees for the October 16 and 18, 2018, withdrawals in which he participated until July 2019. SER 83; ER 431. At the conclusion of the testimony on July 31, the court rejected that defense, stating:

> Mr. Poujade, I find that you are totally unbelievable. You lied to this Court. You perpetrated fraud on this Court. You did that in conjunction with the Cardiffs [Defendants]. You created a paper trail perpetuating the fraud on the Court. It's unbelievable considering the positions that you hold as a financial officer.

> But I guess money is everything and greed is everything. And in pursuit of your greed, you have advanced the interest of the Cardiffs to the detriment of the public, government agencies, the receiver, and the Court.

ER 654-655. In concluding that the Cardiffs and Poujade had violated the court's orders, it found clear and convincing evidence that Poujade knew of the asset freeze and the requirement that all assets controlled by the Cardiffs be turned over to the receiver, yet allowed money from the 3745 account to be withdrawn anyway. ER 654; ER 47-48.

The district court did not rule immediately, but instead continued the hearing to August 27, 2019, encouraging the parties to explore resolution of the matter in the meantime. SER 80. On August 8, 2019, the FTC filed proposed findings of fact and conclusions of law in which it requested, *inter alia*, that the "Cardiffs and Jacques Poujade [be] further ordered to turn over all communications, including emails, text messages, and encrypted chat messages (e.g., Whatsapp, Signal, Telegram), from October 12, 2018 [the day Poujade learned of the TRO] through the present with any of the following individuals/entities: Jason Cardiff, Eunjung Cardiff, Jacques Poujade, Richard Poujade, Ralph Olson, Dana Rohrabacher,

Kamlesh Shah, Anton Drescher, Haywood Securities, Falcon, and Industrial Court L7." SER 154.[4]

At the hearing on August 27, the district court ordered, *inter alia*, production of recorded communications between Defendants and Poujade. SER 79. It also ordered the Cardiffs to turn over their mobile phones. *Id*.[5] In addition, the district court ordered Poujade's counsel to transfer the $1.56 million CAD to the Receiver, as required by the TRO and PI, which eventually did occur. ER 53; ER 586.

At the district court's direction, the FTC and Poujade engaged in ultimately unsuccessful discussions regarding a stipulated order implementing the district court's contempt findings and orders. On October 3, 2019, the FTC filed a proposed order regarding the turnover of funds and film strip machines to the Receiver, an accounting of assets, and the production of documents to the FTC. SER 73, ER 578-583. On the same day, Poujade filed objections and an alternative to the FTC's proposed order. SER 59

[4] The individuals named are TPI directors, while the companies provided services to TPI. The evidence indicates that Jason Cardiff continued to lead TPI and communicated with directors and these companies after the district court adopted the TRO and PI. *See* SER 49-50; SER 51; SER 215-218.

[5] Subsequent forensic analysis of the phones ratified the district court's assessment of Poujade's mendacity. Although he had sworn in a declaration that Jason Cardiff was terminated and had no more connection with company, ER 512; ER 554, the phone records showed that Poujade and Cardiff continued to communicate about TPI, SER 49-50; ER 623-624.

On October 29, 2019, the district court overruled Poujade's objections to the FTC's proposed order and rejected his alternative. ER 44. In so doing, the district court stated that Poujade's failure to comply with the FTC's April 10 subpoena violated the TRO/PI's expedited discovery provisions and that such failure constituted contempt. ER 47. It further stated that "communications between Defendants and Mr. Poujade, as well as Mr. Poujade's business associates, are relevant to the FTC's investigation of whether the Defendants remain involved in [TPI]" and that such communications must be turned over as part of the TRO/PI's Expedited Discovery provisions. *Id.*

Concurrently, the district court entered its "Order Regarding Turnover of Funds to Receiver, Film Strip Machines, Accounting, and Production of Documents." ER 51 [hereafter "Contempt Purge Order"].[6] As relevant here, the Order provided:

> j. Jacques Poujade shall within thirty days of entry of this Order comply with the FTC's April 10, 2019 Subpoena for Documents, to the extent the Subpoena requests information falling within the scope of this Court's expedited discovery (ECF No. 59 at 35-36) and this Order. The parties are reminded that the Court's expedited discovery permits discovering: "(1) the nature, location, status, and extent of Defendants' Assets; or (2) compliance with this Order." (ECF No. 59 at 35.) Such expedited discovery includes communications in any form between Defendants and Mr. Poujade. Such expedited discovery also includes communications between Mr. Poujade and

[6] The court's order overruling Poujade's objections, ER 44, and the Contempt Purge Order, ER 51, are the orders on appeal in No. 19-56397.

> individuals/entities affiliated with Pharmastrip pertaining to the nature, location, status, and extent of Defendants' Assets, and compliance with the TRO and PI. Counsel for the FTC and counsel for Mr. Poujade shall continue to meet and confer to accomplish Mr. Poujade's compliance. Any discovery dispute within the scope of the Court's expedited discovery and this Order shall be brought to the Court's attention in a renewed motion for contempt. Any discovery dispute extending beyond the scope of this Court's expedited discovery and this Order shall be resolved pursuant to the Standing Order, Local Rules, and Federal Rules of Procedure.
>
> k. Eunjung Cardiff, Jason Cardiff, and Jacques Poujade shall within thirty days of entry of this Order produce to the FTC all communications of any type, including emails, text messages, and encrypted chat messages (e.g., Whatsapp, Signal, Telegram), from October 12, 2018 through the present with any of the following individuals/entities: Jason Cardiff, Eunjung Cardiff, Jacques Poujade, Richard Poujade, Ralph Olson, Dana Rohrabacher, Kamlesh Shah, Anton Drescher, Haywood Securities, Falcon, and Industrial Court L7. This Order does not require the Cardiffs to produce any communications already obtained by the FTC as a result of the Cardiffs' turnover of their mobile phones (Dkt. 217).

ER 56-57. The Contempt Purge Order provided that noncompliance after November 28 would lead the district court to order monetary sanctions, with increasing severity over time. ER 57-58.

Rather than comply, on November 22, 2019, Poujade filed an ex parte motion to modify the October 29, 2019, Order or, in the alternative, to stay the order pending appeal. SER 20. He asked the district court to strike Section 2(k) altogether on grounds that the FTC's subpoena had not requested the communications identified in Section 2(k) and that Section 2(k) exceeded the scope of the TRO/PI's Expedited Discovery provision.

The district court denied Poujade's motion to modify or stay on December 17, 2019. ER 619. It specifically found that the communications ordered to be produced in Section 2(k) were responsive to several of the document requests included in the FTC subpoena, including ones seeking communications between Poujade and others regarding companies that include the company name "Pharmastrip." ER 624. It also ruled that Section 2(k) fell within the scope of the Expedited Discovery provision because it sought to discover the extent of Defendants' involvement with TPI for purposes of assessing their compliance with the TRO and PI. It said: "The Court's credibility finding renders the documents even more critically important to revealing the actions of Defendants with respect to [TPI], via the actions of Mr. Poujade." ER 625.

Poujade continued his defiance of the district court orders. On May 29, 2020, the FTC filed a motion asking the district court to hold Poujade in contempt for failing to comply with the Contempt Purge Order. SER 14. Finding that Poujade did not dispute that he violated that order, the court concluded that the FTC had shown by clear and convincing evidence that Poujade should be held in contempt. SER 4. The court provided Poujade until 12:00 p.m. on July 10, 2020, to comply or face $360,000 in monetary sanctions and incarceration. SER 5.

### D. TPI's Motion to Intervene.

Meanwhile, TPI moved to intervene in the FTC's case on October 18, 2019. ER 593. TPI asserted an ownership interest in the $1.56 million CAD originally deposited in the 3745 account and claimed a right to intervene in light of the district court's statements during the Contempt Hearings that TPI would "have its day in court." ER 601-602. The FTC, joined by the Receiver, opposed intervention. SER 32; SER 28. In the order on review in No. 20-55066, the district court denied intervention. ER 628. It ruled that TPI's purported ownership interest was separate and distinct from the question of which of Defendants' assets should be subject to the TRO/PI's asset freeze. ER 634. It also rejected TPI's view that the district court's statement that TPI would "have its day in court" meant that TPI would receive special treatment as an intervenor. "The Court finds no reason for [TPI] to have its interests elevated above those of others, especially since [TPI] can participate in post-judgment proceedings." ER 635.

## SUMMARY OF ARGUMENT

1a. The Court should dismiss Poujade's appeal in No. 19-56397 for lack of jurisdiction. The district court orders under review imposed no sanction, but merely announced contempt and established conditions to purge the contempt. The law is clear that non-party contemnors may not appeal until the district court has

imposed sanctions. In addition, Poujade purged his contempt with respect to the transfer of money to the Receiver, mooting that question.

b. If the Court deems the issue live, the district court properly held Poujade in contempt for failing to transfer money to the Receiver. Poujade does not deny that he cooperated with the Cardiffs to transfer the money out of an account they controlled and that he failed to transfer the money to the Receiver. His contention that the TRO and PI did not apply to his actions is unfounded. The plain terms of the TRO/PI both forbade Poujade from working in concert with the Cardiffs and required him to cooperate with the Receiver's efforts to secure control of the money. The TRO/PI also plainly governed assets controlled by the Cardiffs, not just those they owned.

c. The district court properly held Poujade in contempt for violating the TRO/PI's Expedited Discovery provision. The Expedited Discovery provision explicitly provided that Fed. R. Civ. P. 45's requirements did not apply to subpoenas issued under it. The FTC therefore was not required to file a motion to compel under Fed. R. Civ. P. 45(d)(2)(B) before seeking to hold Poujade in contempt for failing to respond to a subpoena, which could be enforced directly via contempt. And even if Rule 45 applied, the FTC's motion to show cause why Poujade should not be held in contempt functioned as a motion to compel. The

substance of a motion, not its label, determines whether Rule 45's requirements have been met.

d. Poujade is also wrong that the district court's order in Section 2(k) of the Contempt Purge Order that he produce various communications between Defendants and others is a criminal contempt sanction. Section 2(k) is an appropriate civil contempt sanction because it required Poujade to produce the communications he had already been required to produce under the Expedited Discovery provisions.

2a. The district court correctly denied TPI's motion to intervene. With respect to intervention as of right, the district court committed no clear error in its finding that the motion was untimely. TPI learned in June 2019 of the FTC's motion to compel it to transfer money to the Receiver, but it did not seek intervention for four months. The district court's statement that TPI would "have its day in court" does not amount to a promise of intervention that would justify the delay. The court was plainly referring to a post-judgment proceeding, not intervention in the pending one.

The district court also correctly concluded that TPI does not have a significant protectable interest in the ongoing proceeding. This case concerns Defendants' liability for deceptive and fraudulent conduct and the preservation of assets owned or controlled by them to ensure that money is available for monetary

relief in the event of a judgment. TPI's claim to the money at issue here is independent and separate from the issues at stake in the case. Claims such as TPI's are adequately protected in post-judgment claim proceedings, where TPI can represent its own interests.

b. The district court correctly denied permissive intervention. TPI's motion was untimely for permissive intervention for the same reasons as intervention by right. TPI's ownership claim also does not share common questions of law or fact with the questions presented in the case: whether the Defendants are liable for deceptive and fraudulent conduct and which of their assets may be used to provide relief to consumers. And intervention would be disruptive of the orderly disposition of the Receivership estate.

## ARGUMENT

### I. THE COURT LACKS JURISDICTION IN NO. 19-56397, BUT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN HOLDING POUJADE IN CONTEMPT IN ANY EVENT.

#### A. Standard of Review.

The Court reviews a civil contempt order for abuse of discretion and its factual findings for clear error. *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999). A district court "has wide latitude in determining whether there has been contemptuous defiance of its order," *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984), and its interpretation of its own injunction is entitled to "particularly heavy weight," *Schering Corp. v. Illinois Antibiotics Co.*, 62 F.3d

903, 908 (7th Cir. 1995). Its decision should not be reversed "absent a definite and firm conviction that the district court made a clear error of judgment." *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir. 1992) (cleaned up).

### B. This Court Lacks Jurisdiction to Hear Poujade's Appeal.

Poujade appeals an interlocutory order of the district court establishing conditions for him to purge the court's prior finding of contempt. ER51-58. This Court lacks jurisdiction over the appeal. The law is well established in this Circuit that "an adjudication of civil contempt is not appealable until sanctions have been imposed." *Donovan v. Mazzola*, 761 F.2d 1411, 1417 (9th Cir. 1985). The order challenged by Poujade did not impose sanctions and is therefore unappealable.

The district court initially found Poujade in contempt on July 31, 2019, for failing to comply with expedited discovery provisions established in the court's TRO and PI and for helping the Cardiffs avoid repatriating at least $1.56 million CAD in funds that the court had ordered frozen and transferred to a court-appointed Receiver. ER 52. Poujade subsequently purged his contempt with respect to the money, ER 53, but he persisted in ignoring the discovery provisions. On October 29, 2019, the district court gave Poujade 30 days to purge his contempt by producing the required documents and established proposed monetary sanctions for noncompliance. ER 57. Those monetary sanctions, however, were not self-

executing, and when Poujade again failed to comply, the FTC had to file a motion asking the district court to enter a judgment imposing monetary sanctions and coercive incarceration. SER 14.

Although a non-party such as Poujade may seek review of a contempt order before any final judgment in the underlying litigation, he cannot do so until he has been subject to sanctions. "To obtain a right of review" of a discovery order or other pretrial directive, "the non-party must refuse to comply with the order, and the district court must find the non-party to be in contempt *and apply sanctions against him*." *David v. Hooker, Ltd.*, 560 F.2d 412, 415-16 (9th Cir. 1977) (emphasis added). In other words, a non-party's right to appeal an order compelling behavior ripens only once the district court imposes a "sentence for civil contempt" or a "contempt judgment." *Id*. As the Supreme Court has explained:

> [S]uch an order may coerce a witness, leaving him no alternative but to obey or be punished. It may have the effect and the same characteristic of finality as the orders under review, but from such a ruling it will not be contended there is an appeal. Let the court go farther, and punish the witness for contempt of its order,—then arrives a right of review; and this is adequate for his protection without unduly impeding the progress of the case.

*Alexander v. United States*, 201 U.S. 117, 121 (1906).[7]

Poujade's reliance (Br. 3) on *Portland Feminist Women's Health Center v. Advocates for Life, Inc.*, 877 F.2d 787 (9th Cir. 1989), is misplaced. There, the district court imposed sanctions, *id.* at 789, the indispensable ingredient rendering a matter subject to appeal. No sanction was imposed by the Contempt Purge Order, so *Portland Feminist* has no bearing on this case. Poujade's appeal must be dismissed in its entirety.

Even if the Court were not to dismiss Poujade's appeal outright, it would still lack jurisdiction over his challenge to that part of the district court's order finding him in contempt for helping the Cardiffs avoid transferring money to the Receivership estate. That issue would be moot because Poujade purged his contempt when he transferred the money to the Receiver. ER 48, 53. "A long line of precedent holds that once a civil contempt order is purged, no live case or

[7] On June 26, 2020, the district court provisionally granted the FTC's motion for sanctions and gave Poujade until July 10, 2020, to comply or face incarceration and a $360,000 penalty. SER 5. If Poujade remains in contempt and the court actually sanctions him, his appeal rights will ripen, opening the door for him to file a new notice of appeal of the district court's contempt rulings. *Alexander*, 201 U.S. at 121.

controversy remains for adjudication." *In re Campbell*, 628 F.2d 1260, 1261 (9th Cir. 1980) (citing cases); *Richmark Corp.*, 959 F.2d at 1479-80.[8]

### C. The District Court Correctly Held Poujade in Contempt for Violating the TRO/PI's Asset Freeze and Transfer Requirements.

The district court committed no error when it held Poujade in contempt for violating the TRO's and PI's requirements that assets controlled by the Defendants be frozen and turned over to the Receiver. ER 47-48. The TRO/PI ordered the Cardiffs to turn over to the Receiver all their assets, whether held directly or indirectly. SER 369-370, 373-374; SER 334-335, SER 344-345. It expressly prohibited any third party with knowledge of the order from hindering the transfer of assets to the Receiver. SER 382-383; SER 347. The FTC showed that Poujade, who knew of the order, nevertheless cooperated with the Cardiffs to engage in a series of transfers meant to evade the freeze and keep the Receiver from gaining control of money in the 3745 bank account controlled by the Cardiffs. *See* pp. 9-10 *supra*. In other words, Poujade knew he was helping the Cardiff's violate the court's order, clearly contumacious conduct.

[8] The same might be true with respect to the appeal concerning the Expedited Discovery provisions. Poujade produced some documents to the FTC on July 10, 2020, in purported compliance with those provisions and the subsequent contempt orders. The FTC is reviewing that production to determine whether Poujade is in substantial compliance and will update the Court of the FTC's assessment.

Poujade here disputes none of the facts shown by the FTC and determined by the district court. He does not dispute that he knew of the restrictions imposed on him by the TRO/PI order yet cooperated with the Cardiffs to transfer money to avoid the Receiver. Instead, he challenges the district court's reading of its own orders as imposing on Poujade the obligations he was found to have violated. In his view, the TRO/PI order simply did not prohibit what he admits he did. Poujade's claims cannot be squared with the plain language of the order, which the district court properly interpreted. Especially given a district court's "wide latitude" to interpret its own orders, *see Gifford*, 741 F.2d at 266, the Court should reject Poujade's reading of them.

Poujade first maintains that the TRO's and PI's requirement that assets controlled by the Cardiffs be transferred to the Receiver did not apply to him. Br. 48. That is clearly wrong. By its plain terms, the asset-transfer requirement applied not only to Defendants (including the Cardiffs), but also to their "officers, agents, employees, and attorneys, and *all other persons in active concert or participation with any of them, who receive actual notice* of this Order[s]." ER 155, ER 176 (emphasis added). In a finding not contested by Poujade here, the district court concluded that he had actual notice of the TRO no later than October 12, 2018. ER 654; ER 47-48. Poujade also does not dispute that he received notice of the PI no later than March 20, 2019. ER 492; SER 270. Anyone knowingly

bound by the order would have understood that it prohibited him from actively working with Jason Cardiff to accomplish things that Cardiff himself was forbidden from doing. At the very least, that reading of it falls well within the district court's wide latitude of interpretation.

The TRO and PI are clear about Cardiffs'—and Poujade's, as a person in active concert or participation with them—responsibility to transfer money to the Receiver. Section XIX required affirmative cooperation with the Receiver to transfer the money to Receivership estate. SER 382; SER 346. Section XX prohibited interfering with the Receiver's efforts to take possession of the money and from "transferring … or otherwise disposing" of the $1.56 million CAD. SER 382-383; SER 347. Having directly violated those clear commands, Poujade was properly held in contempt.

Next, Poujade contends that the requirement to transfer to the Receiver the $1.56 million CAD applied only to assets "owned" by the Cardiffs. Br. 49, 51. In fact, by its plain language the requirement applied to assets *controlled* by the Cardiffs as well. SER 360, 380-382; SER 324, 344-46. Moreover, the TRO and PI broadly defined "Asset" as "any legal or equitable interest in, right to, or claim to, any property, wherever located and by whomever held." ER 152, ER 171. The asset freeze provision enjoins "transferring, liquidating, converting, encumbering, pledging, loaning, selling, concealing, dissipating, disbursing, assigning,

relinquishing, spending, withdrawing, granting a lien or security interest or other interest in, or otherwise disposing of any Assets that are … owned or *controlled*, directly or indirectly, by any Defendant, *including, but not limited to, those for which a Defendant is a signatory on the account*." ER 156, ER 176 (emphasis added). Section XVII of the TRO and PI specifically required that assets controlled by the Cardiffs be transferred to the Receiver. SER 380; SER 344-45. The Cardiffs were signatories on the 3745 account containing the $1.56 million CAD, ER 374; ER 422-431, and thus controlled that money even though the account nominally belonged to TPI. The TRO and PI unquestionably required that it be transferred to the Receiver.

Finally, Poujade maintains that he could not be held in contempt because the TRO and PI required only that the $1.56 million CAD be frozen but did not require Poujade to actually transfer the money to the Receiver. Br. 51. The claim cannot be squared with the actual language of the TRO and PI, which clearly required that Poujade "fully cooperate with and assist the Receiver in taking and maintaining

possession, custody, or control" of the Cardiffs' assets, including the money frozen in the 3745 account. SER 380; SER 344.[9]

### D. The District Court Correctly Held Poujade in Contempt for Not Complying with the TRO/PI's Expedited Discovery Provisions.

#### 1. The TRO/PI did not require the FTC to file a motion to compel.

The district court held Poujade in contempt for violating the TRO/PI's Expedited Discovery provisions, under which the FTC issued its April 10, 2019, subpoena. ER 49, ER 624-625. Poujade first attacks that holding by asserting that, because he served objections to the FTC's subpoena, the FTC had to a file a motion to compel under Fed. R. Civ. P. 45(d)(2)(B) before the court could find him in contempt. Br. 52-54. Under the TRO/PI, however, Rule 45 did not apply and, in any event, the FTC's Motion for an order to show cause functioned as a motion to compel.

The expedited discovery provision authorized the FTC to pursue discovery via a Fed. R. Civ. P. 45 subpoena. SER 387; SER 350. At the same time, the TRO/PI stated that "[a]ny expedited discovery taken pursuant to this Section is *in*

[9] Poujade's observation that the district court made no finding that TPI was a Receivership Entity is irrelevant to whether the district court correctly held Poujade in contempt. Br. 50. The contempt holding rests on (1) the Cardiff's control over the 3745 bank account, not their control over TPI itself, and (2) Poujade's personal obligations as a person working with the Cardiffs and with notice of the TRO/PI to ensure that frozen assets were transferred to the Receiver.

*addition to*, and is *not subject to*, the limits on discovery set forth in the Federal Rules of Civil Procedure and the Local Rules of this Court." SER 388; SER 351 (emphasis added). Thus, Poujade is wrong that the district court "ignored Rule 45(d)'s plain language." Br. 53. Under the express terms of the court's orders, Rule 45 did not apply; a failure to comply with the expedited discovery provision was a violation of the court's order, enforceable directly via contempt. The district court properly held that Poujade's failure to respond to the FTC's subpoena constituted contempt because "[a]ny failure to provide such discovery is a violation of the TRO and PI." ER 49. Requiring compliance with a court order to produce documents "is a classic use for civil contempt." *In re Contempt Finding in United States v. Stevens*, 663 F.3d 1270, 1272, 1274 (D.C. Cir. 2011). Poujade does not show otherwise.

In any event, the FTC's show-cause motion functioned for all practical purposes as a motion to compel—indeed, when the FTC sought to enforce the April 10 subpoena, the district court referred to the show-cause motion as a "Motion to Compel" (ER49)—and Poujade was able to, and did, raise his objections just as he would have in an ordinary motion to compel. *See* ER 453-464 (Poujade response to FTC motion attaching objections). In its contempt ruling, the district court addressed Poujade's specific objections (*see*, *e.g.*, ER 460-461) such as the relevancy of the discovery and the existence of privileged documents. On

relevancy, the court noted that "communications between Defendants and Mr. Poujade, as well as Mr. Poujade's business associates, are relevant to the FTC's investigation of whether the Defendants remain involved in True Pharmastrip." ER 49 (citing ER 33-34). On privilege, the court stated that "[t]o the extent any documents are privileged, the rules governing discovery set forth an established procedure for seeking to withhold." ER 625.

Poujade complains that the FTC wrongly did not "obtain a court order directing" compliance with the subpoena. *See* Br. 53 (quoting *Pennwalt Corp. v. Durand-Wayland, Inc.*, 708 F.2d 492, 494 n.5 (9th Cir. 1983)). But as a matter of legal substance, it did. Indeed, *Pennwalt Corp.*, the very case relied on by Poujade, demonstrates that the relief sought in a pleading, not its label, determines whether the requirements of Rule 45 have been met. There, the objecting party, Sunkist, did not serve separate written objections but instead filed a motion to quash which it served on Pennwalt. The Court treated Sunkist's motion as written objections for purposes of Rule 45. *Id.* at 494. So too, here: Though not entitled "Motion to Compel," the FTC's Motion for an order to show cause sought the same relief as a motion to compel—an order directing Poujade to comply with the subpoena. What matters is not the form of the motion, but its substance.

**2. The purge conditions were not criminal punishment.**

The district court ordered Poujade to produce within 30 days communications between himself and the Defendants, companies with which they did business, and TPI board members. ER 57. It also identified graduated monetary sanctions and possible incarceration to coerce Poujade's compliance, though imposition of the sanctions would require a further order from the court. ER 57-ER58. Poujade maintains that the order to produce these communications, under threat of penalties or incarceration, operated as criminal punishment because the FTC's subpoena did not require their production. Br. 54-58. Poujade is wrong. Section 2(k) of the Contempt Purge Order served the dual functions of requiring production of documents covered by the FTC's subpoena and as a remedy to enforce the expedited discovery provisions of the district court's own TRO/PI orders (under which the FTC issued its subpoena). The contempt therefore is civil.

"Civil contempt … seeks only to coerce the defendant to do what a court had previously ordered him to do." *Turner v. Rogers*, 564 U.S. 431, 441 (2011) (cleaned up). "[O]nce a civil contemnor complies with the underlying order, he is purged of the contempt and is free." *Id.* at 442 (cleaned up). He "carr[ies] the keys of [his] prison in [his] own pockets." *Hicks v. Feiock*, 485 U.S. 624, 633 (1988) (cleaned up).

Under these standards, Section 2(k) is clearly within the district court's civil contempt authority. First, the district court explained that the "documents ordered to be produced by [Section] 2(k) are responsive to the FTC's subpoena." ER 624. Among other things, the subpoena required production of "[a]ll documents and communications, without limitation to time, referring or relating to any company in which" the names Pharmastrip, Cloverstrip, Clover Cannastrip Thin Film Technologies Corp., Cannabis, and variations of those names appeared. ER 364-365. It also sought the Cardiffs' and Poujade's communications with companies that provided services to TPI, including Haywood Securities. ER 364. Section 2(k) ordered the production of these communications and thus represented an appropriate condition for Poujade to purge his failure to respond to the subpoena.

Second, the district court concluded that the communications required to be produced under Section 2(k) "fall within the scope of the Court's Preliminary Injunction." ER 624. Poujade contends that the TRO/PI authorized discovery only of the Cardiffs' assets, Br. 55, but he ignores that it also covered discovery of evidence of "compliance with" those orders. ER 164, ER 188. The district court addressed this claim directly:

> The Preliminary Injunction permitted limited expedited discovery to discover the nature, location, status, and extent of Defendants' Assets, or compliance with the Preliminary Injunction. (Preliminary Injunction, ECF No. 59, at 35.) Paragraph 2(k) orders production of communications between Mr. Poujade, Defendants, and business associates of True Pharmastrip. These communications are relevant to

> determine the extent of Defendants' involvement with True Pharmastrip. The existence of such involvement is evidenced by Jason Cardiff's communications with Mr. Poujade, and Mr. Poujade's role as Chief Executive Officer of True Pharmastrip. As stated during the August 27 hearing, and noted again in the Court's Order Overruling Objections, communications between Mr. Poujade and his business associates are relevant to the FTC's investigation as to whether and to what extent Defendants remain involved in True Pharmastrip. (Order Overruling Objections 6 (citing 8-27 Tr. at 33-34).)

ER 624-625.[10] In short, the communications ordered produced by Section 2(k) bear directly on whether Defendants' ongoing involvement with TPI violated the TRO and PI. As such, Section 2(k) obligates Poujade to do what the TRO/PI required him to do, which is "a classic use for civil contempt." *Stevens*, 663 F.3d at 1274.

Poujade's final argument is not clear, but seems to boil down to the following. In Poujade's view, Section 2(j) ordered compliance with the FTC's subpoena, while Section 2(k) required production of documents not sought by the subpoena. Because (he claims) only Section 2(j) falls within the TRO/PI's Expedited Discovery provisions, however, Poujade purportedly has no obligation to comply with Section 2(k). If he complies with Section 2(j), but refuses to comply with Section 2(k), the argument goes, he cannot purge his contempt, which renders the sanctions "determinate" in that they could not be avoided through

[10] The district court reasoned that "[t]he Court's credibility finding renders the documents even more critically important to revealing the actions of Defendants with respect to True Pharmastrip, via the actions of Mr. Poujade." ER 625. Therefore, even in the absence of a subpoena, the district court had independent authority to order production of communications covered by Section 2(k). *See In re Fannie Mae Securities Litig.*, 552 F.3d 814, 823 (D.C. Cir. 2009).

compliance with the FTC's subpoena. Br. 57. As such, the sanction is allegedly criminal. *Id.*

Poujade's argument has no merit. The district court concluded that Section 2(k) requires production of communications requested by the FTC's subpoena. ER 624. Even assuming for the sake of argument that the FTC's subpoena did not ask for the communications identified in Section 2(k), the provision was necessary, and Poujade had to comply with it, to remedy his failure to comply with the TRO/PI's Expedited Discovery provision relating to the Cardiffs' compliance with the TRO/PI. As the district court explained, Section 2(k) sought communications that could show the extent of Defendants' involvement with TPI in possible violation of the TRO/PI. ER 624-625. The district court had authority to order further discovery as a civil contempt sanction to remedy the contemnor's failure to comply with prior orders, and Poujade was required to comply with that order. *See Stevens*, 663 F.3d at 1274-75. Section 2(k) thus "was a proper exercise of the district court's contempt power because it coerced compliance" with the TRO/PI. *In re Fannie Mae Securities Litig.*, 552 F.3d at 823. Accordingly, the threat of monetary sanctions or coercive incarceration if Poujade were not to comply within 30 days are classic purge conditions. Poujade had the power to purge himself of his contempt simply by producing the communications required by Section 2(k). *See Turner*, 564 U.S. at 441-42.

## II. THE DISTRICT COURT CORRECTLY DENIED TPI'S MOTION TO INTERVENE.

### A. Standard of Review.

This Court reviews a district court's denial of a motion to intervene as of right *de novo*, except for the district court's factual findings on timeliness, which are reviewed for an abuse of discretion. *See League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) ("*LULAC*"). The Court sets aside factual findings only if they are "clearly erroneous." *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 977 (9th Cir. 2003). The Court reviews a district court's denial of a motion for permissive intervention "only for abuse of discretion." *LULAC*, 131 F.3d at 1307.

### B. The District Court Correctly Rejected TPI's Intervention as of Right.

As applied by this Court, Fed. R. Civ. P. 24(a) requires that: "(1) the application [for intervention] must be timely; (2) the applicant must have a significantly protectable interest relating to the transaction that is the subject of the litigation; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest must be inadequately represented by the parties before the court." *LULAC*, 131 F.3d at 1302 (cleaned up). Timeliness is "the threshold requirement," so if this Court upholds the district court's factual

finding that TPI's intervention was not timely, it may affirm without reaching the other elements. *Id.* (cleaned up).

### 1. The District Court did not abuse its discretion in finding TPI's intervention to be untimely.

There is no specific deadline for intervention, but courts use a three-factor timeliness test that considers: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *United States v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004). Here TPI sought to intervene four months after it had notice that the FTC sought an order requiring Poujade to turn over to the Receiver at least $4 million CAD. The district court properly exercised its discretion in weighing the timeliness factors and rejecting intervention.

The court found that the first two factors—stage of the proceedings and prejudice to other parties—"weigh[ed] slightly in favor of a finding of timeliness." ER 632. Citing ongoing discovery, the court seemed to suggest that TPI's participation in it would not necessarily slow things down and seemed to downplay the prejudice to the FTC as simply "more time and expense for litigation." *Id.* The court then concluded that the third factor—"the reason for and length of delay"—"weigh[ed] heavily in favoring of a finding of untimeliness." ER 633. The court found TPI's asserted attempts to include language providing for TPI's intervention

in an order addressing Poujade's contempt to be "insufficient," especially given that TPI had notice no later than August 27, 2019, that it might have an interest. *Id.*

TPI advances no good reason for this Court to disturb the district court's well-supported factual finding that TPI's intervention was untimely. TPI "should have been aware that [its] interests would not be adequately protected by the existing parties," *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999) (cleaned up), by mid-June, four months before it sought to intervene. That is when the FTC served its Motion for an Order to Show Cause on TPI's counsel, putting it on notice that the FTC sought to require Poujade to turn over to the Receivership estate at least $4 million CAD. SER 38. Yet TPI chose to remain on the sidelines until October 18, 2019.

TPI tries to account for the nearly two-month delay between the August 27, 2019, order requiring TPI to transfer $1.56 million CAD to the Receiver and the filing of the motion to intervene on October 18, 2019, by claiming that it resulted from efforts to meet and confer with the FTC so that TPI would "have its day in court regarding whether the funds ... rightfully belong to" TPI. Br. 34 (quoting ER 15). As shown below, however, the district court made clear on August 27 that TPI's "day in court" would be a post-judgment proceeding, not intervention. ER 14-15. Poujade's counsel (also representing TPI) repeatedly sought to insert language about TPI's intervention in negotiations with the FTC over an order

implementing the district court's findings about Poujade's contumacious conduct. But the FTC rejected that language on August 30 and again on September 11. ER 612, ER 630. At that point, it was clear that the FTC would not agree to intervention, but even then TPI inexplicably waited over a month to file its motion to intervene. The district court properly concluded that TPI had failed to justify its delay. ER 633. *See FTC v. Johnson*, 2013 WL 4039069, at *2 (D. Nev. Aug. 5, 2013) (finding untimely intervention filed over 30 days after court clarified status of receivership assets).

TPI mistakenly relies on the district court's statement that TPI should "have its day in court" as justifying its delay. Br. 34 (quoting ER 15). TPI's apparent claim is that TPI did not move to intervene sooner because it relied on the court's alleged promise that it would be permitted to intervene. In fact, when the court discussed a "day in court," it was clearly referring to *post-judgment* proceedings, not to intervention. On August 27, counsel for the Receiver explained in open court that the Receiver would establish a post-judgment proceeding where interested parties, including TPI, would have an opportunity for discovery and have "their day in court." ER 13. TPI's counsel then reiterated TPI's need for discovery. ER 14. In response, the district court said:

> If you have concerns regarding the *final disposition* of those funds *at a later date in time*, your client will have its day in court to make certain claims and provide evidence to the Court that suggests that

> your client was duped by the Cardiffs and the monies deposited are rightfully your client's. *There may be other claimants also here*.

ER 14-15 (emphasis added). In context, the district court quoting the Receiver's promise of a "day in court" and noting possible "other claimants" obviously referred to the post-judgment proceeding, not intervention by TPI during the ongoing proceeding. Indeed, the court confirmed as much in its order denying intervention. ER 635.

Second, TPI asserts that the district court "ignored" the "absence of prejudice [to the FTC] resulting from intervention. Br. 35. But the district court did not ignore that factor. It said that both the prejudice and stage-of-the-proceeding prongs "weigh[ed] slightly in favor of a finding of timeliness." ER 632. TPI may wish the district court had weighed the timeliness factors differently, but its dissatisfaction does not show an abuse of discretion.

### 2. The District Court correctly concluded that TPI does not have a significantly protectable interest in the pending action.

To satisfy the significantly protectable interest element, TPI needed to have proven that the FTC's action against the Defendants would "have direct, immediate, and harmful effects upon [TPI's] legally protectable interest" and "that there is a relationship between the legally protected interest and the claims at issue." *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 818 (9th Cir. 2001) (cleaned up). TPI based its motion to intervene on a claimed ownership

interest in $1.56 million CAD that the district court concluded should be transferred to the Receiver under the asset freeze (Sections VII and VIII) and foreign asset repatriation (Section X) provisions of the TRO and PI. SER 368-374; SER 329-335. Those provisions required that any assets owned or *controlled* by Defendants be frozen and transferred to the Receiver. The district court concluded that Jason Cardiff controlled the TPI bank account containing at least $1.56 million CAD, making them subject to the asset freeze and transfer requirements. *See* pp. 24-38 *supra*.

The district court concluded that any interest TPI had was "too attenuated" from the FTC's action to amount to a significant protectable interest. ER 634. It explained that, although TPI sought intervention to establish ownership over the $1.56 million CAD, the FTC's action concerns Defendants' liability for violating the FTC Act and whether *Defendants'* ownership or control over certain assets required them to be included in the Receivership estate to provide relief to Defendants' victims. *Id.* It made clear that any claims by third parties would be heard in separate, post-judgment proceedings. ER 635.

TPI's ability to raise its ownership claims later defeats its claim that the ongoing pre-judgment proceedings have a "direct, immediate, and harmful effect" on those claims. Br. 38-39. The district court based its ruling on Jason Cardiff's *control* over the TD bank account containing the funds, which sufficed to bring the

money into the Receivership estate. TPI's nominal ownership is irrelevant to whether the funds should be included. *See CFTC v. Emerald Worldwide Holdings, Inc.*, 2004 U.S. Dist. LEXIS 27511, **18-21 (C.D. Cal. Jul. 29, 2004) ("irrelevant whether or not" defendants "actually 'owned'" assets "so long as they controlled them"). The money will remain in the Receiver's control for the time being (to prevent its dissipation), and the district court's ruling and the ongoing proceedings do not impair TPI's ability to pursue its ownership claim in post-judgment proceedings.

TPI attempts to analogize this case to *FTC v. Loss Mitigation Services*, 2009 WL 10673186 (C.D. Cal. Dec 7, 2009), where a district court permitted intervention in a receivership case, but the comparison fails. Br.37. There, the would-be intervenor argued that a receiver's erroneous ownership determination caused it to take possession of a credit card reserve account pursuant to a court-ordered asset freeze. The district court permitted intervention on the issue of whether the receiver had erred on the question of who owned the account. *Loss Mitigation Servs.*, 2009 WL 10673186, at *4. Here, by contrast, the question is not whether TPI owned the account, but whether the Cardiffs controlled it—and TPI does not challenge the district court's conclusion that he did. The court did not need to resolve whether TPI had any ownership interest, a question that is separate

and independent from the pending action and can be resolved afterwards. ER 634.[11]

TPI's reliance on *SEC v. Lefebvre*, 2004 WL 2696731 (N.D. Cal. Mar. 31, 2004), is misplaced for a similar reason. Br. 39. As in *Loss Mitigation*, the question was whether the would-be intervenor owned the frozen funds. Once again, that is not the question here, and TPI does not challenge the factual finding of the Cardiffs' control that justified subjecting the funds to the asset freeze. Even if TPI could prove ownership, the money would remain part of the Receivership estate under the provisions of the TRO/PI.

Finally, TPI's current inability to use the $1.56 million CAD for operating expenses does not create a significantly protectable interest. Br. 37, 44. All creditors with monetary claims against a receivership estate lose access to the money held by the receiver. This Court, however, has declined to find such an interest sufficient to support intervention:

> A mere interest in property that may be impacted by litigation is not a passport to participate in the litigation itself. To hold otherwise would create a slippery slope where anyone with an interest in the property

[11] Indeed, TPI's actions demonstrate that it understood that its ownership claim raised an issue distinct from whether the disputed funds belonged in the Receivership estate. While the district court was considering that question, TPI brought a *separate* action in Canada seeking a declaration that it was the sole owner of the money. SER 181. Even if a Canadian court had ruled that TPI owned the funds, it would not have been enough to overcome the court's finding that Jason Cardiff *controlled* the money.

> of a party to a lawsuit could bootstrap that stake into an interest in the litigation itself.

*Alisal Water Corp.*, 370 F.3d at 920 n.3.

### 3. TPI's ownership claims are not impeded in the absence of intervention.

The record establishes that TPI will have the opportunity to assert its ownership claims in a post-judgment proceeding, if and when the district court holds Defendants liable. ER 635. TPI's assertions to the contrary are supported by neither law nor fact.

Courts routinely hold that would-be intervenors' interests are not impaired where a court has established another procedure by which they may assert their claims. *See Alisal Water Corp.*, 370 F.3d at 921; *CFTC v. Heritage Capital Advisory Servs., Ltd.*, 736 F.2d 384, 386-87 (7th Cir. 1984); *FTC v. Pricewert LLC*, 2010 WL 94264, *2 (N.D. Cal. Jan. 6, 2010). Indeed, summary proceedings satisfy the requirements of due process so long as the claimant has "fair notice and a reasonable opportunity to respond." *SEC v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986); *CFTC v. Topworth Intern. Ltd.*, 205 F.3d 1107, 1113 (9th Cir. 1999).

TPI's intervention would elevate its interest above all others, including defrauded victims and creditors, and would be contrary to the public interest and equity. A primary purpose of equity receiverships is to promote orderly and efficient administration of the estate by the district court for the benefit of all

creditors. *See SEC v. Wencke*, 783 F.2d 829, 837 n.9 (9th Cir. 1986); *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992) ("The government's and parties' interests in judicial efficiency underlie the use of a single receivership proceeding. … A summary proceeding reduces the time necessary to settle disputes, decreases litigation costs, and prevents further dissipation of receivership assets."). TPI's desire for special treatment would undermine that purpose.

Citing *Black & Veatch Corp. v. Modesto Irrigation District*, 2011 WL 4842319, at *10 (E.D. Cal. Oct. 12, 2011), and *SEC v. Hickey*, 322 F.3d 1123, 1133 (9th Cir. 2003), TPI maintains that it is unlike consumer victims or other creditors and should have its claim heard before any post-judgment claim proceeding. Br.41-42. In *Black & Veatch*, the would-be intervenor City of Modesto sought to be a *co-defendant* in a contract dispute where Modesto was the third-party beneficiary of the contract subject to litigation. 2011 WL 4842319, *1, *7-*8. Quite differently, TPI is not seeking to be a co-defendant and denies that it shares an interest with the Defendants. TPI has a claim for money in the Receivership estate, just like a creditor or a consumer. *Hickey* is not even an intervention case and, in any event, involved the question of whether a district court could freeze all of the assets of a third party based on a defendant's control. *Hickey*, 322 F.3d at 1133. Here, the district court ordered transferred only the

$1.56 million CAD in a specific TPI account over which the Cardiffs were signatories, not all TPI assets.

Finally, TPI says that its interests would not be protected because there is no post-judgment claims process. Br. 42. The district court, the FTC, and the Receiver, however, have all stated that such a process will occur, if and when Defendants are found liable. ER 635. TPI provides no basis to question that pledge. TPI also says that any such process will limit its ability to participate in discovery. Br. 42-43. The Receiver informed the district court, however, that as part of that process "everybody can have their discovery if they need it," ER 13, and based on that statement the court told TPI that it "will have its day in court to make certain claims and provide evidence to the court that suggests that your client was duped by the Cardiffs and the monies deposited are rightly" TPI's, ER 14-15.[12]

**4. TPI will represent its own interests if and when the district court considers its ownership claim.**

As the foregoing showed, the ongoing district court proceeding is not the forum for adjudicating TPI's asserted ownership interest in the $1.56 million CAD. TPI's claim can be heard at any post-judgment proceeding. At such time, TPI can

[12] As an example of the kind of harm it would suffer in a post-judgment proceeding, TPI cites the offering of third-party statements from a deposition at which TPI had no representation. Br. 43. Given the Receiver's statement that discovery will be available, TPI's example is pure speculation. Further, the cases cited by TPI involved evidence offered against defendants, not against a non-party. *Id.* (citing *Hoover v. Switlik Parachute Co.*, 663 F.2d 964, 966 (9th Cir. 1981); *Nelson v. Air & Liquid Sys. Corp.*, 926 F. Supp. 2d 1120, 1127 (C.D. Cal. 2013)).

make a claim and represent itself. It will not need to rely on the Cardiffs or the FTC. *See* ER 636. Accordingly, the question of whether the Cardiffs or the FTC could adequately represent TPI's interest is academic, and TPI's arguments on this issue (Br. 44-46) merit no response.

### C. The District Court Did Not Abuse Its Discretion when It Denied Permissive Intervention.

"Permissive intervention is committed to the broad discretion of the district court…." *Orange Cty. v. Air Cal.*, 799 F.2d 535, 539 (9th Cir. 1986). A district court may permit anyone to intervene who (1) files a "timely motion;" (2) "has a claim or defense that shares with the main action a common question of law or fact;" and (3) after exercising its discretion, the court does not believe "intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(1)(B); Fed. R. Civ. P. 24(b)(3). Like with intervention as of right, a finding of untimeliness will defeat permissive intervention. *See LULAC*, 131 F.3d at 1308. The district court did not abuse its discretion in denying TPI permissive intervention.

The FTC has already shown that the district court's untimeliness finding is factually sound and should not be disturbed. *See* pp. 36-39 *supra*. Regarding common questions of fact or law, TPI maintains that its "claim for the funds shares a common question of fact with the main action under Rule 24(b)(1)(b) in that the FTC claims that the funds were Cardiff assets and that TPI was a mere

continuation of Redwood Scientific." Br. 47. That statement is incorrect. The FTC sought and the district court froze the $1.56 million CAD because of Jason Cardiff's *control* over the funds as demonstrated by the fact that Cardiff was an authorized signer for the 3745 account. As shown above, Cardiff's control made the money part of the Receivership estate; the district court did not have to assess TPI's ownership.

The district court also concluded that TPI's intervention would be disruptive. It noted that allowing TPI to intervene would inappropriately elevate its interest over other claimants and consumers. ER 635. Since the question whether the $1.56 million CAD should be part of the Receivership estate had already been answered, and TPI could have its ownership claims heard in any post-judgment proceeding, the detriments of intervention outweighed any benefit. ER 636.

## CONCLUSION

The Court should dismiss Poujade's appeal in No. 19-56397 for lack of jurisdiction. Alternatively, for the reasons above it should affirm the district court's contempt orders. In No. 20-55066, the Court should affirm the district court's denial of TPI's motion to intervene.

Respectfully submitted,

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July 13, 2020

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Fed. R. App. P. 32(a)(7) and Circuit Rule 32-1, in that it contains 11,397 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

July 13, 2020

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief using the appellate CM/ECF system on July 13, 2020. All participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

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