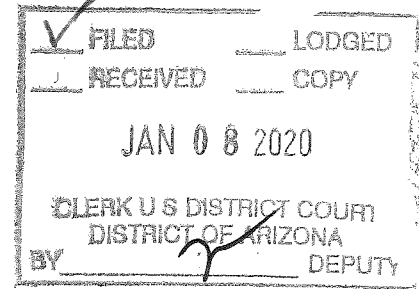


ALDEN F. ABBOTT
General Counsel

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



Attorneys for Plaintiff Federal Trade Commission

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

Federal Trade Commission,

Plaintiff,

v.

James D. Noland, Jr., a/k/a Jay Noland and J.D.
Noland, individually and as an officer of Success By
Media Holdings Inc. and Success By Media LLC;

Lina Noland, individually and as an officer of Success
by Media Holdings Inc. and Success By Media LLC;

Scott A. Harris, individually and as an officer of
Success By Media LLC;

Thomas G. Sacca, Jr., individually and as an officer of
Success By Media LLC;

Success By Media Holdings Inc., a corporation, also
d/b/a Success By Health and Success By Media; and

Success By Media LLC, a limited liability company,
also d/b/a Success By Health and Success By Media

Defendants.

SEALED

CV-20-00047-PHX-DWL

Case No. _____

**MEMORANDUM IN
SUPPORT OF FTC'S EX
PARTE MOTION FOR
TEMPORARY
RESTRAINING ORDER
WITH ASSET FREEZE,
APPOINTMENT OF
TEMPORARY RECEIVER,
LIMITED EXPEDITED
DISCOVERY, AND
OTHER EQUITABLE
RELIEF**

**DOCUMENT SUBMITTED
UNDER SEAL**

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INTRODUCTION

The Federal Trade Commission (“FTC”) requests the Court put an immediate halt to a nationwide pyramid scheme. Defendants, led by serial pyramid scheme promoter Jay Noland, bait entrepreneurial consumers into a financial abyss by telling them that they will attain “financial freedom,” and never have to work again, if they enroll as “Affiliates” in Defendants’ Success By Health (“SBH”) program and follow Noland’s instructions. SBH markets coffees, teas, and nutraceuticals through its Affiliates, but tellingly, Defendants instruct Affiliates that success depends not on the ability to find, and sell to, actual users of SBH products, but instead on recruiting new Affiliates. As a result, Affiliates enter an endless chain of recruitment, in which they can recoup their costs only by enrolling new Affiliates, who themselves must duplicate Defendants’ duplicity to break even. As in any pyramid scheme, the vast majority of Affiliates must be, and are, losing money at any given time. Unsurprisingly, rather than provide financial freedom, the four individual Defendants siphon cash into their own pockets. Through June 2019, the four individual Defendants had paid themselves \$1.35 million. SBH’s 5,000 non-employee Affiliates, by contrast, received payouts totaling just \$1.03 million (just over \$200 per Affiliate), despite spending over \$5.7 million (over \$1,100 per Affiliate) on Defendants’ products and “training.”

While consumers from 49 U.S. states, including Arizona, pursue the promises, Defendants take the money and run. After learning the FTC was looking into them, Defendants Jay and Lina Noland fled their \$1.2 million rented house for South America

in October 2019. The following month, Defendant Scott Harris put his house on the market for \$1.8 million and announced plans to join them. The FTC therefore moves the Court for an *ex parte* temporary restraining order to stop this ongoing fraud, freeze the Defendants' assets for consumer redress, and preserve evidence.

STATEMENT OF FACTS

I. JAY NOLAND'S HISTORY OF PROMOTING PYRAMID SCHEMES

Jay Noland, his false promises, and his pyramid schemes are not new to this Court. In 2000, the FTC sued him for using false promises of substantial income to enroll consumers in a separate pyramid scheme. *See FTC v. Netforce Seminars, et al.*, Dkt. No. 1, No. 00-2260-PHX-RCB (D. Ariz.) (PX 2 at 7 (Att. 1)). In response, Noland filed a "Request for Remedy" that borrowed arguments from the conspiracy-minded "sovereign citizen movement." *Id.* at 19 (Att. 2). Noland asserted that by writing his name in the case caption in all capital letters, the FTC had sued his "VESSEL," a legal entity "registered with the Department of Transportation in Puerto Rico," rather than his person, which was the "secured creditor/priority stockholder/holder-in-due-course" of his "VESSEL." *Id.* Noland threatened that a refusal by the Court to release his "VESSEL" by "immediately" dismissing the case would be a "commercial dishonor" that would force Noland to take Judge Robert C. Broomfield into "involuntary bankruptcy." *Id.*

The Court rejected Noland's arguments as "bizarre" and "entirely frivolous." PX 2 at 25 (Att. 3). Shortly thereafter, Noland settled, and the Court entered the parties' proposed Final Judgment and Order for Permanent Injunction (the "2002 Order") against

Noland. *Id.* at 29 (Att. 4). The 2002 Order barred Noland from further pyramid schemes and prohibited him from making misrepresentations, including about potential earnings.¹

Noland currently engages in the exact conduct that the Court ordered him to cease. As explained below, he continues to use false income claims to lure consumers into his latest pyramid scheme.² To make matters worse, Noland brazenly misuses the 2002 Order as a selling point. For example, shortly before launching SBH, Noland, referencing the Order, told consumers that the Government tacitly endorses his methods:

To have somebody that has generated billions of dollars, do y'all know how much that's paid me? . . . It's paid me so much, literally, the Government told me, this little country boy, I'm telling you, they called me up. ***[The Government] delivered me paperwork, and they said you cannot tell people how much you make because it unfairly entices them.*** . . . Yes, your Federal Trade Commission said, hey Jay, listen, you make people feel like they can run through walls. I had the Government officials tell me. I said, what's wrong with that? They said, don't worry about it. We want you to understand that you can't tell people how much you make So what we started doing instead of telling people how much we make, we just go, okay, last week, I made enough to buy that Maserati cash.

PX 1 at 249 (74:9-18) (Att. 27) (emphasis added); *see also id.* at 41 (¶ 59) (“[T]he Government says I can't tell people. It will unfairly entice people if I tell them. It's ridiculous.”), 36 (¶ 57(d)) (“I've made so much [money] that the Government has told me

¹ After the FTC has served Noland with its Complaint in this matter, the FTC plans to file a contempt motion against Jay Noland and his companies, Success by Media LLC and Success By Media Holdings Inc., for violating the 2002 Order.

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

I can't even talk to people about how much I make. . . . Let's just say I've made more than most people will make in 10 lifetimes, or maybe even 20."). Unsurprisingly, that description is pure fantasy. Noland has also proudly boasted of violating the Court's ban on pyramid schemes, telling the same audience:

Everything in this world is a pyramid. . . . Your church, pyramid. School system, pyramid. *People ask me what do I do. I said I build pyramids, man.* . . . That's what I do. I build some little pyramids. Except I'm at the top of the ones I built.

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

II. DEFENDANTS' FRAUDULENT SALES AND RECRUITING PRACTICES

Noland is at it again. He, along with co-Defendants Lina Noland (his wife), Scott Harris, and Thomas Sacca, operate SBH, which sells its products to and through a network of "Affiliates." Coffee is SBH's flagship product. The company claims it will sell \$24 billion of coffee in 5-7 years,³ built on what Defendants declare are four billion global consumers who spend \$50 per month on coffee. PX 1 at 547 (Att. 55). SBH's products contain Ganoderma, a mushroom that Defendants call the "king of herbs" for its myriad purported health benefits. *Id.* at 527-28 (Att. 55).

Defendants tell consumers that if they enroll as Affiliates in SBH, work hard, and follow "millionaire maker" Jay Noland's instructions, they will replace their job income in six months and become financially free in 18 months. By achieving financial freedom, Defendants claim, Affiliates can stop working while still reaping a perpetual stream of

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

million-dollar yearly, if not monthly, payments. Defendants instruct Affiliates that the key to achieving these goals is recruiting new Affiliates, rather than selling products to people who use them. In fact, Defendants routinely fail to ship products, telling Affiliates to “sell the vision” instead.

Defendants’ costly in-person training events are central to extracting money from Affiliates. These gatherings feature Noland creating an emotionally-charged atmosphere, which he then uses to push more products and trainings on attendees. Defendants’ recruitment-focused program is, plain and simple, a pyramid scheme. As a result, the vast majority of Affiliates are destined to, and do, lose money.

A. Defendants Promise Affiliates Substantial Income.

1. Defendants Promise Affiliates Financial Success.

Defendants repeatedly tell Affiliates and recruits that, if they do as instructed, they will replace their job income in six months and become financially free in 18 months, meaning they “never, ever have to work again.” PX 1 at 1038 (5:23-25) (Noland). This is reasonable and achievable for anyone, Defendants claim. For example, Noland tells Affiliates that they can have a “reasonable expectation” of replacing their job income within six months simply by being “result-oriented and focused.” PX 1 at 867 (10:3-6) (Att. 88). In one recruiting video, Noland says he makes “no promises,” but adds, “You’re going to be able to get out of that job in about six months if you pay close attention.” *Id.* at 169 (9:5-9) (Att. 18). Similarly, Noland tells Affiliates that if they “just appl[y] [his system], without fail, you should be able to be financially free in 18 months.” *Id.* at 1157 (8:3-6) (Att. 136). Sacca confirmed Noland’s promises, telling Affiliates, if

“we’re out there busting this thing for 12 to 18 months, it’s going to give us a lifetime of freedom.” *Id.* at 953 (41:6-8) (Att. 104). At least two of Defendants’ recruiting scripts direct Affiliates to claim, falsely, that “several people” are “achieving Financial Freedom already with our company.” *Id.* at 403-05 (Atts. 48, 49). One consumer confirms being told that he “could retire within 10-18 months” by following Defendants’ instructions. *Id.* at 1305 (Att. 162).

Consistent with these promises of financial freedom, Defendants repeatedly highlight that SBH will make Affiliates millions. They call Jay Noland the “Millionaire Maker.” *See, e.g.*, PX 1 at 25 (¶ 42(b)), 140 (Att. 10), 806 (9:13-14) (Att. 82). Noland, in turn, repeatedly promises to create “1,000 millionaires” through SBH. *See, e.g., Id.* at 38 (¶ 57(j)), 1093 (28:13-15) (Att. 127), 1233 (Att. 146). He boastfully titles many of his videos, “Millionaire Mentorship.” *Id.* at 42 (¶ 60(c)). During one such training, he encouraged his online audience to each type, “I’m going to be a millionaire in SBH.” *Id.* at 37 (¶ 57(e)). Close to 100 viewers did so, including Sacca, who wrote, “Millionaire thru SBH!! Guaranteed!” *Id.* In another training, Noland told Affiliates, “You will be a millionaire if you apply this training.” *Id.* at 39 (¶ 57(m)). Harris echoes these promises, telling Affiliates he has seen Noland “build way too many millionaires and multi-millionaires.” *Id.* at 593 (10:22-11:2) (Att. 61). Consumers confirm hearing similar claims. *See, e.g., id.* at 1337, 1339 (Att. 162).

Defendants repeat their “millionaire” mantra in writing. SBH’s script for group presentations, for example, trains Affiliates to tout the ability to make over \$1 million per

month in commissions and then immediately say “people become what we call ‘Coffee Millionaires;’” the instructions direct the Affiliate to “Laugh at this point.” PX 1 at 397 (Att. 47). Further, Defendants encourage Affiliates to sign a “Million Dollar Contract,” in which Affiliates agree to spend at least \$10,000 over 18 months by ordering \$500 in products per month and attending all corporate trainings. *Id.* at 885 (Att. 91).

Defendants tell recruits that SBH’s purportedly lucrative financial rewards are “achievable for the masses.” *Id.* at 398 (Att. 47). Although Noland sometimes equivocates by saying that not everyone *will* get million-dollar payouts, he explains “the masses” *could* if they just put the time in:

Now, what percentage of the people that are participating . . . in SBH are going to accomplish [\$1 million per year]? Minimal. Why? It’s not because it’s not possible. *The masses can do it.* The masses won’t do it.”

Id. at 1007 (7:13-18) (Att. 110) (emphasis added). On another training, Noland called his plan for earning millions “Direct Sales for Dummies,” adding that a “dummy can just go follow these instructions and create wealth.” *Id.* at 918 (29:8-12) (Att. 100).

At times, Defendants go even further, declaring that Affiliates can earn “unlimited income.” *See, e.g.*, PX 1 at 410 (Att. 50) (touting SBH’s “UNLIMITED Income” opportunity by telling Affiliates that you “can earn as much money as you want”); *id.* at 1115 (10:3-5) (Att. 131) (Noland calling SBH a “literal golden goose” and a “perpetual money and health machine”). Defendants’ “Prospecting System” instructs Affiliates, using the visual below (*id.* at 326 (Att. 38)), to ask a recruit how much money the recruit wants to make and then to say that they can make exactly that much. Affiliates then give

recruits two—extreme and unattainable—examples of “how we make money.” *See infra* Statement of Facts (“SOF”) Section II.C (explaining why these examples are unattainable).

PROSPECTING SYSTEM (4 CLOSING QUESTIONS)

1. “Now, how much money would you need to make on a monthly basis, for this business to be worth your time?”
2. “How many hours per week could you put towards working your SBH business in order to get to \$_____ / month?”
3. “How long (months or years) would you be willing to work _____ hours per week to reach \$_____ / month?”
4. “If I could show you how to get to \$_____ / month working _____ hours per week for _____ months, you’d be ready to getting going, wouldn’t you?”

IMPORTANT: Give 2 quick examples of “How We Make Money.”

- A. RETAILER- Show 100 Customer Example (100 x 3 boxes of product/mo/cust at \$45 profit per customer = \$4,500 per month, \$54,000/yr)
 - B. RECRUIT- 6 Tier Example at just 6 bags per week per Affiliate (10 Referring 10 and so forth...) (\$500 / \$3,500 / \$23,500 / \$173,500 / \$1,173,500/mo)
-

2. Defendants Promise Affiliates “Lifestyle Enhancements.”

Despite repeatedly promising consumers million-dollar incomes, Defendants sometimes adopt a “do as I say, not as I do” approach, telling Affiliates to avoid making “income claims” by instead referring to “lifestyle enhancements.” On one conference call, for example, Harris told Affiliates not to make “income claims,” but instead to say that they had been “able to make [their] car payment or house payment” or “walk away” from their jobs. PX 1 at 744 (8:12-22) (Att. 76). Defendants’ “Getting Started Training” bluntly tells Affiliates, “No Income Claims (Share Lifestyle Enhancements Instead).” *Id.* at 321 (Att. 38). Noland admits the purpose of this strategy is to avoid government scrutiny. *Id.* at 249 (75:1-8) (Att. 27).

In any event, Defendants’ “lifestyle” claims convey the same message as their claims of financial freedom, million-dollar earnings, or unlimited income: SBH is likely to make you rich. The company’s marketing materials show images of luxury yachts, sports cars, cash, and exotic vacations. *See, e.g.*, PX 1 at 12 (¶ 27(b)). Noland claims that his past trainees acquired “Lamborghinis; Rolls Royces; Bentleys; [and] multimillion-dollar homes in single-, double-, and trip-gated communities.” *Id.* at 37 (¶ 57(e)). In one recruiting video (*id.* at 179-80 (8:13-9:12) (Att. 20)), the SBH narrator asks consumers to:

Imagine taking back control . . . of your time, cash flow, and quality of life. You know . . . [t]hose people driving the finest cars, living in the nicest neighborhoods. Chances are they own their own business and they own their life. The good news is, you can too.

Defendants’ interpretation of what qualifies as a “lifestyle enhancement” claim rather than an “income claim” is without principle. Noland, for example, tells Affiliates that they can’t “say *exact* income to recruit,” but that they can say that one Affiliate made more money in two weeks that most people make in 4-5 months. PX 1 at 35-36 (¶ 57(a)); *see also id.* at 13 (¶ 29) (Noland claiming that his three-year-old-son is “already retired,” as are his son’s future grandchildren)

3. Defendants Undermine Their Already-Limited Disclaimers.

Defendants occasionally include disclaimers after making income or lifestyle claims, but they bury and then undermine those statements. For example, SBH’s “Business Overview” recruiting presentation has a small-print, inconspicuous statement that income is not “guaranteed” and “[i]ndividual income results may vary significantly.”

See, e.g., PX 1 at 121 (Att. 8). In initial marketing materials, these statements appeared in two millimeter type, at the bottom of a page where Defendants circled an example of an Affiliate earning a \$1.2 million monthly payout. *Id.* Later, Defendants slashed the disclaimer to one millimeter and lightened the font, while enlarging, bolding, and highlighting in a contrasting color the \$1.2 million monthly payout. *Id.* at 470 (Att. 52).

Even when Defendants do not bury their disclaimers, they undermine them. Defendants sometimes refer to their advertised monthly million-dollar payments as mere “theoretical examples.” *See, e.g.*, PX 1 at 121 (Att. 8), 208 (53:24-54:2) (Att. 25), 397 (Att. 47), 627 (27:8-11) (Att. 64). They then typically undo even that very limited caution by explaining that the example is only theoretical “[b]ecause you just ain’t done it yet” and adding, “But are there people that do it? . . . Yes. I got people in my network globally, they make that look silly.” *Id.* at 208 (53:24-54:5) (Att. 25); *see also* PX 1 at 1191 (9:5-9) (Att. 140) (“So if we talk about anything with theoretical examples, we say they’re theoretical because you haven’t done it yet.”). Robert Mehler, SBH’s former director of sales, has gone further, telling Affiliates that a five-figure monthly income was not a “theoretical example,” but instead a “fact” based on Noland’s past results. *Id.* at 642 (6:23-7:2) (Att. 66).

B. Defendants Tell Affiliates to Focus on Recruiting Rather than Retail Sales to Obtain Substantial Income.

Tellingly, Defendants compel Affiliates to focus on recruiting new Affiliates rather than on selling products to ultimate users. They do so through explicit instructions, the incentives of their compensation plan, and the obstacles they impose on retail sales.

1. Defendants Instruct Affiliates to Recruit.

a. Defendants’ “Four Steps to Success” Stresses Recruiting and Buying Products, but Omits Retail Sales.

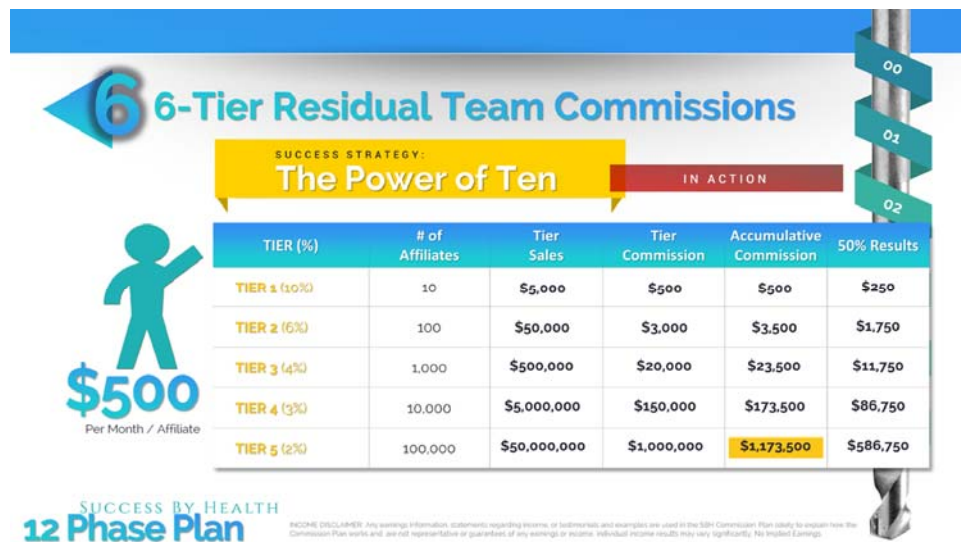
Defendants train Affiliates to follow “Four Steps to Success,” depicted in the visual below (PX 1 at 483 (Att. 52)):



The four steps, however, do not mention sales to actual users. Instead, Defendants tell Affiliates to (1) buy products (preferably packages that cost \$500 or \$1,995), (2) “be a product of the product” by setting a monthly auto-order of at least \$60 (or \$500 if seeking “financial freedom”), (3) build a team (i.e., recruit), and (4) duplicate their own efforts by teaching their downline team members to follow the same steps. *Id.* at 483 (Att. 52), 363 (Att. 39), 1093 (25:1-4) (Att. 127). For the third step, Defendants tell Affiliates to enroll two new Affiliates within 48 hours if they seek financial freedom, within one week if they are replacing their job income, and within 30 days if they are supplementing their income. *Id.* at 366 (Att. 39). Defendants label the fourth step, “duplication,” the “key to long term success as an SBH Affiliate.” *Id.* at 347 (Att. 39).

b. Defendants Promote Exponential (“Power of 10”) Recruiting.

Defendants describe recruiting 10 new Affiliates as the key to attaining financial freedom. For example, they highlight a “Power of 10” “success strategy” in which “Affiliates need to get ‘their 10’ Affiliate Team Members” and then teach new recruits to “do the same thing.” PX 1 at 468 (Att. 52). As show in the visual below, Affiliates achieve the “Power of 10” by recruiting ten new Affiliates as the their “Tier 1,” each of whom recruit ten new Affiliates as the original Affiliate’s “Tier 2,” and so on through Tiers 3-5. *Id.* at 469-70 (Att. 52).



This creates an exponential pyramid of Affiliates: Tier 1 has 10 Affiliates, Tier 2 has 100, Tier 3 has 1,000 Affiliates, Tier 4 has 10,000 Affiliates, and Tier 5 has 100,000. *Id.* Defendants use the visual below to show Affiliates they will make \$1,173,500 when each team member spends \$500 per month. *Id.* at 470 (Att. 52). For *one* person to obtain this \$1.2 million monthly payment, 110,000 people must each purchase \$500 per month in SBH products or induce others to do so.

After Affiliates join SBH, Defendants’ references to “getting ten” are ubiquitous:

- Harris told Affiliates, “*your ten-by-ten is the most important thing you can ever build in this company*. The most important thing you can do is think about it every day.” PX 1 at 1175 (26:16-19) (Att. 138).
- Sacca told Affiliates that the SBH commission plan is “driven 100%” by the “BAM Bonus,” which rewards achieving the Power of 10. *Id.* at 987 (11:13-24) (Att. 108).
- Noland told Affiliates: “*If you’re not creating a ten-by-ten, you’re not doing your job*. Until you get ten-by-tens, you got to be relentless [A]nybody that tells me that they want financial freedom and will not go . . . get these ten, they are an enemy.” *Id.* at 1014 (34:6-12) (Att. 110).
- In one video training session about “how to be a millionaire in SBH,” an impassioned Noland declared: “If people wanna be a dumbass [by declining to join SBH], let them be a dumbass! You don’t need everybody. . . . *You only need ten!*” *Id.* at 39 (¶ 57(m)).
- On a millionaire mentorship training, Noland said, “*All you gotta do is build a ten-by-ten-by-ten*” and that when the fourth tier is about “halfway done, you’re a millionaire per year.” *Id.* at 36 (¶ 57(b)).

c. Defendants’ Other Statements Emphasize Recruiting as “the Most Important Thing.”

At times, Defendants explicitly direct Affiliates to focus on recruiting instead of product sales. For example, Noland told Affiliates that the goal of one cash promotion was to focus them on “what you should be focusing on right now, which is new people getting into the company.” PX 1 at 850 (24:18-21) (Att. 86). In a later training, Noland added that Affiliates’ recruits must themselves become recruiters:

When a person joins, I’m like, “great, way to go.” But I’m not super fired up until that person recruits somebody else to join. When they recruit somebody else to join, I go, ‘Alright! Now okay, I’ve got somebody now. I’ve got me an inviter. *See the most important thing in this industry if you want residual income, you have to recruit inviters. If you don’t recruit inviters, you still have a job.*”

Id. at 41 (¶ 59) (emphasis added).

SBH’s employees and Affiliates march to Defendants’ recruiting drumbeat. SBH’s former director of sales, Robert Mehler, explained to Affiliates that while product sales could help Affiliates “make some extra, part-time money,” “recruiting is key” and Affiliates should spend their time building a “10x10x10x10x10.” PX 1 at 663 (20:12-21:6) (Att. 68). Similarly, during a recruiting pitch, one top Affiliate, Jo Dee Baer, said she would “gloss over retail” to spend more time on the purported benefits of recruiting. *Id.* at 276 (19:20-25) (Att. 30). Consumers confirm that they were pressured to recruit others into the scheme. *See, e.g., id.* at 1319, 1323, 1325, 1329, 1331, 1333 (Att. 162).

2. Defendants’ Compensation Scheme Prioritizes and Rewards Recruiting Over Retail Sales to Actual Product Users.

Even setting aside Defendants’ explicit instructions, SBH’s compensation plan plainly incentivizes Affiliates to spend their time recruiting rather than selling products. It does so in two key ways: (1) paying cash bonuses for recruiting and (2) requiring Defendants to build four- or five-tier teams to obtain meaningful commissions.

a. Defendants Pay Cash Bonuses for Recruiting.

Defendants pay Affiliates four types of lump-sum cash recruiting bonuses for enrolling new Affiliates who buy expensive products.

First, Defendants’ “Accelerator Bonus” pays a one-time \$75 bonus to any Affiliate who enrolls a recruit who buys a \$500 “accelerator pack”—containing assortments of the Company’s coffees, teas, and nutraceuticals—and pay smaller bonuses for further downline recruiting. PX 1 at 554 (Att. 55).

Second, Defendants’ “Power 500” and “Power 1000” bonuses reward rapid spending and recruiting upon joining SBH. Affiliates receive a \$500 or \$1000 bonus if they buy product packs of \$125 or more and then, within 14 days, recruit new members who meet certain purchase requirements. *Id.* at 557 (Att. 55).

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

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

b. The Vast Majority of “Team Commissions” Require Exponential Recruiting.

Defendants also require Affiliates to build extensive pyramids to make meaningful income and obtain the bulk of rewards. Affiliates earn “residual team commissions” based on purchases made through their own or their downline’s Affiliate websites or

“back offices.”⁴ In an example from Defendants’ main recruiting pitch, *see supra* page 12, 85% of earnings occur at Tier 5 (which contains the Affiliate’s recruits’ recruits’ recruits’ recruits’ recruits), and 98% of earnings occur at Tiers 4 and 5. *See* PX 1 at 469-70 (Att. 52). In that scenario, 90% of Affiliates (the 100,000 in Tier 5) must *lose* money because they have no downline from which to recoup their costs. *See* PX 3 at 33-35.

3. Defendants Undermine, and Fail to Reward, Retail Sales to Users of the SBH Products.

Affiliates can sell SBH products either in-person or online through their SBH-controlled website. Consistent with a focus on recruitment over sales, however, Defendants put little emphasis on, and discourage these sales in at least five ways.

First, Defendants make any meaningful amount of in-person sales all but impossible. They do so by selling the products to the public at the same “wholesale” price at which Affiliates must buy. *See, e.g.*, PX 1 at 408 (Att. 50). Thus, although Defendants tell Affiliates to buy products at “wholesale,” apply a markup, then sell to end users at a “retail” price, *id.*, consumers have no reason to pay “retail” when they can simply buy “wholesale” from SBH. Indeed, Defendants tell Affiliates to instruct their “retail” customers on how to cut the Affiliate out of the process and buy at wholesale from SBH. *See* PX 1 at 378 (Att. 43).

Second, Defendants do not reward Affiliates for any in-person sales that may occur. There is no tracking or reporting of those sales. PX1 at 46-47 (¶ 65(k)). Instead,

⁴ Affiliate “back offices” are password-protected websites managed by SBH through which Affiliates access training materials, track earnings, and buy products. PX 1 at 19 (¶ 36(a)).

Affiliates simply earn whatever profit they can by applying a “markup,” *see* PX 1 at 408 (Att. 50), which as just indicated is not economically feasible. (In fact, although SBH treats in-person sales as part of its Affiliate commission plan, anyone (including non-Affiliates) can buy SBH’s products at “wholesale” and then resell them.

Third, online sales to non-Affiliates are not encouraged. Defendants instead tell Affiliates to meet purchase thresholds for SBH ranks⁵ by buying expensive products themselves rather than by selling products. For example, with just under four hours left in one 30-day qualification period, Noland told Affiliates with \$500 in volume to buy \$14,500 in additional products so they could reach a higher rank. PX 1 at 976 (10:5-24) (Att. 106). Similarly, Noland instructs Affiliates that a “great way” to improve their rank is “through your own personal purchases.” *Id.* at 20-21 (¶ 36(b)(iii)). Harris, moreover, admits that Affiliates are holding large volumes of unsold inventory, *id.* at 684 (28:9-19) (Att. 70), but nevertheless encourages further inventory loading by bragging that he and Noland previously carried around “\$25,000 or more in products,” and explaining that he used to spend \$2,000-3,000 to qualify for higher ranks. *Id.* at 684 (30:11-22) (Att. 70), 31 (¶ 54(b)).

Consumers confirm that Defendants pressured them to buy excess products in order to rank advance, including by threatening them with “remov[al] from the company.” PX 1 at 1303 (Att. 162); *see also id.* at 1321 (Noland “[w]ants everybody to

⁵ Affiliates only become eligible for certain rewards by achieving certain “ranks” within SBH. The current 11 ranks range from “Business Affiliate” (“BA”), which requires \$5,000 in monthly purchase volume from the Affiliate and the Affiliate’s downline, to “5 Star Diamond,” which requires \$1.25 million in monthly purchase volume from the Affiliate and the Affiliate’s downline. *See, e.g.*, PX 1 at 507-08 (Att. 54).

order excessive inventory or they don't matter.”), 1323 (“I was also pressured each month to hit a rank, and to do ‘whatever’ it took to do this.”), 1329 (“I have been ‘encouraged’ to spend at least \$500/[month] each month and pressured to spend 3 or 4 times that much”), 1331 (“I even received a phone call at 1 am at the end of the month pressuring me . . . to buy product and hit a rank.”).

As a result, even online sales to non-Affiliates—on which, unlike in-person sales, Affiliates receive an 8-10% commission—are an afterthought within SBH and are rare. Over 95% of SBH product purchases, by value, are by Affiliates. PX 5 at 18 (¶ 30). The average purchase amount for Affiliates, moreover, is approximately \$300, suggesting that these sales are not for personal consumption, and overall purchases double on the last day of the rank-qualification period, suggesting that Affiliates only buy products to hit ranks. *See* PX 5 at 18-19 (¶¶ 31(a), 33). In fact, online sales to non-Affiliates were not even available until one year after SBH’s launch. PX 1 at 35 (¶ 56(d)) (announcing start of these sales). Until that time, non-Affiliates could only obtain products from SBH directly (in which case no Affiliate receives credit) or from in-person purchases from Affiliates (which are not tracked and are unsustainable for the reasons described above).

Fourth, to the extent that Defendants do promote sales to non-Affiliates, they do so as a recruiting strategy, not as a sustainable income strategy. On training calls, in written materials, and in videos, Defendants repeatedly urge Affiliates to convert customers to Affiliates. *See, e.g.*, PX 1 at 366 (Att. 39), 792 (26:16-27:4) (Att. 80), 829 (23:21-24:3) (Att. 84). Defendants’ *Success By Health: The Mag* tells Affiliates that their

“best Affiliate will be someone who was a satisfied customer first,” in a section that purportedly encourages retail sales. *Id.* at 1275 (Att. 157).

Fifth, Noland admits the obvious: the products are, in fact, irrelevant to consumers’ quest for financial freedom. Shortly before launching SBH, Noland (with Harris in attendance) explained to consumers, “[Y]ou can plug any company or product into [Noland’s] process, and you can be free financially if you want to be.” PX 1 at 235 (19:4-6) (Att. 27). Similarly, Noland told SBH Affiliates not to complain about product shipping delays because they should simply “sell the vision” (*i.e.*, the business opportunity). PX 1 at 37 (¶ 57(f)). Noland, in fact, explained that a lack of products is actually a *benefit* to Affiliates because “the more you need to have in your hand, the less you get to have in your future” and “the bigger vision you sell, the bigger paycheck you get.” *Id.* at 38-39 (¶ 57(j)); *see also id.* at 1230 (Att. 145) (Noland boasting that a prior team had sold \$1 million without having any product); *id.* at 31 (¶ 54(a)) (having products causes Affiliates to “lose the faith” in selling the vision).

C. SBH Affiliates Do Not Earn Substantial Income.

Defendants’ claims that the “masses” can make substantial income by enrolling in SBH and following Defendants’ instructions are false. In fact, no Affiliates have received substantial income, PX 5 at 17 (¶ 28), and very few, if any, could ever do so.

Dr. Stacie Bosley, a Ph.D. in Applied Economics and an expert on multilevel marketing who previously has testified in that capacity in this District, reviewed Defendants’ compensation plan and marketing materials. *See* PX 3. She determined that the plan creates a perpetual chain of recruitment and that, as a result, it is a “money-

transfer scheme that siphons money from later entrants to compensate earlier entrants, delivering easily foreseen losses (from a structural perspective) to the vast majority of participants.” *Id.* at 4 (¶ 10). According to Dr. Bosley’s modeling, 90% of people must be losing money in SBH at any given time. *Id.* at 33-35.

Consumers’ actual results support Dr. Bosley’s conclusions. An FTC data analyst reviewed payments to and from SBH for a two-year period, from July 1, 2017 through June 30, 2019. *See* PX 5.⁶ The data shows that SBH’s nearly 5,000 Affiliates received a total of \$1.03 million (just over \$200 per Affiliate), an especially paltry sum because those Affiliates purchased over \$5.7 million (over \$1,100 per Affiliate) in SBH products and trainings to earn those payouts. *Id.* at 17 (¶ 28). Less than two percent of the approximately 5,000 Affiliates, *i.e.*, 81 Affiliates, received more money from SBH than they paid to SBH. *Id.* at 22 (¶ 37). That “lucky” two percent received, on average, a net \$2,297 over an average period of 283 days between their first and last transactions (about \$245 per month). *Id.* Even the ten Affiliates who netted the most from SBH netted, on average, just under \$14,000 over an average of 568 days between their first and last transactions (about \$770 per month)—a far cry from the \$1,173,500 per month

⁶ The FTC did not have direct access to SBH’s accounting software, so instead replicated payments based on records subpoenaed from companies SBH uses. The FTC analysis represents approximately 90% of all payments involving consumers to or from SBH’s main bank account; an FTC data analyst developed a methodology to identify whether or not a consumer is an Affiliate and whether they were paying for a product or a training. “Affiliates” in this dataset excludes the four individual Defendants. PX 5 at 14-15 (¶¶ 23-25). Affiliate income excludes amounts accrued but not yet disbursed, which stood at \$153,434.16 as of December 31, 2018, *id.* at 15 (¶ 25).

Defendants repeatedly emphasize. *Id.* The four individual Defendants, meanwhile, received a total of \$1.35 million. PX 5 at 15-16 (¶ 26).

As if the scheme’s pyramid structure were not bad enough, Defendants frequently fail to honor the terms of their commission plan. An undercover FTC investigator, for example, made purchases that entitled him to at least \$20 in commission. PX 1 at 47, 49-52 (¶¶ 67, 70, 75). SBH, however, never paid that commission or credited it to the investigator’s SBH “eWallet.” PX 1 at 47, 49-52, 54 (¶¶ 67, 70, 75, 79). Defendants also ignored the investigator’s email about the missing commission. *Id.* at 52 (¶ 76). Similarly, Affiliates complain that they are “not receiving [their] commission checks,” despite having “tried multiple times to contact support.” *Id.* at 1307 (Att. 162); *see also id.* at 1291 (“have yet to receive my commission check”), 1313 (SBH has been “shorting people’s commission checks”).

D. Defendants Use “Training” Events to Extract More Money from Affiliates and to Condition Them to Pay More into the Pyramid.

Defendants consistently pressure Affiliates to pay hundreds or thousands of dollars to attend multiple Jay Noland “training” events. Over a two-year period, consumers paid more than \$1.2 million to attend these trainings or to access online training materials—approximately 25% all money they paid to SBH. PX 5 at 17 (¶ 28). During these events, Defendants use intense rhetorical and emotional appeals with bright lights, loud music, dancers, and flashy visuals to extract even more money from consumers.

Defendants’ pressure to attend events takes a variety of forms. In a “1 Year Commitment Form,” for example, new Affiliates agree to attend “all Major Corporate

Events.” PX 1 at 372 (Att. 41). Similarly, Defendants’ “Million Dollar Contract” requires Affiliates to “attend all SBH corporate trainings and events no matter what.” *Id.* at 885 (Att. 91). Sacca said of one event—with \$3,000-5,000 tickets—“*[t]here’s no way you can fail* if you utilize the training that Mr. Noland is going to give us” *Id.* at 700 (8:20-22) (Att. 72). Noland agreed, telling Affiliates the only way they could fail to get wealthy if they and their downline teams attended was “to shoot yourself in the head.” *Id.* at 31-32 (¶ 54(c)). A promotional video for the event featured images of sports cars, luxury yachts, and a woman showering herself with money (PX 1 at 12 (¶ 27(b)):



Defendants also pressure Affiliates to take on debt to attend SBH events (and buy products). Prior to a Florida event, Harris told Affiliates they should max out credit cards and take out loans because attending “is what it takes . . . to make it to the top,” adding:

I had someone tell me yesterday, they said, “Look, if I do this, I’m gonna have to get a loan to be able to go there.” And I said, “*Oh, so it’s not worth getting a loan to come here and build something*”

that's going to take care of your family for generations. Right, I mean yeah! I would get a loan if I needed one. Guess what I did back in the 1990s [in a prior multilevel marketing program]? I got loans, I increased my credit card . . . to the point where I couldn't even use them no more. . . . I borrowed money from people in my family and from some of my friends. . . .

PX 1 at 934 (6:20-7:9) (Att. 102); *see also id.* at 32 (¶ 54(d)) (Sacca boasting that consumers “are using multiple credit cards to get to Icon because they . . . see the value”).

Consumers report that Defendants press them to pay for and attend these events or “be removed from the company.” PX 1 at 1303 (Att. 162); *see also id.* at 1285. One consumer spent \$11,000 on trainings because it was the “only way for me to be allowed to stay with SBH.” *Id.* at 1317 (Att. 162); *see also id.* at 1319, 1325.

Defendants' training events usually take place in hotel conference rooms and feature an intense Noland creating a frenzied atmosphere. There is chanting, dancing, crying, and Affiliates standing on chairs shouting at each other. The events generally end with Noland leading the crowd in a raucous celebration, such as the one pictured below PX 1 at 9 (¶ 25(b)):



The impact on attendees is apparent. In one video, a woman is almost in tears when she attests, “every single time [Jay Noland] makes me tear up because he pulls all that sincerity out. You are, just, totally not doing yourself justice if you don’t sit and give Jay the time that he deserves. Your life will *totally* be different.” PX 1 at 10 (¶ 25(f)). At another event, a woman says, “I met Jay Noland and realized that my life has been completely changed.” *Id.* at 11 (¶ 25(h)). At a “RED” event, one consumer attests that “everything that we’re learning here at Mr. Noland’s RED event has been life-changing,” while another calls it, “amazing, it’s mind-blowing.” *Id.* at 8-9 (¶ 25(a)). Yet another man describes how Noland “kinda gets subconsciously into you.” *Id.* At a Dallas event, a woman says how “this training has completely transformed my way of thinking. And I, I’m ready to go out there and conquer.” *Id.* at 10-11 (¶ 25(g)).

Caught up in this frenzied atmosphere, attendees do not “conquer,” but instead succumb to Defendants’ solicitation to spend more money on products and tickets to future events. PX 5 at 23-24 (¶ 39).

E. Defendants’ Shipping and Refund Policies and Practices Exacerbate the Harm Caused by Their Pyramid Scheme.

Consistent with their focus on recruitment rather than retail sales, Defendants, by their own admission, routinely wait months to fulfill product orders, if they do so at all. They nevertheless refuse to refund Affiliates, even for items never delivered.

Defendants offer vague, hidden shipping times to consumers ordering products online. Rather, buried in SBH’s terms and conditions—which are themselves buried in a hyperlink in the footer of SBH’s website—the company states that its products “usually”

ship within 48 hours, but may not ship for up to 60 days “or longer.” PX 1 at 6 (¶ 19(b)), 92 (Att. 6). In Affiliates’ back offices, Defendants’ state that products ship within “48-72 hours” and add the “60 day or more” exception only in a separate section about refunds. *Id.* at 580, 582 (Atts. 56-57).

Defendants fail to meet even these vague projections. Multiple consumers report never receiving products or waiting months for delivery. *See* PX 1 at 1291, 1293, 1299, 1303, 1311, 1319, 1329, 1331, 1335 (Att. 162). Defendants, for example, sold consumers a \$5,200 “Global Founder’s Pack,” but in some cases never shipped a single product from the pack. *See id.* at 1319, 1329, 1335; *see also id.* at 1303 (referencing “\$20-5,000 orders that were never fulfilled”).

Defendants sometimes admit to prolonged shipping delays. In mid-February 2018, Jay Noland referenced 200 unfulfilled “back orders” from December 2017 and January 2018. PX 1 at 38 (¶ 57(i)). In October 2018, he admitted that SBH sold out of all products for a “month, month-and-a-half” at the beginning of 2018. *Id.* at 35 (¶ 56(e)). At the start of that delay, Noland explained that he would not stop taking orders when products sold out, even after receiving complaints. *Id.* at 37 (¶ 57(f)). He also admitted that SBH would “run out of product from time to time,” but told Affiliates “don’t worry about it, keep ordering, keep moving, keep pushing.” *Id.* at 36 (¶ 57(c)).

Defendants do not offer consumers the opportunity to cancel delayed orders, nor do they provide refunds. In fact, their policy—again hidden in terms and conditions—is to provide no refunds “for any reason whatsoever.” PX 1 at 93 (Att. 6). Unsurprisingly,

Defendants, by Jay Noland’s admission, had “a crazy amount” of people asking about shipping delays. *Id.* at 40 (¶ 57(o)); *see also id.* at 37 (¶ 57(f)) (Noland acknowledging receipt of eight complaints in prior four or five days about delays). Noland blames these complaints on “terrible leadership,” not by himself, but by Affiliates, and threatens to terminate anyone if they or their downline complain:

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

Id. at 40 (¶ 57(o)); *see also id.* at 38 (¶ 57(i)) (“If you complain, great chance you’re going to be terminated. Out. Bam! . . . Can’t complain, it’s one of the rules.”). Noland has referred to consumers concerned about not receiving products as “little gnats.” *Id.* at 40 (¶ 57(o)). Consumers confirm that Defendants did not permit complaints because “Mr. Noland said that questioning him created a negative environment.” PX 1 at 1331 (Att. 162); *see also id.* at 1303 (“[W]e were being removed from this company because we questioned where our products were.”).

Defendants further restrict consumers’ ability to recover money paid for undelivered products by barring Affiliates from seeking chargebacks through their credit card companies. Defendants’ “terms and conditions” state that Defendants are entitled to confess a judgment against any Affiliate who files a chargeback, and that the judgment amount will be three times the amount of the chargeback or \$1,000—whichever is

greater—plus the chargeback amount, along with costs and attorneys’ fees. PX 1 at 93 (Att. 6). In one training, Jay Noland threatened to report Affiliates to the police for requesting chargebacks. PX 1 at 34 (¶ 56(a)). Defendants’ threats are not idle: in December 2018, Success By Media Holdings Inc. sued nine Affiliates in Nevada state court, alleging, among other things, that they sought 12 chargebacks (*i.e.*, a refund through their credit card company). PX 2 at 144, 152 (Att. 8).

III. DEFENDANTS’ FRAUD HARMS CONSUMERS

Using the deceptive claims, threats, and fraudulent business model described above, Defendants collected approximately \$6 million from consumers between July 2017 and June 2019. PX 5 at 18 (¶ 30). An examination by an FTC data analyst shows that Affiliates transferred \$5.7 million to SBH during that two-year period—primarily for product purchases and event tickets—but received only \$1.03 million in Affiliate rewards. *Id.* at 17 (¶ 28); *cf.* PX 1 at 354 (Att. 30) (Defendants claiming to pay commission of “up to 50% of every dollar of sales”).

Defendants prey on consumers who struggle to get by day-to-day and push them to turn over what savings they may have and go deeper into debt. One former Affiliate described Noland telling them to “use other people’s money” by spending on credit cards, “[b]orrow[ing] from friends and family, [and] even . . . sell[ing] things to put more into the company.” PX 1 at 1323 (Att. 162). Another former Affiliate described losing “thousands of dollars” in SBH and being “pressured to spend money I didn’t have [and] attend events I couldn’t afford.” *Id.* at 1319 (Att. 162). That Affiliate added that Noland “encourages individuals to quit their jobs and focus solely on Success By Health.” *Id.*

The SBH magazine features a quote from one consumer who did just that: “When I was introduced to SBH, I had 3 jobs and debt from years of never being taught how to properly invest my income. Within 2 weeks, I had quit my job and was on a plane to Las Vegas,” where SBH is headquartered. PX 1 at 1268 (Att. 157). Through June 2019, that consumer has paid SBH \$12,000 but has received just \$2,000 from the company in compensation. PX 5 at 23 (¶ 38).

The results of Defendants’ strategy are predictably devastating. A former Affiliate told the FTC that “many of [his recruits] have become broke financially [because Noland] continues to push people to spend more money in his company.” PX 1 at 1327 (Att. 162); *see also id.* at 1303 (Defendants “forced” spending on Affiliates “until [they] maybe could barely pay their own bills”), 1297 (“[S]o many are now homeless and broke because [of Noland’s] actions.”).

IV. THE DEFENDANTS

A. The Corporate Defendants

Defendants conduct their fraud through two corporate entities: **Success By Media LLC** (“SBM LLC”) and **Success By Media Holdings Inc.** (“SBM Holdings”). Success By Health is an “unincorporated division” of SBM LLC, which itself is a wholly owned subsidiary of SBM Holdings. PX 2 at 211, 221 (Att. 9). Jay and Lina Noland formed SBM Holdings in August 2018 for the purpose of “manag[ing] and more formally consolidat[ing] the financial operations of seven subsidiaries formally all under Success By Media, LLC.” *Id.* at 211 (Att. 9). The two companies “operat[e] as one corporation,” *id.*, including by, for example, consolidating their funds in shared bank accounts and

sharing common controlling personnel (*i.e.*, the Nolands). PX 4 at 4 (¶ 12) (SBM LLC bank statements reflect all cash reported in Success By Media financial statements).

B. The Individual Defendants

Jay Noland and **Lina Noland** formed SBM LLC and SBM Holdings Inc. PX 1 at 61 (Att. 1), 71 (Att. 2). They are the sole directors of SBM Holdings, *id.* at 71 (Att. 2), and are the sole managers of Success by Media LLC, *id.* at 67 (Att. 1). They also are the sole signatories on the entities' shared bank accounts. PX 6 at 2, 5, 14. Jay Noland owns 71 percent of SBM Holdings and serves as its CEO and as the CEO of Success by Media LLC. PX 2 at 194, 196, 198, 210 (Att. 9). He also identifies himself as the CEO of Success By Health, PX 1 at 110 (Att. 8), and actively recruits and trains Affiliates, including by making the deceptive statements described above, *see supra* Section II.A. Together, Jay and Lina Noland are the sole administrators of the SBH Affiliates-only Facebook page, which Defendants extensively use to promote their scheme. PX 1 at 883 (Att. 90).

Lina Noland regularly posts to the SBH Facebook group and publicly to promote the company; she identifies herself as “Co-Owner at Success By Health.” PX 1 at 883 (Att. 90), 1234-45 (Atts. 147-52). The Nolands revised SBH's commission plan together. *Id.* at 719 (10:11-14) (Att. 74). Lina Noland, moreover, developed an SBH magazine for recruiting purposes, *id.* at 1237 (Att. 148), and also worked to expand SBH to Spanish-speaking consumers, *id.* at 1235, 1241, 1245 (Atts. 147, 150, 152). Harris summarized the Nolands' central role in SBH:

[Jay Noland] is the CEO, the founder, he put everything together, he's working the products, he's working with website stuff, he's working with pretty much everything you see. ***Mr. Noland and his wife Lina Noland, they're all involved in all of it.***

PX 1 at 34-35 (¶ 56(c)) (emphasis added).

Scott Harris and **Thomas Sacca** have had senior roles in SBH through its existence, and Jay Noland credits them with playing a pivotal role in SBH's launch. PX 1 at 1117 (18:8-20:20) (Att. 131). Harris has served as a senior field advisor, executive vice president, and president of SBH and Success By Media LLC, and Sacca has been a senior field advisor, sales director, chief sales officer, and chief visionary officer for the same entities. *Id.* at 1228 (Att. 144), 351 (Att. 39), 453 (Att. 52), 140 (Att. 10). Noland has described Harris and Sacca as "shareholders" in SBH with whom he strategizes. *Id.* at 718 (6:12-19) (Att. 74). He also described Harris and Sacca as key in revising SBH's commission plan. *Id.* at 719 (10:5-11) (Att. 74). Harris and Sacca routinely make the above-described false income claims in hundreds of company conference calls and Facebook live sessions. *See supra* Section II.A; PX 1 at 28, 42 (¶¶ 44, 61).

ARGUMENT

The FTC seeks *ex parte* preliminary injunctive relief, including an asset freeze, appointment of a temporary receiver, immediate access to Defendants' business premises, and a writ of *ne exeat republica* as to Jay Noland to prevent Defendants from dissipating assets and destroying evidence. As set forth below, the evidence overwhelmingly supports entry of the proposed TRO.

I. THIS COURT HAS AUTHORITY TO GRANT RELIEF.

This Court has the authority to grant preliminary and permanent injunctive relief pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). *See, e.g., FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1110-11 (9th Cir. 1982). With that authority comes the power to “grant any relief necessary to accomplish complete justice.” *Id.* at 1112-13. Court in this District frequently have granted the same relief that the FTC seeks here—an asset freeze, the appointment of a receiver, immediate access to business records, and expedited discovery.⁷ District courts have also exercised their equitable authority to issue writs *of ne exeat republica*.⁸

⁷ *See, e.g., FTC v. Hite Media Group LLC, et al.*, No. 18-cv-2221-SPL, Dkt. No. 14 (D. Ariz. July 17, 2018); *FTC v. Blue Saguaro Marketing LLC, et al.*, No. 16-cv-3406-SPL, Dkt. No. 22 (D. Ariz. Oct. 11, 2016); *FTC v. Advertising Strategies LLC, et al.*, 16-cv-3353-DJH, Dkt. No. 18 (D. Ariz. Oct. 4, 2016); *FTC v. Vemma Nutrition Co., et al.*, 15-cv-1578-JJT, Dkt. No. 25 (D. Ariz. Aug. 21, 2015); *FTC v. Money Now Funding LLC, et al.*, No. 13-cv-1583-ROS, Dkt. No. 13 (D. Ariz. Aug. 5, 2013); *FTC v. Am. Business Builders LLC, et al.*, No. 12-cv-2368-GMS, Dkt. No. 19 (D. Ariz. Nov. 6, 2012); *FTC v. ELH Consulting LLC, et al.*, No. 12-cv-2246-FJM, Dkt. No. 10 (D. Ariz. Oct. 22, 2012); *FTC v. Ambrosia Web Design LLC, et al.*, No. 12-cv-2248-FJM, Dkt. No. 13 (D. Ariz. Oct. 22, 2012); *FTC v. N. Am. Mktg. & Assocs.*, No. 12-cv-0914-DGC, Dkt. No. 16 (D. Ariz. May 2, 2012); *FTC v. Premier Nationwide Corp., et al.*, No. 12-cv-0009-GMS, Dkt. No. 13 (D. Ariz. Jan. 5, 2012) (no request for immediate access or receiver); *FTC v. Freedom Foreclosure Prevention Svcs., LLC*, No. 09-cv-1167-FJM, Dkt. No. 16 (D. Ariz. June 1, 2009); *FTC v. Helping Hands of Hope, Inc., et al.*, No. 08-cv-0909-JAT, Dkt. No. 28 (D. Ariz. May 13, 2008).

⁸ *FTC v. Ecological Fox, LLC, et al.*, No. 18-cv-3309, Dkt. No. 13 at 8-9, 25-26 (D. Md. Nov. 5, 2018); *FTC v. Trudeau, et al.*, No. 03-cv-3904, Dkt. No. 699 (N.D. Ill. June 25, 2013); *SEC v. Providence Fin. Investments, Inc., et al.*, No. 16-cv-1877, Dkt. No. 68 (D. Minn. Aug. 25, 2016); *SEC v. Pension Fund of Am. L.C., et al.*, No. 05-cv-20863, Dkt. No. 24 (S.D. Fla. Apr. 4, 2005).

II. THE EVIDENCE JUSTIFIES ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

Section 13(b) of the FTC Act allows a district court to grant the Commission a preliminary injunction “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b). The FTC, unlike private plaintiffs, need not establish irreparable harm. *See FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1233 (9th Cir. 1999). Instead, the Court “must (1) determine the likelihood that the Commission will ultimately succeed on the merits and (2) balance the equities.” *Id.* Here, the FTC satisfies both prongs of the preliminary injunction standard.

A. The FTC Is Likely to Prevail on the Merits.

To establish a likelihood of success, the FTC need only present evidence that it has “some chance of probable success on the merits.” *FTC v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989). The evidence relied upon by the Court at this stage may include inadmissible evidence, including hearsay affidavits. *See, e.g., Flynt Dist. Co. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).

Here, the evidence unequivocally establishes that the Defendants violated the FTC Act both by operating a pyramid scheme and by promoting the scheme using false promises of substantial income. The evidence further establishes that Defendants violated the FTC’s Merchandise Rule and Cooling-Off Rule through their refusal to provide refunds when legally required to do so. Additionally, SBM LLC and SBM Holdings are jointly and severally liable for these violations because they are a common

enterprise, and the individual Defendants are jointly and severally liable because they had authority to control the corporate Defendants and knowledge of their unlawful acts.

1. Defendants Violate the FTC Act By Operating a Pyramid Scheme.

Section 5(a) of the FTC Act prohibits “unfair or deceptive acts or practices in or affecting commerce.” 15 U.S.C. 45(a). Operating a pyramid scheme “constitutes an unfair or deceptive act or practice” in violation of Section 5(a). *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 880 (9th Cir. 2014) (citing *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1178, 1181 (1975)). Pyramid schemes are “inherently fraudulent” because they “must end up disappointing those at the bottom who can find no recruits.” *Webster v. Omnitrition Int’l, Inc.*, 79 F.3d 776, 781 (9th Cir. 1996).

To prove the existence of a pyramid scheme, the FTC must prove that participants pay money to SBH “in return for which they receive (1) the right to sell a product and (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users.” *BurnLounge*, 753 F.3d at 883. The evidence establishes both elements.

a. Participants in SBH Pay Money in Return for the Right to Sell a Product.

Defendants require Affiliates to pay a \$49 annual fee to join SBH, which entitles Affiliates to sell SBH products through an SBH-controlled website. PX 1 at 19 (¶ 35). This satisfies the first element of the pyramid test.

b. Participants in SBH Pay Money in Return for the Right to Receive Recruiting-Based Rewards.

The second prong of the pyramid test is “the *sine qua non* of a pyramid scheme” and requires proof that Affiliates receive rewards based on recruiting additional participants rather than selling products to ultimate users. *See BurnLounge*, 753 F.3d at 883-84. Thus, a pyramid scheme exists where the “mere structure of the scheme suggests that [the company’s] focus was in promoting *the program* rather than selling *the products*.” *Id.* at 884. Courts generally refer to sales of products to ultimate users as “retail” sales. *See, e.g., Omnitrition*, 79 F.3d at 782. Purchases by Affiliates generally are not considered retail sales if those Affiliates would not have purchased the products but for the income opportunity. *FTC v. Vemma Nutrition Co.*, No. 15-cv-1578-PHX-JJT, 2015 WL 11118111, at *3 (D. Ariz. Sept. 18, 2015).

Here, Affiliates’ rewards are based almost exclusively on recruiting rather than retail sales because (1) Defendants pay rewards based entirely on *purchases from* SBH, rather than *sales to* ultimate users and (2) essentially all rewards that Defendants pay are based on recruitment or on purchases by Affiliates in pursuit of the business opportunity rather than for personal consumption.

First, SBH’s commission plan necessarily creates a pyramid scheme because SBH does not condition *any* of its rewards on whether Affiliates are selling products to ultimate users. In *Omnitrition*, the Ninth Circuit explained that “compensation is facially ‘unrelated to the sale of the product to ultimate users,’” and thus creates a pyramid scheme, where “it is paid based on the suggested retail price of the amount

ordered from Omnitrition, rather than based on *actual sales* to consumers.” 79 F.3d at 782 (emphasis in original). Here, SBH does just that. It bases its compensation on amounts ordered from the company, without regard to who is ordering or for what purpose. PX 1 at 550-66 (Att. 55). SBH undertakes no effort to track whether Affiliates make sales to ultimate users. *Id.* at 46-47 (¶ 64(j-k)).

Second, essentially all rewards paid by Success By Health are recruitment-focused. *See supra* SOF Section II.B. Many rewards pay consumers cash in direct exchange for recruiting new members. *See supra* SOF Section II.B.2. Others rewards—such as the percentage-based “residual team commissions”—in theory could be based on retail sales through an Affiliates’ website, but in practice are not. Instead, almost all SBH sales are to Affiliates. PX 5 at 18 (¶ 30). This result is unsurprising. As detailed above, Defendants encourage inventory loading (*i.e.*, excessive product purchasing) by Affiliates as a strategy to earn commissions or advance to higher SBH Rank. *See supra* SOF Section II.B.3. Thus, Affiliate purchases are not retail sales because Affiliates generally buy products not for personal consumption, but instead to qualify for a higher rank as instructed by Defendants. Purchases, for example, spike at the end of rank-qualification periods, and the average product sale of \$300 greatly exceeds what one would expect an Affiliate to buy for personal consumption. *See supra* SOF Section II.B.3.

This case closely mirrors *FTC v. Vemma Nutrition Co.*, in which this Court granted entered a TRO halting Vemma’s pyramid scheme. 2015 WL 11118111, at *1. Vemma’s instructions to Affiliates matched SBH’s “four steps to success”: Vemma

encouraged its distributors (akin to SBH “Affiliates”) to (1) enroll by purchasing a product pack, (2) set up an auto-order, (3) quickly recruit new participants, and (4) teach them to duplicate the process. *Id.* at *2; *see supra* Section II.B.1 (same four steps). At least 71% of Vemma’s U.S. product sales were to Vemma distributors rather than consumers of Vemma’s products. *Vemma*, 2015 WL 1111811, at *2. Nearly three-fourths of distributors who received a commission did not earn enough to recoup their investments. *Id.* The Court thus found “little doubt that the FTC will ultimately succeed on the merits in demonstrating that Vemma is operating a pyramid scheme.” *Id.* at *4.

The evidence in this case is even more compelling. The data here, for example, shows that more than 95% of product purchases from SBH were by SBH Affiliates. PX 5 at 18 (¶ 30). And over 98% of Affiliates did not earn enough compensation to recoup their costs. *Id.* at 2 (¶ 37).

2. Defendants Violate the FTC Act By Making False Income Claims.

Defendants’ deceptive income claims also violate the FTC Act’s prohibition against “deceptive acts or practices in or affecting commerce.” 15 U.S.C. § 45(a)(1). Deception occurs when: (1) defendants make a representation or omission; (2) that is likely to mislead consumers acting reasonably; and (3) that representation or omission is material to consumers’ purchasing decisions. *See, e.g., FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001). The evidence here establishes all three elements.

First, Defendants promise that enrolling in SBH and following their instructions will allow consumers to earn substantial income, becoming financially free in 18 months and reaping million-dollar monthly or yearly payouts. *See supra* SOF Section II.A.1.

Second, Defendants' claims of substantial income are likely to mislead consumers because they are false. Not only are consumers unlikely to obtain financial freedom, but the vast majority of consumers (over 90%) are doomed to lose money no matter how hard they work. *See supra* SOF Section II.C. Purchasing and commission data support this conclusion. *See id.* The courts have consistently held that false claims are likely to mislead consumers. *See, e.g., FTC v. Pantron I Corp.*, 33 F.3d 1088, 1096 (9th Cir. 1994). This is especially true in light of the Ninth Circuit's guidance that "[a]dvertising capable of being interpreted in a misleading way should be construed against the advertiser." *Resort Car Rental Sys., Inc. v. FTC*, 518 F.2d 962, 964 (9th Cir. 1975).

Third, Defendants' misrepresentations are material. A claim is material "if it involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). Courts presume express claims to be material. *See, e.g., Pantron I*, 33 F.3d at 1095-96. Implied claims are also presumed material if they are "deliberately made," *FTC v. Natural Solution, Inc.*, 2007 WL 8315533, at *3 (C.D. Cal. Aug. 7, 2007), or if they "pertain to the central characteristics of the products or services being marketed," *FTC v. John Beck Amazing Profits, LLC*, 865 F. Supp. 2d 1052, 1076

(C.D. Cal. 2012). “Courts consistently conclude that misrepresentations regarding income potential are material.” *Vemma*, 2015 WL 11119111, at *5.

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

3. Defendants Provide Affiliates with Means and Instrumentalities to Violate the FTC Act.

“Those who put into the hands of others the means by which they mislead the public, are themselves guilty of a violation of Section 5 of the [FTC] Act.” *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963); *see also FTC v. Am. Standard Credit Sys., Inc.*, 874 F. Supp. 1080, 1090 (C.D. Cal. 1994) (same). Here, Defendants give Affiliates recruiting materials containing false income promises, including scripts claiming that consumers are already achieving “financial freedom” and that lucrative earnings are “achievable for the masses.” *See supra* SOF Section II.A.1.

4. Defendants Violate the Merchandise Rule by Failing to Offer and Provide Refunds

The FTC’s Merchandise Rule requires merchants who are unable to deliver internet orders within 30 days—or within any other time “clearly and conspicuously” stated during the ordering process—to provide affected customers with the opportunity to consent to a shipping delay or to cancel the order and receive a refund. 16 C.F.R. § 435.2(b)(1). If a merchant fails to seek consent and offer cancellation, or if any buyer requests cancellation, the merchant must provide a refund. 16 C.F.R. § 435.2(c)(1).

Because Defendants do not clearly and conspicuously disclose a shipping date, they are obligated to ship products within 30 days. *See* 16 C.F.R. § 435.2(a)(1) . By their own admission, however, Defendants have had many orders delayed more than 30 days. *See supra* SOF Section II.E. Nevertheless, they not only have failed to seek consent or offer or provide refunds, but have mocked, threatened, and even sued those who seek refunds or ask questions about delayed orders. *See supra* SOF Section II.E.

5. Defendants Violate the Cooling-Off Rule by Failing to Inform Consumers of Their Refund Rights

Defendants also make no effort to afford consumers their rights under the FTC’s Cooling-Off Rule, which gives consumers the right to cancel, within three business days, any purchase of at least \$130 in goods or services (including “courses of instruction or training”) that occurs at a location other than the merchant’s place of business. 16 C.F.R. § 429.1(g). The Cooling-Off Rule also requires the merchant to inform the buyer of this right, both verbally and in writing. 16 C.F.R. § 429.1(a), (e). Separately, the merchant must provide a form “Notice of Cancellation” that the buyer can complete and return to the merchant in order to cancel the sale. 16 C.F.R. § 429.1(b).

The Cooling-Off Rule applies to Defendants’ sales, at their hotel-based training events, of products and tickets to future events. *See* PX 5 at 23-24 (¶ 39); PX 2 at 221 (Att. 9) (“majority” of Defendants’ “coaching” sales occur at “workshops, retreats and events conducted around the world”). Nevertheless, SBH provides no notice of consumers’ rights and refuses to honor timely requests to cancel, relying on its illegal (in this context) no-refund policy. *See supra* SOF Section II.E.

6. The SBM Defendants Operate as Common Enterprise and Are Jointly and Severally Liable.

“When corporate entities operate together as a common enterprise, each may be held liable for the deceptive acts and practices of the others.” *FTC v. Grant Connect, LLC*, 763 F.3d 1094, 1105 (9th Cir. 2014). A common enterprise exists where there is “no real distinction among the companies” operating the scheme. *FTC v. J.K. Pub., Inc.*, 99 F. Supp. 2d 1176, 1202 (C.D. Cal. 2000). In making the common enterprise determination, courts commonly consider a variety of factors, including: “common control, sharing of office space and officers, whether business is transacted through a ‘maze of interrelated companies,’ the commingling of corporate funds, unified advertising, and any other evidence revealing that no real distinction existed between the corporate defendants.” *FTC v. Neovi, Inc.*, 598 F. Supp. 2d 1104, 1116 (S.D. Cal. 2008).

Here, SBM Holdings and SBM LLC admit that they “operat[e] as one corporation”—*i.e.*, that no real distinction exists between them. PX 2 at 211 (Att. 9). Therefore, it is no surprise that the companies share the same name, the same managers or directors (the Nolands), the same officers (Jay Noland, Harris, and Sacca), and the same bank accounts. *See supra* SOF Section IV.A.

7. The Individual Defendants Are Liable for Monetary and Injunctive Relief

An individual defendant is liable for corporate defendants’ violations of the FTC Act or rules promulgated thereunder if that individual “had authority to control” the unlawful acts or “participated directly” in them. *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir. 1997). The defendant is also liable for equitable monetary

relief if he or she had knowledge of the unlawful acts. *Id.* at 1171. Here, the individual defendants each had (1) authority to control or directly participated in the unlawful acts and (2) knowledge of those acts.

a. Authority to Control or Direct Participation

Although either prong is sufficient for injunctive relief, the individual Defendants had authority to control *and* directly participated in the SBM Defendants' misconduct.

First, all of the individual Defendants had authority to control the unlawful conduct. A defendant's status as a corporate officer and authority to sign documents on behalf of the corporation can be sufficient to demonstrate the authority to control. *See, e.g., Publishing Clearing House*, 104 F.3d at 1170; *see also FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1270 (S.D. Fla. 2007) ("status as a corporate officer gives rise to a presumption of ability to control a small, closely-held corporation").

Alternatively, authority to control "can be evidenced by active involvement in business affairs and the making of corporate policy, including assuming the duties of a corporate officer." *Am. Standard Credit*, 874 F. Supp. at 1089.

Here, the individual Defendants are all corporate officers who are actively involved in business affairs. Jay and Lina Noland are the sole managers and directors of both SBM Holdings and SBM LLC, with Jay serving as CEO of both entities and Lina as corporate secretary of SBM Holdings. For SBM LLC, Harris has served as a senior field advisor, executive vice president, and president, and Sacca has served as senior field advisor, sales director, chief sales officer, and chief visionary officer. All are actively

involved in the company. *See supra* SOF Section IV.B. The Nolands, moreover, are signatories on the companies' shared bank accounts. *See supra* SOF Section IV.A.

Second, all of the Defendants directly participated in the unlawful conduct.

Among other things, they made income misrepresentations, actively recruited participants into the pyramid scheme, and helped to develop the company's illegal commission plan.

See supra SOF Section IV.B.

b. Knowledge

The individual defendants are also monetarily liable for the corporate defendants' unlawful acts because they had knowledge of those acts. *See Affordable Media*, 179 F.3d at 1234 (9th Cir. 1999). Knowledge is established by proving actual knowledge, reckless indifference, or "awareness of a high probability of fraud along with an intentional avoidance of the truth," but the FTC need not show intent to defraud. *Publishing Clearing House*, 104 F.3d at 1171. "The extent of an individual's involvement in a fraudulent scheme alone is sufficient to establish the requisite knowledge." *Affordable Media*, 179 F.3d at 1235. Control of an entity involved in fraud, for example, is "strong evidence" of knowledge. *Id.* Thus, the Ninth Circuit has affirmed defendants' monetary liability where their "central involvement" in a scheme rendered them at least recklessly indifferent to whether the scheme's claims regarding "profit potential" were true, especially where the "promised yields . . . were so extraordinary that the [defendants] should have been suspicious." *Id.* at 1235-36.

The same is true here. The individual Defendants' control of SBH is "strong evidence" of their knowledge. *See supra* SOF Section IV.B. This is especially true here,

where all of the Defendants have been centrally involved in SBH scheme from the start. As in *Affordable Media*, each should at least have investigated whether their promises of lucrative earnings were actually true. The fact that the individuals Defendants not only controlled SBH, but also made the income claims described above and, more generally, promoted the scheme further highlights their (at best) reckless indifference. *See supra* SOF Sections II.A, IV. B. There is, moreover, ample evidence that the individual Defendants have actual knowledge they are deceiving consumers. Jay Noland, for example, closely monitors complaints to SBH, *see supra* SOF Section II.E, and Harris asked consumers to send complaints directly to he and Sacca, *see* PX 1 at 34 (¶ 56(c)).

B. The Balance of Equities Favors Entering the TRO.

“[W]hen a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight.” *World Wide Factors*, 882 F.2d at 347. Here, the balance of equities mandates entry of a TRO because the public interest in preventing more consumers from falling victim to Defendants’ scam far outweighs any possible interest Defendants may have in continuing these practices. Indeed, it is likely that only the entry of the requested relief will prevent Defendants from continuing to deceive and harm the public during the pendency of the litigation.⁹

⁹ Defendants started selling memberships in their next pyramid—“VOZ Travel”—in October 2019, once again promising life-changing income in return for exponential recruiting. VOZ purportedly offers up to 75% discounts on all forms of travel and follows the same model as Defendants’ coffee business. PX 1 at 1365 (Att. 163). Specifically, Defendants charge a \$49 annual fee, offer six “tiers” of commission, and encourage Affiliates to purchase “packs” costing up to \$2,800. *Id.* at 1392-93 (Att. 163). They tell consumers that building a downline of 10,000 will result in over \$1.5 million in annual commission. *Id.* at 1390 (Att. 163).

III. THE REQUESTED *EX PARTE* RELIEF IS NECESSARY TO PREVENT DEFENDANTS FROM DISSIPATING ASSETS AND DESTROYING EVIDENCE.

The FTC asks the Court to issue the proposed TRO *ex parte* because Defendants have shown themselves unwilling to comply with court orders or the law, and are likely to conceal or dissipate assets or destroy evidence if they receive advance notice of this filing. The proposed TRO thus includes an asset freeze, receivership, a writ of *ne exeat republica* preventing Jay Noland from leaving the country, immediate access to Defendants' business premises, and other expedited discovery.

A. Ex Parte Relief Is Necessary to Ensure That the Court Will Be Able to Grant Effective Relief.

Federal Rule of Civil Procedure 65(b) permits this Court to enter *ex parte* orders upon a clear showing that “immediate and irreparable injury, loss, or damage will result” if notice is given. Such orders are particularly appropriate when defendants are unlikely to comply with court orders, *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 439 (1974), such that the *ex parte* TRO “is the sole method of preserving a state of affairs in which the court can provide effective final relief,” *In re Vuitton et Fils S.A.*, 606 F.2d 1, 4 (2d Cir. 1979). Courts in this district have regularly granted FTC requests for *ex parte* TROs. *See* cases cited *supra* note 7. The FTC has also obtained *ex parte* TROs in other pyramid actions, including in this district.¹⁰

¹⁰ *See, e.g., FTC v. Vemma Nutrition Co.*, No. 15-cv-1578-PHX-JJT, Dkt. No. 25 (D. Ariz. Aug. 21, 2015); *FTC v. Fortune Hi-Tech Mktg., Inc.*, No. 13-cv-0578, Dkt. No. 23 (N.D. Ill. Jan. 24, 2013); *FTC v. Trek Alliance Inc.*, No. 02-cv-9270, Dkt. No. 7 (C.D. Cal. Dec. 9, 2002); *FTC v. Five Star Auto Club, Inc.*, No. 99-cv-1693, Dkt. No. 18 (S.D.N.Y. Mar. 8, 1999).

Here, giving notice of the TRO would defeat its purpose. As discussed above, Defendants' business operations are permeated by, and wholly reliant upon, deceptive practices. Defendants engaged in fraudulent schemes often dissipate assets and destroy records if they receive notice of an impending FTC action. *See* Rule 65(b)(1) Certification and Declaration of Plaintiff's Counsel Evan Mendelson, ¶¶ 7-8.

That risk is particularly high here because Defendants' leader, Jay Noland, (1) has shown complete disregard for this Court and its prior Order against him, and (2) already took steps to hide his activity and assets upon learning of the FTC's investigation.

First, Noland has rejected this Court's jurisdiction and repeatedly violated its Orders. As set forth above, in the FTC's original case, Noland denied the Court's legitimate jurisdiction by relying on frivolous conspiracy theories. *See supra* SOF Section I. He cannot be trusted to obey a Court order. Indeed, Noland has violated the Court's 2002 Order by (1) operating a pyramid scheme, (2) misrepresenting expected income, (3) providing the means and instrumentalities for others to do the same, (4) failing to properly monitor Affiliates, and (5) not investigating consumer complaints. *See supra* Argument Section II. In the original case, moreover, the Court imposed sanctions on Noland for "fail[ing] to comply with the rules of discovery and this Court's order" and "simply refus[ing] to participate in discovery." PX 2 at 26 (Att. 3).

Second, after learning in May 2019 that the FTC may be investigating him, Jay Noland began steps to conceal assets, cloak his communications, move assets abroad, and physically move from the United States. On or around May 15, 2019, a bank disclosed to

Noland that it had received an FTC subpoena for his bank records. PX 2 at 4 (¶¶ 13-14). Despite pledging his “cooperation” with the FTC’s “ongoing review,”¹¹ *id.* at 4 (¶ 15), Noland simultaneously started making monthly payments to Silent Circle, a Swiss encrypted messaging company. PX 4 at 13 (¶ 20). He also made at least one payment to the Nestmann Group, a Phoenix business that promises to take consumers “[i]nside the world of Big Money Asset Protection” with tips on “[h]ow to make your assets bulletproof from a bankrupt government.” PX 4 at 13 (¶ 21); PX 1 at 146-47 (Att. 12). The Nolands then left their Las Vegas home on or around June 1, eventually relocating to Uruguay. *See* PX 1 at 42-43 (¶ 62) (describing continuous absence from Las Vegas home, including trips to Panama, Uruguay, and Colombia), 41-42 (¶ 60(a)) (Noland referencing “my home in beautiful Uruguay”), 42 (¶ 60(b)) (describing new SBH office in Uruguay and effort to build out staff and put together call center), 150 (Att. 13) (Noland advertising for executive assistant in Uruguay). Noland simply cannot be trusted to obey the Court’s orders.

B. An Asset Freeze Is Necessary to Preserve the Possibility of Providing Restitution to Defendants’ Victims.

This Court has authority to issue an asset freeze. *See, e.g., Singer, Inc.*, 668 F.2d at 11. As the Ninth Circuit has explained, “the public interest in preserving the illicit proceeds . . . for restitution to the victims is great.” *Affordable Media*, 179 F.3d at 1234.

“A party seeking an asset freeze must show a likelihood of dissipation of the claimed

¹¹ The FTC informed counsel that it had no requests of Noland. The FTC has not been in contact with Noland or his attorney since this exchange. For the reasons explained above, Noland’s offers of “cooperation” are not credible.

assets, or other inability to recover monetary damages, if relief is not granted.” *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009).¹² The proposed TRO would freeze defendants’ assets due to their deceptive scheme, the magnitude of the harm they have inflicted, and the likelihood that defendants would dissipate assets absent a freeze.

Courts have found a strong likelihood that a defendant will dissipate assets during the pendency of a case where the defendant’s business is permeated by fraud. *See, e.g., SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2d Cir. 1972) (“Because of the fraudulent nature of appellants’ violations, the court could not be assured that appellants would not waste their assets prior to refunding public investors.”); *see also Singer, Inc.*, 668 F.2d at 1113 (“[Defendants’] activities, as shown in the record, lead to the conclusion that absent a freeze, they would either dispose of, or conceal, or send abroad, all of the moneys that they have obtained from their victims.”).

Furthermore, Defendants’ financial dealings establish a likelihood of dissipation absent an asset freeze. The Nolands have transferred assets to Panama, Colombia, and Uruguay, where, as stated above, they appear to have permanently relocated. PX 1 at 41-43 (¶¶ 60(a), 62) (Noland referencing his house in Colombia in addition to property owned in Panama and the potential purchase of another “oceanfront lot” in Panama). Jay

¹² At least one court has found that, in cases brought by the FTC or other government agencies, possibility of dissipation, rather than likelihood of dissipation, is sufficient. *FTC v. Wealth Educators, Inc.* No. 15-cv-2375, Dkt. No. 14 (C.D. Cal. Apr. 6, 2015) at 9 (“[W]hen a government agency is a movant, the mere ‘possibility’ (as opposed to likelihood) of dissipation of assets is sufficient to justify a freeze.”). The FTC satisfies either standard.

Noland, moreover, took steps to protect his assets after learning of an FTC subpoena, making a payment to an asset-protection firm. *See supra* SOF Section III.A.

Harris is closely following the Nolands' fleeing footsteps. He listed his home for sale in November 2019 for \$1.8 million and declared his intent to join the Nolands in Uruguay. PX 1 at 55-56 (¶ 84), 153 (Att. 14). He also concealed transfers received from the proceeds of Defendants' scheme by receiving those payments through a Kentucky corporation that the State dissolved in 2017 for failure to make required filings. PX 4 at 6-7 (¶ 13(g)); PX 1 at 84-86 (Att. 4).

C. A Writ of *Ne Exeat Republica* Is Necessary Because Jay Noland Has a Record of Disregard for the Judicial Process.

“A Writ of *Ne Exeat Republica* is a form of injunctive relief that restrains a defendant from leaving the jurisdiction in order to compel feissance to the sovereign.” *United States v. Mathewson*, No. 92-1054, 1993 WL 113434, at *1 (S.D. Fla. Feb. 25, 1993). The writ may issue to “enable the Government to have effective discovery” both on liability and a defendant's assets. *See, e.g., United States v. Shaheen*, 445 F.2d 6, 9-10 (7th Cir. 1971) (Stevens, J.). Courts use the preliminary injunction standard to determine whether a writ *ne exeat* should issue. *United States v. Lipper*, No. C-81-1222-RPA, 1981 U.S. Dist. LEXIS 11766, *18 (C.D. Cal. 1981). Thus, the Court “must 1) determine the likelihood that the Commission will ultimately succeed on the merits and 2) balance the equities.” *Affordable Media*, 179 F.3d at 1233.

As shown above, the FTC has a very strong likelihood of success. The equities, too, favor the FTC. In particular, public interest in obtaining discovery, and ultimately

redress, for victims from Jay Noland is extremely strong. Likewise, the need to restrict Jay Noland's foreign travel is substantial because if he leaves the Court's jurisdiction, the Court may lose the ability to coerce Noland's compliance with Court orders. That coercion, moreover, is likely to be necessary given Noland's past disregard for the Court's orders. *See, e.g.,* Order, *FTC v. Ecological Fox, LLC, et al.*, No. 18-cv-3309, Dkt. No. 13 at 8-9, 25-26 (D. Md. Nov. 5, 2018) (issuing temporary writ *ne exeat* based on individual defendants' "history of avoiding discovery obligations, "substantial assets overseas," and "ability to flee to another jurisdiction"); Order, *FTC v. Trudeau*, No. 03-3904, Dkt. No. 699 at 2 (N.D. Ill. June 25, 2013) (issuing a temporary writ *ne exeat* in part to maintain court's ability "to compel defendant to comply with its order[s]").

D. A Temporary Receiver is Necessary to Preserve the Status Quo.

The FTC requests appointment of a temporary receiver over the SBM Defendants to marshal their assets and prevent further consumer harm. This Court has authority to appoint a receiver incident to its equitable powers under Section 13(b) of the FTC Act. *See FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1432 (11th Cir. 1984); *see also* cases cited *supra* note 7. When Defendants have used deception to obtain money from consumers, "it is likely that, in the absence of the appointment of a receiver to maintain the status quo, the corporate assets will subject to diversion and waste" to the detriment of victims. *SEC v. First Fin. Group of Texas*, 645 F.2d 429, 438 (5th Cir. 1981).

Appointment of a receiver is particularly appropriate here. Defendants' deceptive and unlawful business practices and history of violating court orders reflect such indifference to the law that Defendants are likely to destroy evidence and dissipate assets

if left in control of SBM. The temporary receiver would help prevent this misconduct by identifying, securing, and controlling the SBM Defendants' assets, as well as marshaling and preserving their records. The receiver will also assist the Court in determining the full extent of Defendants' fraud and in communicating with injured consumers.

E. Immediate Access and Expedited Discovery Is Necessary to Preserve Evidence.

To facilitate the FTC's and the receiver's efforts to locate documents and assets related to the Defendants' scam, it is appropriate to authorize the FTC to engage in expedited discovery and allow the FTC and the temporary receiver immediate access to the Corporate Defendants' business premises and records. Immediate access is critical to protecting evidence against destruction and ensuring that the Court can ultimately determine: (1) the full scope of Defendants' unlawful acts; (2) the identities of injured consumers; (3) the total amount of consumer injury; and (4) the nature, extent, and location of Defendants' assets. Courts in this district have frequently granted this relief in similar cases. *See* cases cited *supra* note 7.

In this case, Defendants have shown that they are likely to destroy evidence unless the FTC moves swiftly to obtain and preserve it. They have already taken steps to hide assets and evidence, and are unlikely to be forthcoming in regular discovery or to take seriously their obligations to preserve records relevant to this case.

CONCLUSION

For the reasons set forth above, the FTC moves this Court to enter the attached proposed *ex parte* temporary restraining order.

Respectfully submitted,



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