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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Federal Trade Commission,

Plaintiff,

vs.

James D. Noland, Jr., *et al.*,

Defendants.

No. CV-20-0047-PHX-DWL

REVISED MOTION TO RELEASE ENHANCED CAPITAL FUNDING FROM RECEIVER'S CONTROL

(Oral Argument Requested)

The receiver determined that Enhanced Capital Funding is a Receivership Entity[1] on the same day the temporary restraining order was issued in this case.[2] Exhibit A, Declaration of Jay Noland, ¶ 2. But Enhanced Capital is not a defendant and has never been involved in multi-level marketing or any of the services that were offered by the Corporate Defendants. *Id.*, ¶ 3. So Enhanced Capital, through its owner, objects to being a Receivership Entity and asks this court to reverse the receiver's decision that made Enhanced Capital a company controlled by the receiver.

Jay Noland is the owner of and has operated Enhanced Capital since April 2002. *Id.*, ¶ 1. Enhanced Capital is and has been involved in consulting, product formulations, domain

[1]Capitalized terms have the meaning given to these epithets in the preliminary injunction entered by the court, Doc. 109.

[2]The emailed designation was sent by the receiver's counsel, Warren Stapleton, at 1:44 p.m. on January 13, 2020, the day the TRO was entered, so it is clear the receiver, who was just appointed earlier that day, was taking directions from the FTC and made no determination, herself, that Enhanced Capital should be a Receivership Entity. The receiver's first report (Doc. 82-1), even says it was the FTC that froze the bank accounts of the Receivership Entities before the TRO had even been served. (Doc. 82-1 at 4.)

registrations, and software development and strategies. *Id*., ¶ 4. The attached declaration of Crystal Roney, exhibit B, identifies the amount and source of gross revenues received by Enhanced Capital Funding from its business activities each year since it began operation. A relatively small amount has been received from the Corporate Defendants for licensing of product used by Success By Media, LLC, dba Success By Health; there is a licensing agreement between Enhanced Capital and Success By Media that requires Success By Media to pay royalties for the sale of the products it has been and is now selling under the receiver's management. Exhibit A, ¶ 6; exhibit B, Declaration of Crystal Roney, at ¶ 5.

The Supreme Court just decided *Liu v. SEC*, 591 U.S. ___ (2020). This June 22, 2020, decision renders the receiver's seizure of the assets of Enhanced Capital Funding illegal.

Liu involved the SEC expanding equitable powers beyond the language of a statute, 15 U.S.C. § 78u(d)(5), that allows "any Federal court [to] grant . . . *any equitable relief* that may be appropriate or necessary for the benefit of investors." *Id*. (emphasis added). The analogue to this in the FTC's realm is 15 U.S.C. § 53(b), which allows the FTC to file suit "in a district court of the United States to enjoin any such act or practice," meaning a violation of the law. These sister agencies—the SEC and the FTC—have gradually expanded their equitable powers under these two statutes beyond the language of the statutes and any legislative history. David M. Fitzgerald, *The Genius of Consumer Protection Remedies Under Section 13(b) of the FTC Act* (Paper, FTC 90th Anniversary Symposium, September 23, 2004) available at https://bit.ly/2EFgaK8. And these sister agencies mimic each other, *id*., and this aping resulted in the overreach the Supreme Court pared back in *Liu*. What *Liu* says, in other words, is exactly applicable to the FTC's exercise of equitable rights not granted by 15 U.S.C. § 53(b).

In fact, the *ratio decidendi* of *Liu* is *a fortiori* applicable to the FTC's overreaching because the FTC statute, 15 U.S.C. § 53(b), gives the FTC *only* the right to an injunction, not the "any equitable relief" as allowed by the SEC analogue. And there is nothing to enjoin so far as non-party Enhanced Capital is concerned because Enhanced Capital's business activities have never involved anything that even the FTC can argue is within the ambit of the FTC Act—consumer protection.

Certainly, Enhanced Capital's dealings with Success By Media or Success By Health are beyond the FTC's pale because no consumers were even involved. Exhibit A, ¶ 5. The dealings between Enhanced Capital and the Corporate Defendants were commercial, contractual dealings. *Id*. ¶ 6. Enhanced Capital licensed its property to Success By Media so products could be sold by Success By Media to the consumers, and the *quid pro quo* was the licensing fees paid to Enhanced Capital by Success By Media. *Id*. ¶ 6. These licensing fees were an expense paid by the Corporate Defendants that reduced their net profit. *Id*. ¶ 7.

Which brings this court back to *Liu v. SEC*. The Supreme Court held that the only portion of ill-gotten gains subject to an equitable seizure or restitution or disgorgement—the Court recognizes these as synonyms—is net profit. The issue in the *Liu* "was whether, and to what extent, the SEC may seek 'disgorgement' through its power to award 'equitable relief' under 15 U.S.C. § 78u(d)(5)." 591 U.S. at ___, (slip op., at 1). The Supreme Court ruled that equitable remedies allowed by statute—which the SEC statute allows, but the FTC statute does not—does not permit the SEC to seize money for restitution beyond net profits realized from prohibited activity because

> "statutory reference[s]" to a remedy grounded in equity "must, absent other indication, be deemed to contain the limitations imposed upon its availability that equity typically imposes."

591 U.S. at ___ (slip op. at 14).

The holding in *Liu v. SEC* is simple. The only restitution allowed and the only thing that may be seized for restitution is the net profits or net gain from wrongful conduct.

> In interpreting statutes like § 78u(d)(5) that provide for "equitable relief," this Court analyzes whether a particular remedy falls into "those categories of relief that were *typically* available in equity."591 U.S. ___ (2020) slip op., at 5. The Court then proceeds with the review of both treatises and case law that limit equitable relief to net profits after expenses.

591 U.S. at ___ (slip op., at 5 *passim*) (emphasis by the court). The Court makes it clear that it is only a wrongdoer's net profits that can be seized for restitution that, then, must be paid to the victims of the wrongdoing.

> Decisions from this Court confirm that a remedy tethered to a wrongdoer's net unlawful profits, whatever the name, has been a mainstay of equitable courts.

591 U.S. at ___ (slip op., at 7).

The Court in *Liu v. SEC* makes it clear that even the Court itself, much less inferior courts, cannot violate cardinal rules of statutory construction. Thus, when considering the statute before it in *Liu v. SEC*, the Court held that the SEC's equitable rights to seize profits from wrongdoing had to be for the benefit of the investors, not the public at large.

> But the SEC's equitable, profits-based remedy must do more than simply benefit the public at large by virtue of depriving a wrongdoing of ill-gotten gains. To hold otherwise would render meaningless the latter part of § 78u(d)(5). . . . [T]he Court found that the additional statutory language must be given effect since the section "does not, after all, authorize . . . 'equitable relief' *at large*." *Id*., slip op. at 16. The Court made it clear that "the Court [cannot] violate the "cardinal principle of interpretation that courts must give effect, if possible, to every clause and word of a statute.

Id.

Similarly, neither the Court nor any federal court can read something into a statute that is not there because the Court disallowed the general seizure of assets for restitution in the *Liu* case.

The statute in the case *sub judice* allows only one remedy for the Federal Trade Commission. That remedy is an injunction against ongoing or future illegal conduct. There is no right for the appointment of a receiver or the seizure of assets because the statute, borrowing from the language of the court in *Liu*, does not authorize equitable relief *at large*.

More importantly, even if there were a grant, the only relief allowed when a statute allows equitable powers is the wrongdoer's net profits. Therefore, assuming, *arguendo*, the defendants are wrongdoers, the only thing this court has power to seize is the net profits of the wrongdoers, not the assets and profits of a non-party, Enhanced Capital.

The *Liu* case deals with the complex situation where a wrongdoer uses a shell entity or third party to shuttle off net profits or moves money around to escape the equitable powers of a court. 591 U.S. at ___ (slip op., at 17, *et seq.*) The court held, though, that a factual finding that such a practice exists is rife with dangers that could transform a net-profits-focused remedy into a penalty. After citing cases about a wrongdoer channeling profits to friends, family, or clients, or recovering money from both a tipper and a tippee (both of whom are wrongdoers under the securities law), the court says the only way there can be a joint and several disgorgement or restitution is if "the facts are such

that [the wrongdoers] can, consistent with equitable principles, be found liable for profits as partners in wrongdoings." 591 U.S. at ___ (slip op., at 18). This is akin to the factual predicate necessary to pierce a corporate veil, which is not easy because the law recognizes the separate existence of corporate entities and shareholders/members.

The court underscored its may-not admonition to lower courts, and it affirmed that restitution or disgorgement awards (when they are permitted) cannot exceed net profit.

> Courts may not enter disgorgement awards that exceed the gains "made upon any business or investment, when both the receipts and payments are taken into account." . . . Accordingly, courts must deduct legitimate expenses before ordering disgorgement under § 78u(d)(5). A rule to the contrary that "make[s] no allowance for the cost expenses of conducting [a] business" would be "inconsistent with the ordinary principles and practice of courts of chancery.

591 U.S. at ___ (slip op., at 19).

The statute under which the FTC is proceeding in this case, of course, is unlike the statute in *Liu v. SEC*. The statute here does not allow any sort of equitable relief, much less, as the court said in *Liu*, "equitable relief *at large*." But disregarding the fact that the only remedy allowed the FTC under 15 U.S.C. § 53(b) is an injunction against future or ongoing action, there is no basis upon which this court can countenance the receiver's overreach designating Enhanced Capital as a Receivership Entity. It is not. It is not a wrongdoer. None of its assets are touchable for any sort of equitable seizure or control even if the FTC had the rights to do so under the law.

Nonetheless, the FTC has informed counsel that it will not consent to the release of Enhanced Capital, and it has given a series of reasons why it told the receiver to designate Enhanced Capital as a Receivership Entity, a clandestine, *ultra vires* injunction that subverts due process and wrongly shifts the burden of filing this motion to Enhanced Capital.

The FTC thinks the receiver's designation means everything owned by Enhanced Capital is within the pale of the receiver's control, that is to say, the FTC's control. The effect is to keep the defendants from defending themselves. The FTC wants to win by default, which it will if the Receivership Entities cannot pay to defend themselves. It wants to keep the Assets the receiver has seized from even non-party Enhanced Capital for restitution purposes that are not available to the FTC according to the holding in *Liu v. SEC*. *Liu* means the expansion of a statutory remedy allowing

only an injunction to include seizure of assets—even seizure for restitution to consumers—is contrary to the law.

The 7th Circuit was prescient. It has already ruled that restitution is not available in a case like this, *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019). The 7th Circuit cited Supreme Court precedent and distinguished contrary decisions in other circuits, including the 9th Circuit to reach its vatic result. Even 9th Circuit panels have questioned the 9th Circuit's acquiescence to restitution as a remedy:

> I respectfully suggest that such interpretation [i.e., restitution in an FTC case] is no longer tenable.
>
> Because the text and structure of the statute unambiguously foreclose such monetary relief, our invention of this power wrests from Congress its authority to create rights and remedies. And the Supreme Court's recent decision in *Kokesh v. SEC*, ___ U.S. ___, 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017), undermines a premise in our reasoning: that restitution under § 13(b) is an "equitable" remedy at all. Because our interpretation wrongly authorizes a power that the statute does not permit, we should rehear this case en banc to relinquish what Congress withheld.

FTC v. AMG Capital Management, LLC, 910 F.3d 413, 429 (2018) (O'Scannlain, J. and Bea, J. concurring).

Liu v. SEC does more than undermine the 9th Circuit's allowance of restitution. The holding by the 7th Circuit is clearly right, and holdings in the 9th Circuit otherwise are clearly wrong.

Quite apart from the lack of a legal basis for the receiver's seizure of Enhanced Capital, a balancing of equities militates in favor of releasing Enhanced Capital. It is a company that enables Noland to earn money for bread on the table, and the individual defendants want to use Enhanced Capital to generate money during the pendency of this lawsuit for, *inter alia*, attorney's fees. Exhibit A, ¶ 8. It is unfair for this court to allow the receiver—the FTC, actually—to deprive the individual defendants of a livelihood and a means to defend the claims brought by the Federal Trade Commission. "[T]his suit was brought to establish the defendants' wrongdoing; the court cannot assume the wrongdoing before judgment in order to remove the defendants' ability to defend themselves. The basis of our adversary system is threatened when one party gains control of the other party's defense as appears to have happened here." *Federal Savings & Loan Insurance Corp.*

v. Dixon, 835 F.2d 554, 565 (5th Cir. 1987) cited with approval in *Commodity Futures Trading Commission v. Nobel Metals International, Inc*., 67 F.3d 766 (9th Cir. 1995)(requiring exercise of discretion to allow attorney's fees from frozen assets "in light of the fact that wrongdoing is not yet proved").

Under *Liu v. SEC*, the only remedy available to the FTC is an injunction against illegal conduct. Thus, depriving the defendants of funds for defense is violative of due process rights.

An aside about both the FTC's *modus operandi* and the confirmation bias affecting this case—the FTC's attitude and its seizure of Enhanced Capital—is merited. First, its *modus operandi*. The FTC has acknowledged the advantage of expanding its powers gradually while operating under the radar, so to speak:

> In exploring its section 13(b) authority, the Commission moved warily, selecting cases with compelling facts that established clear violations of well-established legal standards, and advancing well-supported legal arguments to support limited and clearly justified equitable relief. Through this carefully considered, step-by-step approach, the Commission established its basic Section 13(b) analyses and arguments, and obtained favorable decisions endorsing them, before pursuing a more ambitious agenda.
>
> . . . .
>
> . . . . In the early years, the effort to employ Section 13(b) in the consumer protection arena received relatively little attention. . . . For those of us who saw the development of Section 13(b) as important, however, that was liberating, rather than frustrating, because it allowed us to pursue our efforts with little interference.

David M. Fitzgerald, *The Genius of Consumer Protection Remedies Under Section 13(b) of the FTC Act* (Paper, FTC 90th Anniversary Symposium, September 23, 2004) at 21–22, available at https://bit.ly/2EFgaK8.

This slow turning-up of the heat to boil the frog has been working, but that does not mean, as the Supreme Court in *Liu v. SEC* ruled, that it is right and that this court should allow itself to be seethed because of the FTC's churning. Having the receiver designate Enhanced Capital as a receivership Entity is exactly consistent with the FTC's back-room machinations. This court, under *Liu*, must not countenance and succumb to this legerdemain.

The FTC's confirmation bias is the second important aside. Leo Tolstoy described the blinding effect of confirmation bias:

> The most difficult subjects can be explained to the most slow-witted man if he has not formed any idea of them already; but the simplest thing cannot be made clear to the most intelligent man if he is firmly persuaded that he knows already, without a shadow of a doubt, what is laid before him.

Leo Tolstoy, *The Kingdom of God is Within You,* Ch. 3 (1893), Constance Garnett, translator. Project Gutenberg, http://www.gutenberg.org/cache/epub/4602/gp4602.html. (accessed April 3, 2012).

The FTC's confirmation bias is patent. It is wont to characterize Jay Noland dysphemistically: it repeatedly calls him a serial pyramid-scheme promoter (Doc. 8 at 6), a recidivist as though this is a criminal proceeding, and the court has acceded to this.[3] The FTC disparages Mr. Noland even though the stipulated Order in CV-00-2260-PHX-DWL says there is no admission of wrongdoing. (Stipulated Judgment and Order for Permanent Injunction Against J.D. Noland, CV-00-2260-PHX-DWL (July 2, 2002) at 2, ¶ 4.) The 2002 order even says it cannot be construed as the FTC and this court has done.

> This order shall not be construed as an admission or finding of guilt or wrong doing on the part of the Defendant.

Id. at ¶ 7.

The sardonicism is implicit in the FTC's dysphemisms underscores its bias. The FTC's disregard of the court's shall-not-be-construed order in 2002 is contumacious, also an earmark of bias. So expecting the FTC to be less vitriolic so far as Enhanced Capital is concerned may ask too much even though the FTC's mission was provoked by the fulminations of a cabal.

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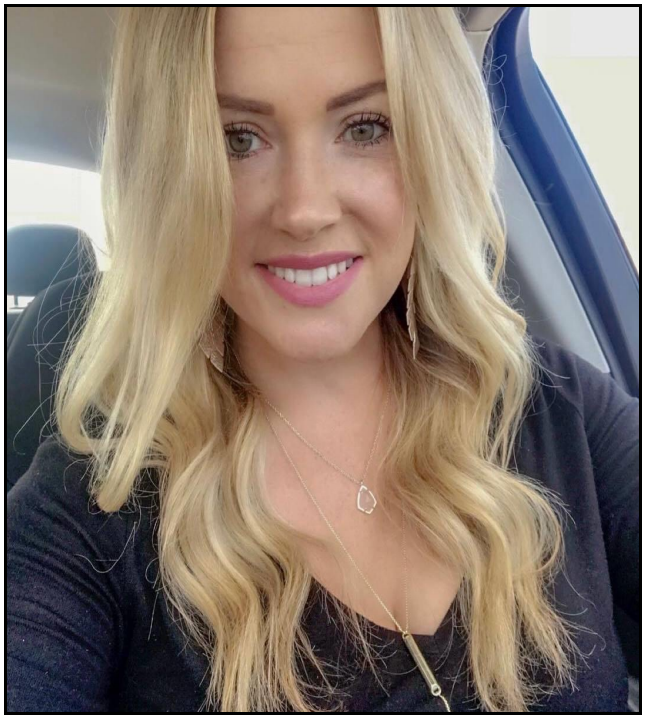
[3]This court's order in support of the preliminary injunction, Doc. 106, justifies a receiver instead of a monitor by saying, "It would be folly to reinsert a recidivist pyramid scheme operator into management and hope the third time will be the charm," Doc. 106 at 27:14–16, even though Jay Noland has never admitted to or been adjudged a pyramid scheme operator. There has never been a first time, much less a third time. It is virtually certain the FTC will piggy-back on the court's unfortunate, prejudicial comment to justify ongoing *ad hominums* against Mr. Noland.

Luke Curry & Wife



Rylie Qualls

The vendetta sparking the FTC is because Luke Curry, a married man and father of three, was having an affair with Rylie Qualls. Exhibit A, ¶ 9. Qualls was fired, and Curry was demoted and signed a disciplinary agreement that strictly limited his activities. *Id*., ¶ 10. Curry could not abide the agreement he made, so he quit. Curry, then, got his friends to file the consumer complaints—false complaints—on which the FTC acted. *Id*. ¶ 11. The FTC, in other words, is helping Luke Curry exact revenge for getting caught committing adultery. *Id*., ¶ 12.

Jason Johnson was and is one of Luke Curry's good friends and a party to getting the FTC to punish Jay Noland and his companies. *Id*., ¶ 13. Johnson was elated when the FTC filed suit. He crowed to an affiliate of Success By Health, Francois Hewing, when the FTC filed this case, "They fukd up . . . . blasted their ass!! More to come . . . ." Exhibit C, Declaration of Francois Hewing.

Johnson's text did not have the desired effect because Hewing, as can be seen by the sidebar, did not agree with Johnson's venom; Hewing did not think anyone had been hurt, or that any

misrepresentations had been made to anyone. Nor does anyone else, excluding Luke Curry's cabal. *See* Declarations attached to Objection to Receiver's Fees, Doc. 146-1 and 146-2.

Unfortunately, the FTC drank the Kool-aid and extrapolated. But the FTC was indirect. It did not make Enhanced Capital a defendant; it used its influence to get from receiver what it could not ask of this court: it had Enhanced Capital designated as a Receivership Entity by the receiver, not the court. The FTC supposes Enhanced Capital is a culpable party hurting people even though the affiliates or even the customers of Corporate Defendants do not think they have been hurt, and there are no complaints against Enhanced Capital, not even from the Curry Cabal.

The defendants will win this case unless this court prevents them from generating the money to defend themselves; Enhanced Capital is the vehicle for that defense. To foreclose the defendants from earning money to pay attorneys' fees is particularly unfair when the business of Enhanced Capital and the business the defendants wish to conduct has never had and will not have anything to do with operating a multi-level marketing program. Indeed, in accordance with the provisions of Part XI of the preliminary injunction (Doc. 109, p. 11), the details of the business Enhanced Capital will conduct are as follows:

1. The name of the business entity: Enhanced Capital Funding, a Nevada corporation.

Johnson Text

2. Address and phone number: 1452 W. Horizon Ridge Parkway, Suite 503, Henderson, NV 89012, 760-230-8916.

3. James Noland is the sole owner, officer, and director of the company. It is anticipated, however, that Scott Harris and Tommy Sacca will become involved as managers or employees of some sort so that they can earn money along with Jay Noland.

4. Detailed description of the business entity's intended activities: Business consulting, product formulation, software creation, and consulting.

Enhanced Capital Funding does business consulting that helps organizations improve their performance, primarily through analysis of existing business problems and development of plans for improvements. Exhibit A, ¶ 14. Product formulation services involves consultation, research, and tests with respect to ingredient materials, how ingredients behave and interact, how to provide enhanced properties improving processing and delivery of an active ingredient in a convenient and useable form for human consumption or use. *Id*., at ¶ 15. It includes creating a particular product formulation. *Id*., at ¶ 16. SaaS (Software as a Service) method is used; it is a software licensing and delivery model in which software is licensed on a subscription basis or purchased while being centrally hosted. The systems can be created for virtually any industry on demand. *Id*., at ¶ 17. None of these activities involve multi-level marketing. *Id*., at ¶¶ 3, 18.

The fact that Enhanced Capital has never been and will not be involved in multi-level marketing does not impress the receiver or the FTC. They will point to the court's definition of *Receivership Entities* to object to the release of Enhanced Capital:

> Corporate Defendants as well as any other entity that has conducted any business related to Defendants' marketing of programs, opportunities, or services offered by Success By Media, including receipt of Assets derived from any activity that is the subject of the complaint in this matter, and that the receiver determines is controlled or owned by any defendant.

Doc. 109 at p. 3; Doc. 19 at p. 5.

Plainly, the receiver is acting as the FTC's majordomo, running the Corporate Defendants (liquidating them, actually) like the FTC believes they should be run, and that includes the non-party

but *de facto* defendant, Enhanced Capital. The FTC had the receiver freeze the assets of Enhanced Capital.[4]

Notwithstanding the forward-looking policy of § 13(b) of the Federal Trade Commission Act—prohibiting unfair or deceptive trade practices—and the questionable right of the FTC to recover restitution from the Corporate Defendants, the FTC/receiver want to ignore the separate corporate identity of Enhanced Capital by relying on the over broad definition of *Receivership Entities*. They want to kill Enhanced Capital like they are killing the Corporate Defendants.

The mortal wounds being wreaked on the Corporate Defendants should not be allowed, but the wreckage being made of Enhanced Capital is particularly egregious because there is not even one allegation of wrongdoing by Enhanced Capital. *Liu v. SEC* does not permit this court to countenance the seizure of Enhanced Capital.

The wreckage Enhanced Capital seeks to avoid by this motion is underscored by the flotsam being made of the Corporate Defendants before they can even get to trial. An example of the receiver's/FTC's scuttling of the Corporate Defendants underscores why Enhanced Capital wants free of the Receivership-Entities dragnet.

The example is from a Wharton MBA, a retired Senior Vice President of Pepsi-Cola North America, Robert Mehler.[5] He wrote an email to the receiver on June 8, 2020, complaining to the receiver about product he and others want to purchase but cannot. Exhibit D, Declaration of Robert

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[4]Enhanced Capital licensed formulas to Success By Media in January 2017. Exhibit A, ¶ 19. These licenses provide the basis upon which Success By Health can market products. *Id*., at ¶ 20. In other words, the license agreement is what enables the receiver to market products she is liquidating and must, to the thinking of the FTC and the receiver, give plenary control over Enhanced. The receiver is not paying royalties to Enhanced Capital in breach of contract. *Id*.

[5]A declaration to Mehler was attached to the objection to the receiver's request for fees, Doc.146-2, p.42–45. Mehler was a Senior Vice President running one of five arms of a distributorship for Pepsi-Cola North America. He has an MBA from the Wharton School of Business. Very successful. Very well educated. His declaration at Doc. 146-2 shows that he knows first-hand that the FTC's allegations in this case are specious, and he knows the receiver is killing the corporate defendants, as is made perspicacious by Mehler's declaration attached to this motion as exhibit C.

Mehler (June 19, 2020). The receiver did not respond, but she did forward the email to the FTC, which immediately sent Mehler a subpoena citing Mehler's email.

> The "dozens of texts and emails from SBH affiliates desperately looking for SBH products" referenced in your June 8, 2020 email to Kimberly Friday, Daryl Williams, and Warren Stapleton.

Id., exhibit D-2 at 5, *see* highlighted portion of the subpoena.

Mehler complained on June 8, 2020, about the receiver's ineptitude, "outrage regarding your inept abilities"and "financially destroying what was a viable business entity," the same complaints made in the dozens of declarations about the receiver/FTC attached to the objection to payment of the receiver's fees. Doc. 146-1, 146-2.

Mehler's second email on June 12, 2020, asks a pointed question:

> Just who [sic] is Kim Friday and Warren [Stapleton] working for that my letter to them gets no direct response, but is immediately in the hands of he FTC.
>
> Just whose interest is she furthering as receiver? Happily paid by SBH, seemingly working on behalf of the FTC.

Id.

Summary

The gravamen of the FTC's complaint is multi-level recruiting without product sales rather than multi-level marketing that only pays commissions out of proceeds of product. The FTC's complaint has nothing to do with the business of Enhanced Capital in the past or as planned. But the receiver and the FTC want to impale Enhanced Capital while liquidating the Corporate Defendants.[6]

The owner of Enhanced Capital does not want Enhanced Capital liquidated. The owner wants Enhanced Capital free to operate.

[6]This liquidation is obvious from the reports filed by the receiver in this matter, Doc. 82, Receiver's Initial Report (Feb. 10, 2020), and Doc. 139-1, Receiver's Second Report (May 12, 2020). The defendants will shortly file a motion objecting to the receiver's liquidation of companies during the pendency of the lawsuit because there is no final determination that these companies should be put out of business. The preliminary remedy should be limited to preventing the violation of law, not a death penalty for the Corporate Defendants.

The preliminary injunction in this case surely cannot be read to allow the receiver to assume full control of whatever the FTC/receiver determines—without a hearing or trial—is a Receivership Entity. Surely, this court did not intend to place the burden of persuasion on the ensnared non-party to free itself.

The receiver has her knee on the neck of a company that was in existence more than ten years before any multi-level marketing by Success By Heath. This victim—Enhanced Capital—has never done anything wrong, and there is no allegation that it has done anything illegal. So why is it in prison?

The preliminary injunction gives the receiver the questionable right to identify a non-party entity as a Receivership Entity (Doc. 109, Preliminary Injunction at 16, § Part XIV(U) (Feb. 28, 2020).), but the designation of Enhanced Capital cannot be right. It is wrong. The preliminary injunction order also allows a challenge to the designation of Enhanced Capital as a Receivership Entity. This motion is that challenge.[7]

Hopefully, the court can recognize that this motion is made by the owner of Enhanced Capital rather than the company only to avoid a claim that the undersigned is contumacious or usurping the receiver/FTC. This really should be a motion on behalf of Enhanced Capital, but the receiver controls whether Enhanced Capital can even have its own lawyer, which is the subject of a pending motion.

Enhanced Capital had money in two of its own bank accounts seized by the receiver and transferred to the receiver's bank. The total funds seized are shown in the receiver's second report, $8,177.69. Doc. 139-1, Receiver's Second Report (May 12, 2020), exhibit 3. As a part of the release of Enhanced Capital from the receiver's pale, the defendants request that the money taken or frozen that belongs to Enhanced Capital be unfrozen and returned to it.

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[7]Another aside is important. The receiver's first report, Doc. 82, was filed on February 10, 2020, two days before the preliminary injunction. There was no meaningful opportunity, therefore, for the defendants—or Enhanced Capital—to counter the receiver's findings, a due process violation. Nonetheless, this court gave great weight to the receiver's initial report when it issued the preliminary injunction. This will be the subject of a motion yet to be filed.

Finally, the purpose of the receiver in this case was the location and preservation of Assets related to what the court concluded will likely be determination after trial that Success By Media engaged in an illegal pyramid scheme. That preliminary order, of course, is subject to change before and after trial, and the defendants believe the court will change its mind when the court is presented with honest-in-substance evidence.[8] So the preliminary nature of the proceedings thus far and the charge of the receiver to maintain Assets does not allow the receiver to destroy the Assets, to kill the Corporate Defendants, and take control and kill non-party Enhanced Capital. The Corporate Defendants will soon be dead because of what the receiver is doing. As soon as the Corporate Defendants are dead—out of business—the FTC will have won because there will be nothing left to litigate and the Corporate Defendants will be deprived of due process as a result.

Other motions will to be filed highlighting the improper conduct of the receiver to date and seeking appropriate relief. This motion just asks that the court free Enhanced Capital and its assets (seized without due process) so that it can conduct business, allowing Enhanced Capital and the individual defendants to live and defend themselves.

Respectfully submitted this 26th day of June, 2020.

/s/ Daryl M. Williams
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[8]This belief is based on the fact that it is clear that representations and arguments made by the FTC to obtain the TRO and preliminary injunction are false, demonstrably so. In other words, the court was misled. This lack of candor by the FTC will be the subject of future motion practice.

Certificate of Service

I, Daryl M. Williams, certify that the original **Revised Motion to Release Enhanced Capital Funding from Receiver Control** was eFiled this 26th day of June, 2020, with the clerk of the court's CM/ECF filing system, and copies were emailed via the court's ECF filing system this same day to:

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