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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Federal Trade Commission,

No. CV 00-02260-PHX-DWL

10 Plaintiff,

ORDER

11 v.

12 Netforce Seminars, et al.,

13 Defendants.
14

15 Pending before the Court is a motion by Jay Noland, Scott Harris, and Thomas Sacca
16 (together, “the Contempt Defendants”) to dismiss the FTC’s contempt claims in this action
17 under Rule 12(b)(1) of the Federal Rules of Civil Procedure or, in the alternative, to allow
18 the Contempt Defendants to assert an unclean hands defense and/or to rely on certain
19 evidence. (Doc. 127.) For the following reasons, the motion is denied.

20 **RELEVANT BACKGROUND**

21 In 2000, the FTC initiated this action, which will be referred to as the “First Action,”
22 by filing a complaint that charged Noland with violating the FTC Act by operating a multi-
23 level marketing business as an illegal pyramid scheme. (First Action, Doc. 1.)

24 On July 2, 2002, Noland and the FTC resolved the First Action by entering into a
25 settlement agreement that included a stipulated permanent injunction. (First Action, Doc.
26 66.) As described in more detail in other orders, the injunction restrains Noland’s future
27 conduct in various ways, including by prohibiting him from participating “in any prohibited
28 marketing scheme,” from making any “false or misleading statement or misrepresentation

1 of material fact” “in connection with . . . any multi-level marketing program,” and from
2 “providing to others the means and instrumentalities with which to make” such prohibited
3 statements. (*See, e.g.*, First Action, Doc. 130 at 1-2.)

4 On January 8, 2020, the FTC initiated another action against Noland. (*FTC v.*
5 *Noland et al.*, CV-20-47-PHX-DWL.) The operative complaint in that action, which will
6 be referred to as the “Second Action,” alleges that Noland, Harris, Sacca, and Lina Noland
7 (together, “the Individual Defendants”) operated a pair of multi-level marketing businesses
8 called Success By Health (“SBH”) and VOZ Travel as illegal pyramid schemes, made false
9 statements in the course of operating those businesses, and violated various FTC rules in
10 the course of operating those businesses. (Second Action, Doc. 205.)

11 On January 17, 2020, the FTC filed a motion for an order to show cause (“OSC”)
12 why Noland should not be held in civil contempt in the First Action. (First Action, Docs.
13 74, 78.) In a nutshell, the FTC’s theory was that Noland’s challenged conduct in the
14 Second Action also amounted to a violation of the permanent injunction issued in the First
15 Action. (*Id.*) After Noland filed a response to the motion for an OSC (First Action, Doc.
16 82), the FTC expanded the scope of its OSC request to include Harris and Sacca. (First
17 Action, Doc. 91.) Harris and Sacca then filed a response. (First Action, Doc. 98.)

18 On July 6, 2020, the Court issued an order granting the FTC’s request for an OSC
19 in relevant part. (First Action, Doc. 101.) Among other things, the Court held that the FTC
20 properly filed its OSC request in the same action in which the underlying injunction was
21 issued and, thus, “the Court will not require the FTC to file a new action or amend its
22 complaint in the [Second Action].” (*Id.* at 3.)

23 In April 2021, the legal landscape underlying some of the FTC’s claims shifted by
24 virtue of the Supreme Court’s decision in *AMG Capital Management, LLC v. FTC*, 141 S.
25 Ct. 1341 (2021). There, the Supreme Court held—contrary to the rule that had previously
26 been in place in the Ninth Circuit—that the FTC may not obtain “equitable monetary relief
27 such as restitution or disgorgement” pursuant to its authority under § 13(b) of the FTC Act.
28 *Id.* at 1344. Following this development, the FTC clarified that it is only seeking monetary

1 remedies in the Second Action pursuant to its rules-based claims, which are claims under
2 § 19 of the FTC Act, and is not seeking monetary remedies in the Second Action pursuant
3 to its pyramid-scheme and false-statement claims, which are claims under § 13(b) of the
4 FTC Act. (Second Action, Docs. 351, 365.)

5 On June 23, 2021, the FTC formally moved for contempt sanctions against the
6 Contempt Defendants in the First Action. (First Action, Doc. 106.) The motion later
7 became fully briefed. (First Action, Docs. 112, 114.)

8 On March 15, 2022, the Contempt Defendants filed the pending motion. (First
9 Action, Doc. 127.)¹

10 On March 22, 2022, the Court issued an order denying, without prejudice, the FTC’s
11 motion for civil contempt sanctions in the First Action. (First Action, Doc. 130.) Although
12 the Court acknowledged that “[t]he FTC has established that the Contempt Defendants
13 violated some provisions of the permanent injunction,” the Court also found that “the FTC
14 has not established, at least at this stage of the proceedings, that the Contempt Defendants
15 committed certain other alleged violations of the permanent injunction.” (*Id.* at 7-9.) The
16 Court continued that, “[b]ecause the FTC has not established all of the violations alleged
17 in its motion, it follows that the FTC has not established an entitlement to the \$7,012,913.25
18 compensatory contempt award sought in its motion. To calculate that sum, the FTC added
19 together the net revenues earned from both SBH and VOZ Travel. But because the SBH-
20 related violations have not been established, the FTC’s requested sum is necessarily
21 overstated.” (*Id.* at 9.) Given this determination, the Court found it “unnecessary at this
22 juncture to decide whether the FTC’s approach to calculating financial remedies is flawed
23 for other reasons,” including (1) the failure to “account for the inherent value of the
24 products that consumers actually received and consumed” and (2) the “unresolved
25 questions” arising from *AMG Capital* “about the FTC’s authority to pursue a compensatory
26 civil sanction based on new § 13(b) violations that also violate an injunction issued in a
27 previous § 13(b) enforcement action (such as the permanent injunction issued in the First

28 ¹ The Contempt Defendants’ request for oral argument is denied because the issues
are fully briefed and argument would not assist the decisional process. See LRCiv 7.2(f).

1 Action),” and simply noted that those issues “will benefit from further briefing.” (*Id.* at 9-
2 11.)

3 On March 28, 2022, the FTC filed a response to the Contempt Defendants’ pending
4 motion. (First Action, Doc. 132.)

5 On April 4, 2022, the Contempt Defendants filed a reply. (First Action, Doc. 135.)

6 DISCUSSION

7 I. Subject-Matter Jurisdiction

8 A. **The Parties’ Arguments**

9 The Contempt Defendants’ primary argument is that because the Supreme Court
10 held in *AMG Capital* that the FTC cannot recover monetary damages pursuant to § 13(b)
11 of the FTC Act, and because the injunction in the First Action was predicated on claims
12 under § 13(b) of the FTC Act, “[t]he FTC’s attempt to indirectly seek monetary redress
13 through its contempt claims must be dismissed for lack of subject matter jurisdiction.”
14 (Doc. 127 at 2.) The Contempt Defendants elaborate: “The losses claimed by the FTC are
15 derived from the 2002 Stipulated Order, which is based solely on Section 13(b), which
16 does not allow courts to impose monetary redress. The *AMG* ruling bars any . . . monetary
17 recovery based on Section 13(b) either directly through lawsuits, or indirectly through a
18 contempt action. The FTC can put lipstick on this pig, but it is still a pig.” (*Id.* at 16.)

19 The FTC opposes the Contempt Defendants’ request for dismissal. (Doc. 132 at 2-
20 7.) The FTC argues that the Court “plainly has jurisdiction” to enforce the permanent
21 injunction issued in the First Action via the exercise of its civil contempt power, that *AMG*
22 *Capital* does not undermine the Court’s authority to impose monetary sanctions based on
23 violations of the permanent injunction (a conclusion that two other district courts have
24 already reached), and that net revenues remain a permissible compensatory contempt
25 sanction under Ninth Circuit law. (*Id.*)

26 In reply, the Contempt Defendants argue that “[t]he Court should dismiss the Order
27 to Show Cause . . . because the Court lacks the subject matter jurisdiction necessary to
28 make such a ruling.” (Doc. 135 at 1.) The Contempt Defendants assert in a footnote that

1 “[w]hether Rule 12 is a correct vehicle for the Court to dismiss this action is irrelevant . . .
2 because a Court must have subject matter jurisdiction to preside over a lawsuit.” (*Id.* at 1
3 n.1.) The Contempt Defendants also argue that one of the cases cited by the FTC is
4 distinguishable. (*Id.* at 2.) Finally, the Contempt Defendants disagree with the FTC’s
5 arguments concerning the permissibility of net-revenue sanctions. (*Id.* at 7-10.)

6 B. Analysis

7 There is a disconnect between the substantive argument raised in the Contempt
8 Defendants’ motion (*i.e.*, the FTC’s request for monetary contempt sanctions in the First
9 Action is barred by *AMG Capital*) and the relief they seek (*i.e.*, a dismissal based on the
10 absence of subject-matter jurisdiction). The Court unquestionably has subject-matter
11 jurisdiction to entertain a claim for civil contempt sanctions based on the violation of a
12 permanent injunction it previously issued. *Shillitani v. United States*, 384 U.S. 364, 370
13 (1966) (“There can be no question that courts have inherent power to enforce compliance
14 with their lawful orders through civil contempt.”). Although the parties debate whether the
15 FTC’s theory of damages in the First Action is foreclosed by *AMG Capital*, this debate
16 does not implicate the Court’s subject-matter jurisdiction. The FTC’s arguments on this
17 point are not insubstantial, implausible, or otherwise so completely devoid of merit as not
18 to involve a federal controversy. Thus, even assuming the Contempt Defendants are
19 correct about the meaning of *AMG Capital*, this would simply mean the FTC’s request for
20 relief in the First Action should be denied on the merits (as opposed to being dismissed for
21 want of subject-matter jurisdiction). *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83,
22 89 (1998) (“It is firmly established in our cases that the absence of a valid (as opposed to
23 arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts’
24 statutory or constitutional *power* to adjudicate the case. . . . Jurisdiction is not defeated by
25 the possibility that the averments might fail to state a cause of action on which petitioners
26 could actually recover. . . . Dismissal for lack of subject-matter jurisdiction because of the
27 inadequacy of the federal claim is proper only when the claim is so insubstantial,
28 implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of

1 merit as not to involve a federal controversy.”) (cleaned up).

2 The Court acknowledges that, at some point in the near future, it may be necessary
3 to decide whether the FTC’s request for monetary sanctions in the First Action is foreclosed
4 by *AMG Capital*. But the only request now properly before the Court is the Contempt
5 Defendants’ request for dismissal for lack of subject-matter jurisdiction. As explained
6 above, that request lacks merit.

7 II. Unclean Hands

8 A. **The Parties’ Arguments**

9 One of the Contempt Defendants’ alternative requests is to “allow them to add
10 additional defenses asserting the unclean hands doctrine.” (Doc. 127 at 1.) The Contempt
11 Defendants contend that the unclean hands doctrine is applicable here for three reasons:
12 first, because the FTC “knew full well” that it lacked authority to pursue monetary redress
13 under § 13(b) of the FTC Act but persuaded the appellate courts to adopt a contrary,
14 incorrect interpretation for “almost four decades” until the Supreme Court finally decided
15 *AMG Capital* (*id.* at 2-4); second, because the FTC breached the settlement agreement in
16 the First Action by issuing a press release that characterized Noland as a “pyramid
17 promoter” (*id.* at 5-13); and third, because the FTC failed to cite a controlling authority—
18 the Ninth Circuit’s decision in *FTC v. Figgie Int’l, Inc.*, 994 F.2d 595 (9th Cir. 1993)—
19 when disclosing its damages computations or briefing the issue of damages in its summary
20 judgment motion (*id.* at 13-15).

21 The FTC opposes the Contempt Defendants’ request to add an unclean hands
22 defense. (Doc. 132 at 7-11.) As for its litigation history, the FTC argues that the
23 “Contempt Defendants cite no authority establishing that legal advocacy urging courts to
24 adopt a particular statutory interpretation can be an ‘unconscionable act’ demonstrating
25 unclean hands” and note that “every court of appeals that examined the issue for nearly 40
26 years agreed with the FTC’s reading of Section 13(b).” (*Id.* at 9.) Next, the FTC argues
27 that the press release did not contain any false statements or violate the settlement
28 agreement. (*Id.* at 9-10.) Finally, the FTC notes that it *did* cite *Figgie* in its damages

1 disclosures and summary judgment briefing and argues that the parties' disagreement over
2 *Figgie's* applicability does not amount to unclean hands. (*Id.* at 10-11.)

3 In reply, the Contempt Defendants argue that the FTC's litigation history before
4 *AMG Capital* amounted to "decid[ing] to mislead the courts and hope that they got a good
5 ruling" and that "[i]t falls on this Court to protect the public because the FTC has shown
6 no remorse or regret for its manifest infidelity to the statutes it is sworn to enforce" (Doc.
7 135 at 2-6); that the press release was misleading (*id.* at 7 n.7); and that although the FTC
8 may have cited *Figgie* in its disclosures and summary judgment briefing, the FTC still
9 displayed a "lack of candor about the standard of proof for damages" (*id.* at 6-7).

10 B. Analysis

11 As a threshold matter, the Contempt Defendants' request for permission to "add" an
12 unclean hands defense is procedurally confusing. Because this is a civil contempt
13 proceeding premised on alleged violations of a permanent injunction previously issued in
14 this case, the FTC did not file a formal complaint accusing the Contempt Defendants of the
15 alleged violations and the Contempt Defendants did not file an answer. Instead, the Court
16 simply granted the FTC's request to issue an OSC. (Doc. 101.) The next step will be to
17 hold an evidentiary hearing to resolve the FTC's contempt allegations in the First Action
18 (as well as its claims in the Second Action) on the merits. (Doc. 134 at 3 ["This case has
19 been pending for over two years, discovery is closed, and a consolidated evidentiary
20 hearing in the First and Second Actions will need to take place regardless of how the
21 reconsideration motion is resolved."].) It is therefore unclear what the Contempt
22 Defendants are asking for permission to do—there is no answer in the First Action to which
23 an unclean hands defense might be formally added.

24 At any rate, the Contempt Defendants' arguments fail on the merits. The FTC did
25 not engage in conduct remotely implicating the unclean hands doctrine by successfully
26 persuading an array of federal courts over a four-decade span to adopt a particular
27 interpretation of the FTC Act. Although that interpretation turned out to be wrong, being
28 wrong about a debatable issue of statutory interpretation that dozens of federal judges

1 found persuasive does not come close to qualifying as “wrongfulness, willfulness, bad
2 faith, or gross negligence.” *Pinkette Clothing, Inc. v. Cosmetic Warriors Ltd.*, 894 F.3d
3 1015, 1029 (9th Cir. 2018). As for the press release, the Court has already determined that
4 it “was not issued in violation of the 2002 stipulated judgment.” (Doc. 133 at 9-10.)
5 Finally, as for *Figgie*, the Contempt Defendants have established, at most, that the FTC
6 took one side of a good-faith debate about a disputed legal issue, which again does not
7 come close to qualifying as conduct that might support an unclean hands defense.

8 **III. New Evidence**

9 **A. The Parties’ Arguments**

10 The Contempt Defendants’ final alternative request is for the Court to “consider the
11 Declarations of Tevis Sherfield and J. Noland in support of their defense to the contempt
12 charges.” (Doc. 127 at 1.) According to the Contempt Defendants, these declarations
13 “establish that affiliates were not misled on issues involving income potential but were
14 provided hypothetical examples based on SBH’s compensation plan.” (*Id.* at 15.)

15 In response, the FTC argues that although the Contempt Defendants “do not explain
16 in what context they want the Court to consider the declarations,” it appears “they want the
17 Court to consider them when ruling on the FTC’s Motion for Contempt Sanctions.” (Doc.
18 132 at 11.) The FTC argues that, because that motion has now been denied, the Contempt
19 Defendants’ request is moot. (*Id.*)

20 In reply, the Contempt Defendants do not discuss the declarations. (Doc. 135.)

21 **B. Analysis**

22 The Court agrees with the FTC that the Contempt Defendants’ request related to the
23 Sherfield and Noland declarations is moot. Other than the motion being addressed in this
24 order, there are no other pending motions in the First Action.

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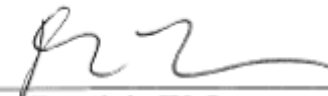
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Accordingly,

IT IS ORDERED that the Contempt Defendants' motion to dismiss and to supplement briefing (Doc. 127) is **denied**.

Dated this 18th day of May, 2022.



Dominic W. Lanza
United States District Judge