UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FEDERAL TRADE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**Case No. 4:19-cv-00715**
ADVOCARE INTERNATIONAL, INC., A limited partnership, BRIAN CONNOLLY, DANNY McDANIEL, DIANE McDANIEL, CARLTON HARDMAN and LISA HARDMAN,	§ § § § §	
	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS

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Defendants, Danny McDaniel and Diane McDaniel (collectively, the "McDaniels"), pursuant to Fed. R. Civ. P. 12(b)(6), file their Motion to Dismiss, and state:

I. STATEMENT OF ISSUES TO BE DECIDED

The Federal Trade Commission ("FTC") brings this case against the McDaniels pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The FTC alleges, in conclusory form, that it "has reason to believe that [Defendants] are violating or are about to violate laws enforced by the Commission."[1] However, all of the allegations of wrongdoing in the Complaint arise out of the Defendants' ***past*** participation in the Advocare International, Inc. ("Advocare") multi-level marketing ("MLM") program. As the FTC acknowledges in the Complaint, "Advocare abandoned its multi-level marketing structure in July 2019 during its negotiations with the FTC." Complaint at § 72(e). Further, contemporaneously with the filing of the Complaint, the FTC filed an unopposed motion to enter stipulated orders in which Advocare and all other defendants but the McDaniels agreed to permanent injunctions and monetary judgments. (Dkt. 2). The Court entered the stipulated orders on October 9, 2019, permanently enjoining Advocare from promoting or operating any MLM program. (Dkt. 15 and 16). There are simply no factual allegations in the Complaint which would support an inference that the McDaniels are engaging in or are about to engage in any unlawful conduct.

Based on the foregoing, the Court will have to determine whether the FTC has the statutory authority to bring the Complaint and, if so, the extent to which the FTC may pursue claims for monetary relief under Section 13(b).

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[1] Plaintiff's Complaint for Permanent Injunction and Other Equitable Relief (Doc. 1) ("Complaint") at ¶¶ 71 and 72.

II. SUMMARY OF THE ARGUMENT

This action arises out of Advocare's operation of an MLM program. In the Complaint, the FTC alleges that Advocare's MLM program constitutes an illegal pyramid scheme in violation of 15 U.S.C. § 45(a). Complaint at §§ 75-76. The FTC further alleges that the Defendants operated or promoted Advocare's allegedly illegal MLM program. *Id*. Finally, the FTC alleges that the Defendants made deceptive income representations and furnished others with the "means and instrumentalities" to commit deceptive acts in connection with Advocare's MLM program. Complaint at ¶¶ 77-81. The FTC claims its statutory authority to file this action, and seek the monetary redress sought in the Complaint, arises under Section 13(b) of the FTC Act, 15 U.S.C. §53(b). In this motion the McDaniels first argue that the FTC has failed to allege sufficient facts to meet even the preliminary requirements of an action brought under section 13(b) and the action must be dismissed in its entirety. Alternatively, the McDaniels argue that the court should dismiss those portions of the FTC's complaint seeking monetary relief against the McDaniels since section 13(b) remedies are limited to injunctive relief.

First, the FTC has failed to plead facts necessary for it to invoke its limited authority under section 13(b). Congress granted the FTC authority to file an action in federal court pursuant to section 13(b) only in limited circumstances where there is a need for immediate relief, in the express terms of the statute, where the defendant "is violating" or "is about to violate" the law:

> Whenever the Commission has reason to believe . . . that any person, partnership, or corporation ***is violating***, or ***is about to violate***, any provision of law enforced by the [FTC] . . . the Commission . . . may bring suit in a district court of the United States to enjoin any such act or practice.

15 U.S.C. § 53(b) (emphasis added). However, no need for immediate relief has been pled here. To the contrary, the FTC's own allegations confirm that the alleged pyramid scheme, through

which they allege the McDaniels' unlawful conduct occurred, terminated forever in July 2019, and the allegations of misconduct directed at the McDaniels did not continue past 2017. While there are conclusory allegations that the Defendants "are operating" or "are promoting" a pyramid scheme, there are no ***factual*** allegations at all to support them. In fact, the factual allegations make clear that Advocare's current marketing system is lawful as it was implemented as part of its settlement with the FTC and is permitted under this Court's permanent injunction.

There are also no factual allegations that the McDaniels are about to violate the law. The settlements of Advocare and the other defendants, as evidenced by the respective stipulated orders, confirm that there is no basis to believe that they are "about to" violate any law. With respect to the McDaniels, who have not settled with the FTC, the Complaint fails even to offer conclusory or speculative allegations about what they "might do" in the future. Even if the Complaint did include such speculative allegations, they would be insufficient as a matter of law.

Second, even if the FTC has properly exercised its authority under Section 13(b), that section provides only for the imposition of injunctive relief. The FTC has historically used Section 13(b) as a means to file lawsuits seeking restitution and disgorgement of funds from businesses and individuals accused of violating the FTC Act. It is attempting to do so in this suit as well. However, neither the plain language nor the legislative history of the FTC Act supports this extraordinary use of power by an administrative agency. Although a number of courts have allowed the FTC to exercise this power through the Court's "equitable powers," recent case law makes clear that such broad power is not granted under Section 13(b). In fact, the Seventh Circuit has recently overruled three decades of its own precedent to make clear that Section 13(b) grants the FTC no authority to seek monetary remedies of any kind. Accordingly, even if

the Court is satisfied that the Complaint properly alleges a claim upon which relief may be granted, the Court must nevertheless dismiss any request for monetary relief.

III. STATEMENT OF FACTS

A. The Advocare MLM Program.

Advocare was founded in 1993. Complaint at ¶ 13. Until recently, Advocare advertised and sold its health and wellness products through a network of independent distributors. *Id*. Distributors could earn income by purchasing Advocare's products at a wholesale discount and selling them to retail customers or by the purchase of products by their "downline" distributors which occurred at a lower wholesale discount than that to which the earning distributor is entitled. *Id.* at ¶ 15. Advocare's distributors also had the ability to earn additional compensation from Advocare in the form of overrides, bonuses or other incentives. *Id*. at ¶ 16.

In the Complaint, the FTC alleges that "product purchases are driven by the compensation plan and not by consumer demand for AdvoCare products." Complaint at ¶ 19. The FTC further alleges that "[s]ince at least 2014, Defendants have marketed the AdvoCare business opportunity through personal stories touting the improved lifestyle and unlimited income opportunity purportedly available through AdvoCare." *Id*. at ¶ 22.

B. Allegations of Misconduct Directed at the McDaniels.

The Complaint alleges specific conduct which the FTC asserts constitutes violations of the FTC Act. With respect to the McDaniels, those allegations are:[2]

- In a video posted on the McDaniels' website until *at least April 2017*, Diane McDaniel stated, "the sky is the limit. I'm the variable. I get to decide what I truly want according to the effort I put forth" and that "there is incredible profit that can be made through infinity." Complaint at ¶ 22(g).

[2] While the Complaint mentions a 2018 Instagram post, that post does not mention Advocare and does not evidence any unlawful conduct. Complaint at ¶ 22(f).

- In a video on the McDaniels' website *until at least December 2016*, Diane McDaniel stated, "whether it's a little or a lot, anywhere from 200 to 500 to 5,000 to 50,000 dollars a month—the sky is the limit here." Complaint at ¶ 22(h).

- Diane McDaniel told Distributors at a recorded *2014 training* event that "[i]f your stories don't have any numbers attached to it, your story stinks. . . . If you don't have numbers, people aren't hearing your stinky story." She also told Distributors to convince consumers they would "make more money. Because that's the lingo they're looking for—more money. . . . More money. More money." Complaint at ¶ 27.

- In a training document *used until at least June 2014*, the McDaniels provide the following example of emotional storytelling: "After 5 years, we have the potential of earning a 2-week pay check, even if we decide to retire from the business. One of the ways the company pays is residual income, which means you and I can earn money for a lifetime if we build it right." Complaint at ¶ 30.

- The Hardmans and McDaniels also teach their downlines to use the fear of loss. In a PowerPoint training presentation *used until at least 2015*, they told Distributors to tell prospects "that they have the opportunity to invest in a company that has the potential to move & grow like a 'Nike' or a 'Bill Gates[.]' Your Prospect does not want . . . regrets 3 years down the road because they did not invest in Advocare!" Complaint at ¶ 32.

- With AdvoCare's help and approval, the McDaniels created a version of the income disclosure statement that—like AdvoCare's version—reported annualized earnings as averages and ignored Distributors without earnings. . . . Both the Hardmans and the McDaniels used versions of this income disclosure statement in their business opportunity presentations *until at least mid-2015*. Complaint at ¶¶ 35-36.

- The McDaniels pressured recruits to take financial risks to reach Advisor. *In 2013*, when one Distributor said he could not afford Advisor because he had just $2,000 saved, Diane McDaniel asked that he "go [half] in with $1,050" and purchase the remaining volume the next pay period. *In 2015*, a Distributor wrote of "putting [her] faith in [the McDaniels'] hands" while using credit cards she was "hoping not to use" to reach Advisor. Complaint at ¶ 52.

- The Hardmans and McDaniels share this focus on recruiting business opportunity participants. *Until at least November 2016*, they regularly contacted members of their downline to attempt to convince them to become Advisors. To do so, they used a "prequalification report" AdvoCare provided to all Distributors. The report tracked how close downline were to becoming Advisors. Complaint at ¶ 59.

- Danny McDaniel also sent Distributors notes *in December 2013* with the instruction that "if an organization is just bringing in Distributors [it has] no value . . . there has to be [Advisors]." Complaint at ¶ 60.

- Diane McDaniel also frequently dismissed retail earnings as "fun," rather than "real," money. *In 2014*, she told a Distributor that recruiting customers was "fun but a very slow way to build anything." *In 2015*, she trained Distributors at a corporate event to never assume people know about the fun money versus the real money in AdvoCare. Complaint at ¶ 67(b).

- *In 2012*, Danny McDaniel taught Distributors to lead with the business opportunity and treat products as a fallback, and called AdvoCare "a leadership factory disguised as a nutrition company." Complaint at ¶ 67(c).

- *In a 2012 training document* on how to run a business opportunity meeting, the McDaniels told Distributors to quickly show recruits how to earn retail and wholesale commissions—and to then "let them know that you are going to show them how we really earn money in this business . . . through the two types of RESIDUAL income that Advocare provides." Complaint at ¶ 67(d).

C. Advocare's MLM Program Terminated in July 2019.

Importantly, although the Complaint frequently speaks in the present tense. i.e., "AdvoCare continues to train Distributors that product users are secondary to business opportunity participants," the present tense of such allegations is clearly erroneous given that the Complaint concedes that "AdvoCare abandoned its multi-level marketing structure in July 2019 during its negotiations with the FTC."[3] All of the allegations in the Complaint must be read in the context of these *undisputed facts*: Advocare's MLM program terminated forever in July 2019 and its current marketing structure, which resulted from its settlement with the FTC and which is permitted under the permanent injunction, is entirely lawful according to the FTC.

[3] *Compare* Complaint ¶ 70 with ¶ 72(e). For reasons unclear to the McDaniels, the FTC did not see fit to draft the Complaint to reflect the current realities brought on by its settlement with Advocare. As of the date of its filing, the Complaint contains many false statements potentially implicating Fed. R. Civ. P. 11. Given that Advocare voluntarily agreed to terminate its MLM program in April 2019, "during its negotiations with the FTC," and thereafter actually terminated its MLM program in July 2019, these allegations by the FTC, which are clearly false, are also very troubling.

D. The McDaniels Did Not Operate Advocare's MLM Program.

In 2017, the McDaniels were named as defendants in a class action lawsuit alleging that the Advocare MLM program was an unlawful pyramid scheme. In dismissing the McDaniels, ***with prejudice***, the district court made a number of observations pertinent hereto including that, even if the Advocare MLM was a pyramid scheme, which has not been established, the McDaniels were not guilty of operating it: "the Court holds that the Individual Defendants did not operate the pyramid scheme." Memorandum Opinion and Order at p. 17, *Ranieri, et al. v. Advocare International, Inc., et al*., Civil Action No. 3:17-CV-0691-S, United States District Court, Northern District of Texas, August 27, 2018.

IV. APPLICABLE LEGAL STANDARD

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is appropriate if the complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). While the Court must accept the complaint's well-pleaded facts as true, it must disregard any legal conclusions since the truth of legal conclusions is not assumed. *Doe v. Robertson*, 751 F.3d 383, 386-387 (5th Cir. 2014); *see also Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) ("conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.").

V. ARGUMENT

A. The FTC Has Failed to Plead Facts Necessary to Invoke Its Limited Authority Under Section 13(b).

The FTC's power to act is limited to the statutory authority delegated to it by Congress. *See Zola v. Interstate Commerce Comm'n*, 889 F.2d 508, 515 (3d Cir. 1989) ("The [FTC] is an administrative body possessing only such powers which are granted by statute." (*quoting Arrow-*

Hart & Hegeman Elec. Co. v. FTC, 291 U.S. 587, 598 (1934)). The FTC brings this action pursuant to section 13(b) of the FTC Act. *See* Complaint ¶ 1. Section 13(b), however, only grants the FTC authority to file suit where a defendant is violating or is about to violate the law. 15 U.S.C. § 53(b). In other words, to invoke the jurisdiction of this Court under section 13(b), the FTC must plead facts demonstrating either an ongoing or imminent violation of the law.

Here, the FTC has done nothing of the sort. While the Complaint does assert that the Defendants are violating the FTC Act through the operation and promotion of Advocare's MLM program, the Complaint also concedes that Advocare's MLM program actually terminated in July 2019. Furthermore, with respect to the McDaniels, who as independent distributors did not "operate" Advocare's MLM program, the Complaint alleges only conduct occurring between 2012 and 2017. Further still, all of the conduct alleged in the Complaint as violating the FTC Act is conduct related to the promotion of Advocare's previously terminated MLM program.

Likewise, although the Complaint asserts the legal conclusion that the Defendants are "about to violate" the FTC Act, the factual pleadings simply do not support such a conclusion. The McDaniels are not alleged to have engaged in unlawful conduct outside the context of promoting Advocare's now extinct MLM program. Likewise, the Complaint does not allege that the McDaniels intend to, or are even considering to, participate in any other allegedly unlawful venture. Accordingly, the Complaint should be dismissed pursuant to Rule 12(b)(6) because the Complaint fails to allege facts sufficient to state a claim.

1. The FTC's Section 13(b) Authority To Seek An Injunction In Federal Court Is Expressly Limited To The Need to Address An Ongoing Or An Imminent Future Violation Of Law.

In construing section 13(b), the Court need look no further than the plain language of the statute. *Stankis v. Environmental Protection Agency*, 713 F.2d 1181, 1185 (5th Cir. 1983) (*quoting Oliver v. U.S. Postal Service,* 696 F.2d 1129 (5th Cir.1983) (per curiam)) ("When

interpreting statutes and regulations, the plain language of the statute or regulation controls our construction, absent a clearly expressed legislative intention to the contrary."). Where, as here, Congress uses the present and future tense, the statute must be construed as reaching only those acts that are ongoing or will occur in the future, but not acts that were completed in the past. *Carr v. United States*, 560 U.S. 438, 448 (2010); *see also T D X Energy, L.L.C. v. Chesapeake Operating, Inc*., 857 F.3d 253, 266 (5th Cir. 2017) ("The use of the present and future tenses [drilling or intending to drill] shows legislative intent that the provision did not apply to completed wells."); *Dictionary Act*, 1 U.S.C. § 1 ("In determining the meaning of any Act of Congress, . . . words used in the present tense include the future as well as the present.").

The conclusion that section 13(b) authorizes the FTC to seek injunctive relief addressing only ongoing or imminent future conduct is also compelled by the statutory structure of the FTC Act. Section 5 of the FTC Act proscribes as unlawful "[u]nfair methods of competition in or affecting commerce." 15 U.S.C. § 45(a)(1). As relevant here, when faced with what it believes to be a violation of section 5, the FTC may proceed in one of two ways, depending upon whether the alleged conduct at issue occurred in the past, is still ongoing, or is about to happen. First, in the case of past or ongoing alleged conduct, under section 5(b), the FTC may initiate administrative proceedings against a party that the FTC has reason to believe "***has been or is using***" an unfair method of competition. 15 U.S.C. § 45(b) (emphasis added). Second, in the case of ongoing or imminent future conduct, under section 13(b), where the FTC has reason to believe that an entity "***is violating, or is about to violate***" a provision of law enforced by the FTC (including section 5), the FTC may file suit in federal court seeking to enjoin the ongoing or imminent violation. 15 U.S.C. § 53(b) (emphasis added).

That sections 5(b) and 13(b) serve wholly separate purposes is consistent with how the FTC has construed its statutory authority in the merger context. There, the FTC institutes section 5(b) administrative proceedings to review the legality of a proposed merger under the antitrust laws, and typically simultaneously seeks an injunction under section 13(b) in federal district court to block the merger pending completion of the administrative review.[4] Indeed, the FTC itself repeatedly has referred to its pursuit of injunctive relief under section 13(b) as a measure intended to "preserve the status quo."[5]

Although it is not necessary to consider legislative history given the unambiguous terms of the statute, there is no doubt that Congress intended what it wrote. Before 1973, the FTC lacked the authority to initiate a civil proceeding of any kind in federal court with respect to alleged anticompetitive conduct. Its only procedural avenue was an administrative proceeding. *See United States v. JS & A Group, Inc.*, 716 F.2d 451, 452 (7th Cir. 1983). Given the protracted nature of the administrative process, however, section 5 was widely criticized at the time as inadequate.[6] In 1973, Congress addressed this problem by enacting section 13(b). See Pub. L. No. 93-153, § 408, 87 Stat. 592 (1973). As explained in a preceding Senate report, "[t]he purpose of [section 13(b)] is to permit the Commission to bring an immediate halt to unfair or deceptive

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[4] *See, e.g.*, Br. of the FTC at 2-3, *FTC v. Penn State Hershey Med. Ctr.*, No. 16-2365 (3d Cir. June 1, 2016) (Doc. No. 003112313990) (describing the FTC's administrative complaint to block the merger of two hospital systems while, "[i]n the meantime, the FTC . . . asked the district court . . . to issue a preliminary injunction preventing the merger from closing before the administrative adjudication is complete").

[5] *See, e.g.*, Pl.'s Mem. of Points and Authorities in Opp'n to Def.'s Mot. for a Scheduling Order and an Expedited Status Conference at 3-4, *FTC v. Inova Health Sys. Found.*, No. 1:08-cv-00460-CMH-JFA (E.D. Va. May 20, 2008) (D.I. No. 11) (describing the FTC's decision to proceed under § 13(b) as "inherently limited in scope" and intended to "preserve the status quo until the FTC can perform its function") (citations omitted).

[6] *See, e.g.*, David O. Bickart, *Civil Penalties under Section 5(m) of the Federal Trade Commission Act*, 44 U. Chi. L. Rev. 761, 762-63 (1977).

acts or practices when . . . . [a]t the present time such practices might continue for several years until agency action is completed." S. Rep. No. 93-151, at 30-31 (1973).[7]

Thus, the FTC Act's plain language, structure, and legislative history establish conclusively that the FTC has no authority to pursue a federal court action in connection with conduct that occurred in the past. *See FTC v. Evans Prods. Co.*, 775 F.2d 1084, 1089 (9th Cir. 1985) ("[T]he statutory language, legislative history, and cases indicate that § 13(b) may not be used to remedy a past violation that is not likely to recur."); *FTC v. Shire Viropharma, Inc.*, 917 F.3d 147, 156 (3rd Cir. 2019) ("Simply put, Section 13(b) does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant "is" committing or "is about to" commit another violation.").

2. The Complaint Concedes That All Of The Challenged Conduct Occurred In The Past And The FTC Has Not Alleged That Defendants Are Violating, Or Are About To Violate, The Law.

Here, exclusively invoking section 13(b), the FTC asks this Court to grant equitable relief based upon alleged conduct that the FTC itself acknowledges has already ceased. All of the conduct alleged in the Complaint is directed at the McDaniels' alleged participation in the Advocare MLM program. The FTC does not generally allege that MLM programs are unlawful, as in fact they are not. Rather, the FTC alleges that the McDaniels' ***past*** conduct, in connection with Advocare's MLM program, was unlawful precisely because it promoted the Advocare MLM program, which the FTC alleges was an illegal pyramid. However, the Complaint concedes that Advocare terminated its MLM program in July 2019, the stipulated orders entered

[7] The FTC itself explained at the time that it was seeking the power to enjoin ongoing violations of law. See 119 Cong. Rec. at 21,445 (1973) (explaining that, in § 13(b), the FTC sought "the statutory authority to seek directly in the federal district courts preliminary injunctions against the continuance of anticompetitive conduct") (letter from Ronald M. Dietrich, General Counsel of the FTC, to Sen. Henry M. Jackson, Chairman, Committee on Interior and Insular Affairs).

by the Court guarantee that Advocare's MLM program will *never* be reinstated and by settling with Advocare the FTC has acknowledged that Advocare's current marketing program is lawful. Not surprising, nowhere does the Complaint allege facts supporting the conclusory allegation that the McDaniels are currently engaged in any illegal conduct or are "about to" violate the law. That should end the inquiry.

To be sure, the FTC is well aware of the problems with bringing this case under Section 13(b). The FTC reached a settlement with Advocare which resulted in the termination of the Advocare MLM program and the payment of $150,000,000 by Advocare, as evidenced by the stipulated order. The FTC and the McDaniels, unfortunately, were unable to reach mutually acceptable terms and have not settled. This leaves the FTC in the curious position of having achieved its main goal, the termination of the Advocare MLM program, ***through voluntary compliance*** without ever having filed suit. This also means that, regardless of the McDaniels' alleged conduct, all such conduct necessarily ended, *at the very latest*, by July 2019. Accordingly, there is simply no factual basis for an allegation that the McDaniels, or any of their co-defendants for that matter, "are" violating the FTC Act as of the filing of the Complaint, because they are not.

In order to address this obvious shortcoming, the FTC alleges the following:

> 72. Based on the facts and violations of law alleged in this Complaint, the FTC has reason to believe that Defendants Danny McDaniel and Diane McDaniel are violating or are about to violate laws enforced by the Commission because, among other things:
>
> a. The McDaniels engaged in deceptive acts and practices through their participation in AdvoCare, which they promoted over a period of more than 20 years;
>
> b. The McDaniels' deception was widespread and permeated their business practices, including their sales and recruitment presentations, their social

media feeds, their marketing and training activities, and their creation and distribution of sales aides and materials;

c. The McDaniels have no significant income other than their income from AdvoCare;

d. The McDaniels continued to deceptively promote AdvoCare after learning of and throughout the FTC's investigation and after the company was sued in a 2017 class action lawsuit that alleged the company was a pyramid scheme;[8]

e. The McDaniels never voluntarily ceased their deceptive conduct; instead, they continued to engage in deception until AdvoCare abandoned its multi-level marketing structure in July 2019 during its negotiations with the FTC;[9]

f. The McDaniels have never acknowledged their culpability or shown remorse for their roles in promoting an unlawful pyramid scheme, for making materially deceptive earnings claims, or for sharing the means and instrumentalities for violating Section 5 of the FTC Act, 15 U.S.C. § 45.

Complaint at ¶ 72.

Aside from the inaccuracy of these entirely conclusory allegations, none of them even suggests that the McDaniels have engaged in any wrongdoing independent of and apart from their ***past*** participation as successful distributors in Advocare's MLM program. Notably, none of the allegations in the Complaint allege any *actual misrepresentations* by the McDaniels. The closest the Complaint comes to alleging that the McDaniels made any *actual misrepresentations* is the allegation that they prepared misleading financial disclosures, between 2012 and 2015, but also recognizes that these financial disclosures were based upon Advocare's financial disclosures to its distributors and were approved by Advocare. The Complaint doesn't even suggest, much

[8] This conclusion is not supported by any factual allegations in the Complaint. Furthermore, as stated above, the McDaniels were dismissed from the class action with prejudice.

[9] Again, as is the case with the immediately proceeding conclusion, this conclusion is not supported by any factual allegations in the Complaint.

less allege, that the McDaniels were aware that Advocare's financial disclosures were false or inaccurate or that such materials were used after 2015.

Further, even if these allegations were true, which they are not, they would not be sufficient to trigger the FTC's authority to file suit in federal court under section 13(b) because they say nothing about what the McDaniels are doing now or are about to do. Moreover, conclusory and speculative allegations about what the McDaniels might do in the future would be insufficient to support an injunction even if the FTC had the authority to bring this action. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953) (a permanent injunction is appropriate where the moving party shows that "there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive"); *Seals v. McBee*, 898 F.3d 587, 591 (5th Cir. 2018) (party seeking injunctive relief "must show that 'there is a real and immediate threat of repeated injury.'") (*quoting City of L.A. v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983)); *see also Evans*, 775 F.2d at 1087 ("'past wrongs are not enough for the grant of an injunction'; an injunction will issue only if the wrongs are ongoing or likely to recur."); *In re Plavix Indirect Purchaser Antitrust Litig.*, No. 1:06-cv-226, 2011 WL 335034, at *4 (S.D. Ohio Jan. 31, 2011) ("[M]ere[] speculat[ion] that Defendants' previous behavior . . . leads to the assumption that Defendants will engage in [similar behavior in the future]" is insufficient to survive a motion to dismiss). By simply parroting the statutory language of Section 13(b), the FTC offers only a "formulaic recitation" of one of the elements it would be required to satisfy in order to obtain injunctive relief, which is patently insufficient to meet its pleading burden. *See, e.g., Hernandez v. Siemens Corp.,* 726 Fed. Appx. 267, 269 (5th Cir. 2018) ("To survive a Rule 12(b)(6) motion, the complaint must contain 'more than labels and conclusions,' or 'a formulaic recitation of the elements of a cause of action. . . . It must state

a facially plausible claim that allows for reasonable inferences to be drawn regarding the defendant's liability for the alleged misconduct.") (*citing Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

A recent case out of the Third Circuit is instructive. In *FTC v. Shire Viropharma, Inc*., 917 F.3d 147 (3rd Cir. 2019), the Third Circuit Court of Appeals affirmed the district court's dismissal of a complaint filed by the FTC pursuant to Section 13(b) based upon conduct which had ceased prior to the filing of the Complaint. The Third Circuit concluded that the plain language of Section 13(b) conferred no authority on the FTC to file such a suit. *Id*. at 156-57. "Section 13(b) requires that the FTC have reason to believe a wrongdoer 'is violating' or 'is about to violate' the law. *Id*. § 53(b)(1). We conclude that this language is unambiguous; it prohibits existing or impending conduct. Simply put, Section 13(b) does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant 'is' committing or 'is about to' commit another violation." *Id*; *see also Evans*, 775 F.2d at 1089 (FTC must show a past violation is likely to occur in order to obtain relief under section 13(b)).

The plain language of the statute together with *Shire* and *Evans* compel the conclusion that the FTC cannot establish a cognizable danger of an imminent violation of law merely by alleging past misconduct and asserting that history could repeat itself. This is especially true here where Advocare's MLM program terminated well before the FTC filed this action.

3. The Complaint's Conclusory Allegations Are Refuted by the Facts Pled And The FTC's Settlement With Advocare.

Not only has the FTC failed to plead facts supporting the allegation that that a future violation is imminent, but there is ample basis for the Court to conclude at the Rule 12 stage that there is no plausible basis to believe that a future violation is likely to occur or even could occur.

The FTC's allegations relate solely to the Advocare MLM program. However, as conceded by the FTC in the Complaint, the Advocare MLM program terminated in July 2019 and the FTC considers Advocare's current marketing program completely lawful. Accordingly, as a result of the FTC's negotiations and settlement with Advocare, it is clear that the McDaniels are not merely unlikely to but are unable to engage in any unlawful conduct by virtue of any continuing operation or promotion of the Advocare MLM program.

Nor is there any basis to conclude that the McDaniels are predisposed to intentionally engage in unlawful conduct in connection with some other MLM program. With respect to the McDaniels, the Complaint alleges that they have been Advocare distributors for more than 20 years. The Complaint does not allege that the McDaniels are promoting or participating in any other unlawful MLM program or are likely to do so. Rather, the Complaint alleges that the McDaniels have no significant income other than through their Advocare distributorship, income that the FTC must now concede is entirely lawful.[10] The Complaint does not, however, allege facts which would support the conclusion that the McDaniels will now pursue anything other than lawful employment in the future or that they even could operate their Advocare distributorship in an unlawful manner given the July 2019 changes to the Advocare marketing program negotiated by the FTC and the permanent injunction entered by this Court related thereto. In fact, the Complaint does not even allege that the McDaniels ***knowingly*** engaged in any unlawful conduct in the past. Rather, they are accused of "making materially deceptive earnings claims" more than two years ***before*** this suit was filed which are not even alleged by the FTC to have been false.

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[10] This allegation also concedes that the FTC is fully aware that the McDaniels are not participating in any other MLM program.

4. The FTC's Specific Prayer For Relief Further Demonstrates That The FTC Has Exceeded Its Section 13(b) Authority.

Finally, the FTC's broad, general request for an injunction in the Complaint's prayer for relief – that the Court "[e]nter a permanent injunction to prevent future violations of the FTC Act by Defendants" – confirms the complete lack of any basis to conclude that either the McDaniels or their co-defendants "are violating" or are "about to violate" the law. First, the fact that the FTC has not sought a preliminary injunction to cease some activity that is occurring now underscores that there is no ongoing violation alleged in the Complaint. Second, the complete lack of any specificity in the FTC's prayer for relief confirms that it has absolutely no reason to believe the McDaniels are about to violate any law. Clearly, the FTC has failed to plead the existence of a specific violation that is "about to" happen.

Indeed, given the absence of any specific ongoing or threatened violation, it is difficult to envision any injunction that this Court could issue that would satisfy Rule 65. *See* Fed. R. Civ. P. 65(d)(1) (every order granting an injunction must "state its terms specifically; and describe in reasonable detail . . . the act or acts restrained or required"); *see also Meyer v. Brown & Root Constr. Co.,* 661 F.2d 369, 373 (5th Cir. 1981) ("A general injunction which in essence orders a defendant to obey the law is not permitted. 'This command of specificity is a reflection of the seriousness of the consequences which may flow from a violation of an injunctive order.'") (*quoting Payne v. Travenol Laboratories, Inc*., 565 F.2d 895, 897 (5th Cir.), *cert. denied*, 439 U.S. 835, 99 S. Ct. 118, 58 L. Ed. 2d 131 (1978)). That concern is particularly important here, because, as it relates to the McDaniels, the conduct that the FTC targets is Constitutionally-protected free speech activity and there is a heavy presumption against prior restraints.[11]

[11] *See United States v. Bell*, 414 F.3d 474, 478 (3d Cir. 2005) ("Permanent injunctions [barring speech] . . . are 'classic examples of prior restraints' . . . ." (*quoting Alexander v. United States*, 509 U.S. 544, 550 (1993))); *Grove Press Inc. v. City of Phila*., 418 F.2d 82, 89 (3d Cir. 1969) ("[P]rior restraint upon speech suppresses the

B. Section 13(b) Does Not Authorize a Monetary Award.

When it comes to a pursuit of monetary awards, Congress authorized avenues other than Section 13(b) through which the FTC must proceed. Under Section 5(b) of the FTC Act, the Commission may challenge "unfair or deceptive act[s] or practice[s]" (or violations of other consumer protection statutes) through maintenance of an administrative adjudication. When there is "reason to believe" that a violation of the FTC Act has occurred, the FTC may issue an administrative complaint setting forth its charges. After hearing by an Administrative Law Judge ("ALJ"), the FTC may adopt the findings of the ALJ and enter an order which become final and binding 60 days after it is served unless the order is stayed by the FTC or by a reviewing court. The ALJ may propose a cease and desist order. If a respondent violates a final order, it is liable for a civil penalty for each violation, as set forth in FTC Rule 1.98(c). The penalty is assessed by a district court in a suit brought to enforce the FTC's order. 15 U.S.C. §45(l), (m). Importantly, Section 5(m)(1)(B) provides that penalties may be imposed if the individual acted with "actual knowledge" that the conduct was unlawful.

1. The Text of Section 13(b) Does Not Authorize the FTC to Obtain Monetary Relief.

It is important to note what Section 13(b) actually provides and does not provide:

> **(b) TEMPORARY RESTRAINING ORDERS; PRELIMINARY INJUNCTIONS**
>
> Whenever the Commission has reason to believe—
>
> (1) that any person, partnership, or corporation ***is violating***, or is ***about to violate***, any provision of law enforced by the Federal Trade Commission, and
>
> (2) that the enjoining thereof ***pending the issuance of a complaint by the Commission*** and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon

precise freedom which the First Amendment sought to protect . . . . [and] bear[s] a heavy presumption against . . . constitutional validity." (citations and internal quotation marks omitted)).

> has become final, would be in the interest of the public— the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, ***That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction***.

(emphasis supplied). This one (very lengthy) sentence must be interpreted as a whole and harmonized to affect Congressional intent. Simply stated, Section 13(b) does not authorize restitution, disgorgement, or damages judgments.

a. Court Must Interpret and Apply the Plain Language of the Statute.

It is axiomatic that the Court must interpret the plain language of a statute to determine its meaning and the intent of Congress. The Court's first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to a particular dispute in the case. *Robinson v. Shell Oil Co*., 519 U.S. 337 (1997). The Court's inquiry must cease if statutory language is unambiguous and "the statutory scheme is coherent and consistent." *Id*. The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Id*. at 341; *accord Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). "In the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail." *Aaron v. SEC*, 446 U.S. 680, 700 (1980). In *Meghrig v. KFC Western, Inc*., 516 U.S. 479, 487-488 (1996), the Supreme Court held that: "[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Merhrig*, 516 U.S. at 487-

488. In *Lamie v. U.S. Trustee*, 540 U.S. 526 (2010), the Court held that, "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Id*. at 534.

Neither the text nor the legislative history of Section 13(b) permits the FTC to file lawsuits seeking disgorgement or restitution in lieu of pursuing either an administrative action pursuant to Section 5 or a civil action in federal court pursuant to Section 19. As set out below, Congress provides for consumer redress through Section 19 of the Act and not Section 13(b).

b. Section 13(b) Is Not Ambiguous.

The FTC asserts authority to file this enforcement action under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). Significantly, Section 13(b) authorizes the FTC to file suit in federal court seeking an "injunction" only when a defendant allegedly "is violating, or is about to violate, any provision of law enforced by the [FTC]." As set forth above, under Section 13(b), therefore, the FTC's authority to sue in federal court for injunctive relief is limited to matters involving ongoing or imminent future conduct when there is a need for prospective relief (i.e., where a party is currently violating the FTC Act or is about to do so). "This language ["is violating or is about to violate"] is unambiguous; it prohibits existing or impending conduct." *FTC v. Shire Viropharma, Inc*., 917 F.3d 147, 156 (7th Cir. 2019).

Section 13(b) further limits the scope of the FTC's authority to seek injunctive relief from a district court by the phrase "the Commission by any of its attorneys designated by it for such purpose *may bring suit in a district court* of the United States *to enjoin any such act or practice."* This phrase conditions the authority of the Commission or its attorneys to bring an action only to "enjoin any such act or practice." Clearly, there is nothing in this provision that authorizes the FTC to "enjoin any such act or practice" and then seek a full-fledged damages lawsuit for past allegedly deceptive acts.

In Section 19 of the FTC Act, on the other hand, Congress granted the Commission authority to "commence a civil action" for violation of FTC rules and seek, among other remedies, refund of money or payment of damages. 15 U.S.C. § 57b(b). "It is a well-established canon of statutory interpretation that the use of different words or terms within a statute demonstrates that Congress intended to convey a different meaning for those words." *S.E.C. v. McCarthy*, 322 F.3d 650, 656 (9th Cir. 2003). The ability to bring suit to restrain or enjoin conduct is fundamentally different and distinct from the authority to "commence a civil action" seeking disgorgement or restitution. Congress provided statutory procedures to the FTC to pursue injunctive relief while the Commission was either (1) adjudicating administrative claims or (2) pursuing consumer redress through Section 19, but not otherwise. *See FTC v. Southwest Sunsites, Inc*., 665 F.2d 711, 718 (5th Cir. 1982) ("[T]he exhortation in *DeMario*[12] to preserve the possibility of complete relief ... makes it appropriate to consider that the final, complete relief in this case may entail consumer redress ***through a Section 19 proceeding***.") (emphasis added).[13]

In sum, the plain language of the statute does not allow the FTC to go any further than seeking an injunction to protect consumers while the Commission pursues other adjudicatory proceedings. To allow the FTC to simply forego the adjudicatory proceedings authorized by the FTC Act which provide for monetary relief and instead obtain that same relief without complying with the statutory requirements established by Congress is clearly a result that runs

[12] *Mitchell v. DeMario Jewelry, Inc*., 361 U.S. 288, 80 S. Ct. 332, 4 L. Ed. 2d 323 (1960).

[13] A number of circuits allow the FTC to seek monetary relief under Section 13(b) based upon the Court's equity jurisdiction. Until recently, the Seventh Circuit was among them. However, in *FTC v. Credit Bureau Ctr., LLC*, 2019 U.S. App. LEXIS 24931, *4, 44-46 (7th Cir. August 21, 2019), the Seventh Circuit overruled thirty years of its own precedent in holding that Section 13(b) does not authorize monetary relief. *Southwest Sunsites* is the Fifth Circuit's only case dealing with Section 13(b) and it appears to preclude the possibility of restitution, pointing instead to Section 19 for monetary remedies. *Id*. at 719. Predictably, no circuit has materially relied on *Southwest Sunsites* to support an implied restitution award.

afoul of the overall meaning and intent of Section 13(b) and is prohibited. *Davis,* 489 U.S. at 809.

c. Section 19 Must Be Read Together With Section 13(b).

Section 13(b) and Section 19 are both parts of the FTC Act and must be construed together as a whole. Section 13(b) provides: "*Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction." (emphasis in original). Proper cases refer to the antecedent clauses which make clear that Section 13(b) authorizes injunctive relief pending filing of a complaint by the Commission under Section 19. If Congress wanted to grant broad authority to the FTC to pursue damages, restitution and disgorgement actions, it would have expressly provided for these powers in Section 13(b). Congress did not grant these powers.

In 1975, two years after adopting Section 13(b), Congress adopted Section 19 of the FTC Act, 15 U.S.C. § 57b. Section 19(a) authorizes "Suits by Commission Against Persons, Partnerships, or Corporations; Jurisdiction Relief for Dishonest or Fraudulent Acts." 15 U.S.C. § 57b(a). This provision provides that the Commission may pursue adjudicatory proceedings and also specifically provides for remedies that may be enforced by the district courts upon final resolution of the case. Section 19(b) of the FTC Act, 15 U.S.C. § 57b(b) provides:

> The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

Section 19(c), 15 U.S.C. § 57b(c), in turn, allows the FTC to file a civil action to enforce a cease and desist order. While the legislative history of the Act is admittedly sparse, it is clear

that no one understood Section 13(b) to authorize consumer redress. Indeed, Congress adopted Section 19 to accomplish that purpose. J. Howard Beales & Timothy J. Muris, *Striking the Proper Balance: Redress Under Section 13(b) of the FTC Act*, 79 Antitrust L.J. 1, 16-17 (2013).

Further, Section 19(b) explicitly prohibits "the imposition of any exemplary or punitive damages." Any argument that Congress preserved implied remedies in Section 13(b) that it expressly forbade in §19 is untenable. *See FTC v. Figgie Intern., Inc.*, 994 F. 2d 595, 607-08 (9th Cir. 1993) (finding Congressional intent in § 19 "was not to punish deceptive trade practices."). Congress did not authorize the FTC to pursue punitive actions against FTC violators. Use of disgorgement to deter potential violators is punitive.

2. *FTC v. Credit Bureau* Analyzed the History of Section 13(b) and Relevant Case Law And Determined That Section 13(b) Only Authorizes Injunctive Relief And Only Pending Adjudication Under Section 5 or Section 19.

Section 13(b) of the FTC Act, 15 U.S.C. Sec. 53(b), authorizes the Commission to seek preliminary and permanent injunctions to remedy violations of "any provision of law enforced by the Federal Trade Commission." Section 13(b) was added to the FTC Act as part of amendments to the Trans-Alaska Pipeline Act of 1973. At the time, the provision was expected to be used principally for obtaining preliminary injunctions against corporate acquisitions pending completion of FTC *administrative hearings*. Whenever the Commission has "reason to believe" that any party "is violating, or is about to violate" a provision of law enforced by the FTC, the FTC may ask the district court to enjoin the allegedly unlawful conduct pending completion of an FTC administrative proceeding to determine whether the conduct is unlawful. Further, under the second proviso of Section 13(b), "in proper cases,"[14] the FTC may seek, and

[14] The FTC has not adopted any definition of a proper case, which results in the exercise of standardless discretion by the FTC.

the court may grant, a permanent injunction. However, this clause only applies in instances where the FTC has completed administrative adjudication before the Commission and does not independently authorize commencement of civil actions seeking damages, disgorgement or restitution. *FTC v. Credit Bureau Ctr., LLC*, 2019 U.S. App. LEXIS 24931, *4, 44-46 (7th Cir. August 21, 2019) (*citing Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 116 S. Ct. 1251, 134 L.Ed. 2d 121 (1996)).

In *Credit Bureau*, a unanimous panel of the Seventh Circuit overruled thirty (30) years of its own precedent and held that Section 13(b) does not provide for the recovery of monetary relief by the FTC. *Id*. Section 13(b) was not widely used by the FTC to seek damages to consumers for at least a decade after its passage because the FTC understood the limitations of the narrow statutory scope of the provision. In the mid-1980s, the FTC began to make widespread use of the permanent injunction proviso of Section 13(b) in its consumer protection program to challenge cases of basic consumer fraud and deception. The Commission essentially argued that the proviso in Section 13(b) permitting a court to award a "permanent injunction" in "proper cases" was sufficient to allow the FTC to seek remedial monetary relief or any other form of equitable relief from a district court. *FTC v. Singer*, 668 F.2d 1107, 1113 (9th Cir. 1982). The FTC also argued that, to preserve the possibility of ultimate monetary equitable relief, it should be able to obtain a freeze of assets and imposition of temporary receivers in appropriate cases.

The appellate courts have primarily relied on *Porter v. Warner*, 328 U.S. 395 (1946) and *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288 (1960) as authority for this dramatic expansion of judicial and administrative power. *See FTC v. Singer*, 668 F.2d 1107 (9th Cir. 1982); *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1026 (7th Cir. 1988). *Porter*

held that when Congress granted district courts the power to impose injunctive relief, it also granted authority to grant any ancillary relief necessary to accomplish "complete justice" because it "did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *Singer*, 668 F.2d at 1113; *World Travel*, 861 F.2d at 1026. The Seventh Circuit relied on the Ninth Circuit's decision in *Singer* and its own decision in *World Travel* to hold, in *FTC v. Amy Travel Service, Inc*., 875 F.2d 564, 572 (7th Cir. 1989) (*overruled* as stated in *FTC v. Credit Bureau Ctr., LLC*, 2019 U.S. App. LEXIS 24931, *4 (7th Cir. August 21, 2019)) that Section 13(b) granted the district court "the power to order any ancillary equitable relief necessary." *Amy Travel,*875 F.2d at 572.

However, in 1996, in *Meghrig v. KFC Western, Inc*., 516 U.S. 479, 487-488 (1996), the Supreme Court dramatically limited *Porter*:

> As we explained in *Middlesex County Sewerage Authority v. National Sea Clammers Assn*., 453 U.S. 1, 14, 101 S. Ct. 2615, 2623, 69 L.Ed.2d 435 (1981), where Congress has provided "elaborate enforcement provisions" for remedying the violation of a federal statute, as Congress has done with RCRA and CERCLA, "it cannot be assumed that Congress intended to authorize ***by implication*** additional judicial remedies for private citizens suing under" the statute. "'[I]t is an elemental canon of statutory construction that ***where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.***'" *Id*., at 14-15, 101 S. Ct., at 2623 (*quoting Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S. Ct. 242, 247, 62 L.Ed.2d 146 (1979)). (emphasis added)

The Seventh Circuit recently revisited its holding in *Amy Travel* in the context of *Meghrig* and other more recent Supreme Court cases. "Since *Amy Travel*, the Supreme Court has clarified that courts must consider whether an implied equitable remedy is compatible with a statute's express remedial scheme. And it has specifically instructed us not to assume that a statute with 'elaborate enforcement provisions' implicitly authorizes other remedies." *Credit Bureau*, 2019 U.S. App. Lexis at *3 (internal citations omitted).

> Applying *Meghrig's* instructions, we conclude that section 13(b)'s grant of authority to order injunctive relief does not implicitly authorize an award of restitution. Every reason *Meghrig* gave for not finding an implied monetary remedy applies here. Most notably, the FTCA has two detailed remedial provisions that expressly authorize restitution if the Commission follows certain procedures. Our current reading of section 13(b) allows the Commission to circumvent these elaborate enforcement provisions and seek restitution directly through an implied remedy.

Id. at *3-4.

> The FTCA gives the Commission several tools to enforce the Act's prohibition on unfair or deceptive trade practices. Under its 'cease and desist' power, the Commission adjudicates a case before an administrative law judge, who can issue an order prohibiting the respondent from engaging in the illegal conduct at issue. *See* 15 U.S.C. § 45(b). This order becomes final if it survives administrative appeal and judicial review. *Id*. § 45(g).
>
> A final cease-and-desist order empowers the Commission to sue the violator for legal and equitable relief, but only if 'a reasonable man would have known under the circumstances [that the conduct] was dishonest or fraudulent.' *Id*. § 57b(a)(2), (b). After it becomes final, the order also draws a line in the sand for both the respondent and anyone else who engages in the prohibited conduct. If the respondent later violates the order, the Commission can sue for civil penalties and any equitable relief 'the court finds necessary.' *Id*. § 45(l). If anyone else engages in the prohibited conduct after the order becomes final, the Commission can seek civil penalties if it can prove that the violator acted with 'actual knowledge' that his conduct was unlawful. *Id*. § 45(m)(1)(B).
>
> The Commission has two other enforcement mechanisms at its disposal. First, it can promulgate rules that 'define with specificity acts or practices which are unfair or deceptive.' *Id*. § 57a(a)(1)(B). By preemptively resolving whether certain conduct violates the FTCA, rulemaking permits the Commission to pursue 'quick enforcement' actions against violators. Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 225-26 (2019). Once the Commission promulgates a rule, it can seek legal and equitable remedies, including restitution, from violators. *See* 15 U.S.C. § 57b(a)(1), (b). And if it establishes that a violator had 'actual knowledge or knowledge fairly implied on the basis of objective circumstances' that his conduct violated a rule, the Commission can also pursue civil penalties. *Id*. § 45(m)(1)(A).[15]

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[15] Notably, the FTC has promulgated rules related to the use of testimonials in advertising. See 16 CFR Part 255, §§ 255.0-255.5. With respect to Counts II and III of the Complaint, the McDaniels are accused of violating the FTC Act in connection with their own truthful testimonials. However, despite that the FTC promulgated a rule governing the use of testimonials, it has not pursued a claim against the McDaniels pursuant to 15 U.S.C. § 57b. If it did so, the FTC would have to establish that the McDaniels violated the provisions of the rule

> The Commission's remaining enforcement mechanism is different. Under section 13(b) of the FTCA, the Commission can forego any administrative adjudication or rulemaking and directly pursue a temporary restraining order and a preliminary or permanent injunction in federal court. § 53(b).

Id. at *14-15.

> The restitution order [] rests on section 13(b)'s permanent-injunction provision, which states that 'in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.' *Id*. [The Defendant's] straightforward argument is that section 13(b) doesn't authorize restitution because it doesn't mention restitution.
>
> We start with the obvious: Restitution isn't an injunction. 'Injunction' is of course a broad term. *See* Injunction, Black's Law Dictionary (10th ed. 2014) ('A court order commanding or preventing an action.'). But statutory authorizations for injunctions don't encompass other discrete forms of equitable relief like restitution. *See, e.g., Meghrig*, 516 U.S. at 484 ('[N]either [a mandatory or prohibitory injunction] contemplates ... equitable restitution.') (*quotation marks omitted*); *Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., Inc*., 622 F.3d 1307, 1324 (11th Cir. 2010) ('Injunctive relief constitutes a distinct type of equitable relief; it is not an umbrella term that encompasses restitution or disgorgement.'); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 365, 131 S. Ct. 2541, 180 L. Ed. 2d 374 (2011) (holding that an equitable order for backpay isn't an injunction); *Nken v. Holder*, 556 U.S. 418, 430, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009) ('Whether [a deportation stay] might technically be called an injunction is beside the point; that is not the label by which it is generally known.').

Id. at *15-16.

The FTC has "elaborate enforcement provisions" in both Sections 5 and 19 of the FTC Act. Section 13(b) is intended to enjoin misleading or deceptive activity preserving the status quo pending the FTC's filing and resolution of adjudicative remedies. Allowing the FTC to proceed in this case, pursuant to Section 13(b) and to seek a monetary award as a remedy for alleged ***past wrongs*** ignores the procedural requirements and safeguards crafted by Congress in the FTC Act.

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and the FTC would also be limited to addressing conduct within the three-year period prior to filing a complaint. 15 U.S.C. § 57b.

> Further, as we've explained, section 13(b) is procedurally incompatible with restitution. For example, before invoking section 13(b), the Commission must reasonably believe that stopping an ongoing or imminent violation is in the public interest. § 53(b)(2). And the statute dissolves a preliminary injunction if the Commission doesn't begin an administrative proceeding before a court-set deadline. § 53(b). But the Commission would have no need for an administrative proceeding if it can get complete restitutionary relief through section 13(b)'s permanent-injunction provision. In short, section 13(b)'s prerequisites, like those in the RCRA, make it a 'wholly irrational mechanism' for remedying past harms. *Meghrig*, 516 U.S. at 486.
>
> Relatedly, unlike § 57b(b), section 13(b) has no statute of limitations. The absence of a limitations period in the RCRA was 'striking' to the *Meghrig* Court and provided strong evidence that the RCRA's injunction provision did not implicitly authorize restitution. *Id*. The same is true here.
>
> Section 13(b) also lacks a central feature of the FTCA provisions that expressly permit monetary relief: a notice requirement. When the Commission brings an administrative cease-and-desist action, it can secure restitution only by proving that the violation occurred after its order became final or that 'a reasonable man' would have known that the conduct was fraudulent. §§ 45(l); 57b(a)(2). And notice is also baked into the Commission's power to promulgate and enforce rules. The Commission must follow detailed procedures before promulgating a final rule. *See id*. § 57a(b)(1) (requiring publication of notice and an informal hearing for rulemaking). Moreover, final rules must 'define with specificity' the prohibited acts. § 57a(a)(1)(B).
>
> The Supreme Court has held that similar provisions are crucial to determining the remedial scope of implied rights of action, a closely related context: 'It would be unsound ... for a statute's express system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially implied system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.' *Gebser*, 524 U.S. at 289. We face the same unsound result here: Reading an implied restitution remedy into section 13(b) allows the Commission to circumvent the FTCA's detailed notice requirements.

Id. at *45-47.[16]

[16] "This 'one free bite' approach was deemed appropriate because the broad language of Section 5(a) was thought to give businesses little notice of the standards to which they would be held until the Commission applied Section 5 to specific conduct through a cease and desist order. . . . Neither the text of Section 13(b) nor its legislative history disclosed a basis to argue for broad equitable relief." David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act*, https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf.

The enforcement structure of the FTC Act is not accidental. Prior to adopting Section 13(b) in 1973, Congress considered granting but instead rejected the FTC's request for statutory authority to pursue consumer redress remedies. 117 Cong. Rec. at 39,626 (1971) (Sen. Dole) ("I believe section 203 would create many more problems than it would solve. It is language that is extremely vague and does not define those acts or practices upon which recovery may be had.")[17] The FTC could have but chose not to pursue a cease and desist order against Advocare. Similarly, the FTC could have but chose not to undertake its rule making authority putting the MLM industry on notice of what it considers unlawful. The purpose of enacting Section 19 was specifically to provide consumer redress remedies only in limited cases, such as where the FTC has promulgated applicable rules. Although the FTC has issued "Business Guidance Concerning Multi-Level Marketing," the FTC notes that its own guidance is not binding on it and does not necessarily represent the views of the FTC.[18] Further, even this non-binding guidance was not published until January 2018, well after the conduct complained of by the FTC herein.[19]

The McDaniels, having complied with all applicable industry standards and having relied on Advocare's compliance department to ensure the integrity of their business, are now threatened with millions of dollars in alleged "consumer redress" liability where it is ***undisputed*** that they are not currently engaged in nor are they "about to" engage in any unlawful conduct. This is clearly not what Congress intended when it gave the FTC authority to seek ***injunctive***

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[17] 117 Cong. Record. at 39,849 (1971) (Sen. Hruska) ("The second aspect is the consumer class action [i.e., the redress provision]. The dealer can be as honest as the day is long, plus an hour, and yet if he gets caught or is sued in a class action, he has no means of getting out except buying his way out or trying the case to the last remedy that is available to him, and there are problems within that area, with the lack of safeguards in it, which are much greater than any civil damage or any fine could be. So it is not a matter of the honest dealer and the honest manufacturer not being affected, and that he should not fear. He should fear, Mr. President. He should fear more mightily because this will be a very, very unfair bill for him. He will be affected.")

[18] https://www.ftc.gov/tips-advice/business-center/guidance/business-guidance-concerning-multi-level-marketing.

[19] *Id.*

relief under section 13(b) when one "is violating" or "is about to violate" the law. Accordingly, even if the Court does not dismiss the Complaint in its entirety, the Court should nevertheless dismiss the FTC's request for monetary relief under Section 13(b) for failing to state a claim upon which relief can be granted.[20]

VI. CONCLUSION

For the reasons set forth herein, the McDaniels respectfully request that the Court grant this Motion to Dismiss in its entirety and enter an order dismissing the claims against them with prejudice. The McDaniels also seek such other and further relief to which they may show themselves to be justly entitled.

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[20] The Court should resolve the scope of relief available to the FTC at this early stage of the proceedings because (1) the issue involves a pure question of law and (2) the parties will not be able to effectively pursue any agreed resolution of this case while this issue remains unresolved.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served upon all counsel of record herein, via the Court's ECF system, contemporaneously with its filing.

/s/ Baxter W. Banowsky

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

FEDERAL TRADE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	**Case No. 4:19-cv-00715**
ADVOCARE INTERNATIONAL, INC., A limited partnership, BRIAN CONNOLLY, DANNY McDANIEL, DIANE McDANIEL, CARLTON HARDMAN and LISA HARDMAN,	§ § § § §	
	§	
Defendants.	§	

ORDER ON DEFENDANTS' MOTION TO DISMISS

The Court, having considered Defendants Danny and Diane McDaniel's Motion to Dismiss, the Response thereto, and the argument of counsel, is of the opinion that the Motion should be **GRANTED**; it is therefore

ORDERED, ADJUDGED AND DECREED that Defendants' Motion to Dismiss is **GRANTED** and the claims asserted against Defendants Danny and Diane McDaniel herein are hereby **DISMISSED WITH PREJUDICE**.

SO ORDERED.