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BLOG

FTC Obtains Asset Freeze of Success By Health Top Executives in Arizona Federal Court

FEBRUARY 6, 2020

On January 17, 2020, a federal judge in Arizona granted the Federal Trade Commission's (FTC) request to both temporarily shut down the multi-level marketing company Success By Health, as well as taking the more extreme step to freeze the assets of top executives. Success By Health is best known for its mushroom-infused instant coffee product "MycoCafe."

The FTC filed a complaint against Success By Health (a d/b/a of Success By Media LLC), as well as four of its top executives, in Arizona federal court seeking injunctive and other equitable relief pursuant to Sections 13(b) and 19 of the FTC Act. In a press release, the FTC described this matter as "the third action the FTC has brought since October [2019] to halt an alleged pyramid scheme masquerading as a legitimate multi-level marketing (MLM) business."

At first blush, one might think that the FTC's choice of venue for this lawsuit was creative to avoid uncertain Circuit precedent because Success By Health is based in Henderson, Nevada (see this article here). But the FTC's choice of forum can likely be explained, at least in part, by a case the FTC brought nearly 20 years ago. In 2002, current Success By Health executive James D. Noland, Jr., settled FTC pyramid scheme charges related to Mesa, Arizona-based internet shopping mall network "Bigsmart." As part of the settlement, Noland was barred from engaging in any future pyramid schemes and from misrepresenting: (i) the potential earnings or income of any MLM program; (ii) the benefits a participant in an MLM can receive; and (iii) the amount of sales an MLM participant could expect to make. The FTC now claims Noland is in violation of the 2002 settlement and related court order.

In addition to Noland's previous ties to an alleged pyramid scheme, an FTC press release claims that "[s]hortly before launching Success By Health in 2017, the FTC alleges, Noland told an audience, 'People ask what do I do. I said, 'I build pyramids, man.'" Further, the FTC's complaint alleges that after learning of the FTC's investigation of Success By Health, Noland, along with his wife (also a named defendant), fled to South America, with another executive announcing plans to join them and putting his house up for sale. Given this backdrop, the FTC's aggressive decision to seek to freeze the individuals' assets is less surprising.

However, the FTC's case against Success By Health is still reflective of stepped-up enforcement against MLMs and demonstrates the broad equitable relief available, including the ability to freeze the assets of MLM executives.

While the Arizona federal court declined to restrict Noland's travel or require surrender of his passport (noting it is unclear whether such relief was available and in any event, Noland was already out of the country), it granted the FTC's request to temporarily shut down Success By Health, to appoint a receiver, and for expedited discovery, in addition to the asset freeze. Although this case is the first MLM pyramid scheme action of 2020, the year has only begun and if the end of 2019 is any indication, we expect to see the FTC continue to test the boundaries of the equitable relief available under the FTC Act.

[Note: the Complaint was signed by two D.C. FTC attorneys Evan Mendelson and Jonathan Ware, both of the Bureau of Consumer Protection].

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