No. 17-15552

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee

v.

AMERICANS FOR FINANCIAL REFORM,
Intervenor-Appellee,
AMG CAPITAL MGMT., LLC, ET AL.,
Defendants-Appellees;

E.T.S. VENTURES, LLC
AND EL DORADO TRAILER SALES, LLC,
Real-Party-In-Interest-Appellants;

THOMAS W. MCNAMARA, COURT-APPOINTED MONITOR,
Receiver-Appellee.

On Appeal From An Order Of The U.S. District Court
For The District of Nevada, No. 12-cv-00536

BRIEF OF THE FEDERAL TRADE COMMISSION

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INTRODUCTION

Appellant El Dorado[1] has in its possession a custom-built race-car trailer that a defendant in the case below ordered and paid for with money bilked from victims of the defendants' fraud. El Dorado has the trailer because it took over the company building it, apparently intending to deliver the trailer to the defendant as promised. But El Dorado changed its mind when the trailer was nearly complete. El Dorado decided unilaterally to sell the trailer and keep the proceeds for itself, without refunding the money paid by the defendant—money now owed to consumers.

When the FTC learned of El Dorado's plan, it informed El Dorado that the trailer was subject to a prejudgment asset freeze order entered to preserve the defendants' assets for victim redress. The district court then enforced the freeze against the trailer and prohibited El Dorado from selling it. El Dorado asked the court to lift the freeze, but the court declined to do so. By that time, the court had had entered both final judgment and a second asset freeze in conjunction with the appointment of a monitor to oversee the defendants' assets. The court held that the trailer is part of the monitorship estate created by the postjudgment asset freeze and that the monitorship is necessary to preserve the defendants' assets.

[1] "El Dorado" refers to the appellants El Dorado Trailer Sales LLC and E.T.S. Ventures LLC, collectively.

El Dorado appeals the denial. It mainly claims that the court lacked jurisdiction to enforce its prejudgment order against El Dorado, which does not reside in Nevada and was not a party to the case. But there is nothing remarkable about the court's decision, which was a routine exercise of its inherent power to protect its judgment. That power includes the authority to freeze a defendant's assets and prevent their dissipation both before and after the court renders a final judgment. If the court lacked that authority, its judgment would amount to a notice that a culpable defendant's assets are ripe for the taking. The district court's order should be affirmed.

JURISDICTION

This case arises from an FTC action to enjoin unfair or deceptive acts or practices prohibited by the FTC Act, 15 U.S.C. § 45(a). The district court had jurisdiction under 28 U.S.C. § 1331 and 15 U.S.C. § 53(b).

The appeal concerns an order of the U.S. District Court for the District of Nevada entered Jan. 26, 2017, declining to dissolve its prior order appointing a monitor and freezing assets of the monitorship entities. ER 10-14. As explained below, the district court had inherent jurisdiction to enter a prejudgment asset freeze to preserve the assets of named defendants and to enforce that order against appellants, who were afforded notice of the order. The court likewise had jurisdiction to appoint a monitor and enter a second asset freeze order to preserve defendants' as-

sets to satisfy the judgment in this case. El Dorado timely appealed the order on March 27, 2017. ER 354. This court has jurisdiction under 28 U.S.C. § 1292(a)(1) because the appeal arises from the district court's final order refusing to dissolve its asset freeze order.

QUESTIONS PRESENTED

During an FTC enforcement lawsuit involving more than $1 billion in consumer fraud, the district court froze the assets of the defendants to preserve them for victim redress. One of the frozen assets is a $580,000 race-car transport trailer paid for with ill-gotten money and now in the possession of appellant El Dorado, which bought the company that was paid to build the trailer. The principal questions presented are:

1. Whether the district court had jurisdiction to enforce its asset freeze against the trailer when it was held by a third party; and

2. Whether the district court abused its discretion when it declined to unfreeze the trailer after the court appointed a monitor to oversee the defendants' assets.

STATEMENT OF THE CASE

The present dispute is a case-within-a-case. The underlying case involves a massive lending fraud in which consumers seeking short-term loans (so-called "payday" loans) were tricked into a payment program that debited their bank accounts for far more than they originally borrowed, netting the perpetrators over $1.3 billion in unjust gains. In 2012, the FTC sued to stop the fraud, which violated a host of federal laws.

The matter now before the Court involves an asset purchased by Scott Tucker, one of the architects of the fraud, using money he derived from his scheme. Tucker had taken up a racecar-driving hobby and formed a company, Level 5 Motorsports, one of Tucker's codefendants, which spent millions of dollars on Ferraris, Porsches, and other exotic cars. It also ordered and paid for a custom-built trailer for transporting those cars, which is the asset at the center of this case.

A. Level 5 Buys A Trailer From Bruce High Performance.

While the FTC's enforcement case was pending, Level 5 contracted with Bruce High Performance Transporters to custom build a race-car transport trailer. ER 121-127. Level 5 paid the full purchase price—$578,046—up front in three installments. SER 52.[2] The contract specified that the trailer would be delivered to Level 5 in December 2014, SER 50, but delivery was not made at that time. Below

[2] SER refers to the FTC's Supplemental Excerpts Of The Record.

is a picture of a different trailer built by Bruce High Performance for Level 5 that closely resembles the one at issue here:[3]

B. El Dorado Buys Bruce High Performance And Begins Doing Business As Bruce Transporters.

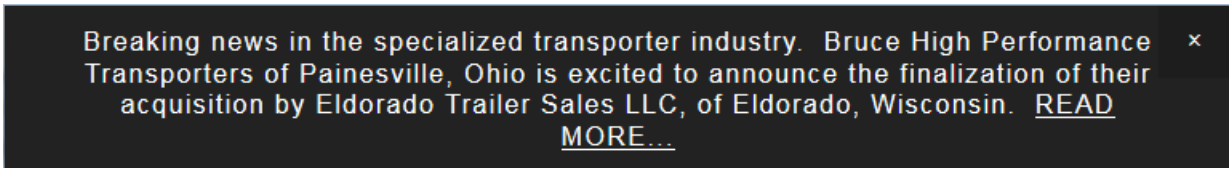
In December 2015, El Dorado bought Bruce High Performance Transporters for $400,000. ER 129-154. El Dorado now characterizes this transaction as simply an "asset purchase." But El Dorado's pleadings before the district court and in a separate lawsuit show that it bought the entire company, liabilities included, and not just the assets. *See* ER 109-110; SER 85-87. According to El Dorado, the deal came about when the owner of Bruce High Performance offered "to *sell the company* for $400,000." SER 85 (emphasis added). El Dorado said it relied on repre-

[3] *See* http://www.auctionsamerica.com/events/feature-lots.cfm?SaleCode=AS17&ID=r0176.

sentations that buying Bruce High Performance "would allow production to re-start" and that "[a] *new owner* could come in for $400,000 and *own the business* debt-free at the current location with current staff." *Id.* (emphasis added). El Dorado also said it relied on representations that when the business "complet[ed] the 53-foot custom trailer ordered by Level 5" it would realize a $95,000 profit. *Id.*

The sales contract shows that El Dorado bought Bruce High Performance's entire business, even though it was labeled an "asset purchase agreement." *See* ER 129-154. El Dorado purchased not only the business's "tangible and intangible assets" (listed on a 14-page attachment), but also "all rights to the name 'Bruce High Performance Trailers, LLC.'" ER 129. The comprehensive list of items included in the "purchased assets" contains not just assets, but *liabilities* as well, such as accounts payable. *Id.* Many of the other assets listed reveal an intent to continue running the business as it existed, including marketing materials, customer and supplier lists, sales and credit records, trade names, trademarks, phone numbers, licenses, and even Bruce High Performance's website. *Id.* The agreement also contemplated that El Dorado would "formally change its name" to Bruce High Performance Transporters or "any variation thereof." ER 130.

Following the transaction, Bruce High Performance's website touted the "acquisition by Eldorado Trailer Sales LLC." That announcement (reproduced immediately below) still appears on the website. *See* brucetransporters.com.[4]



Since the acquisition, El Dorado has "operate[d] a trailer manufacturing facility" formerly known as Bruce High Performance under the name "Bruce Transporters." *See* ER 67, 109. Its website shows that El Dorado owns Bruce Transporters, describing the company as "an ETS Venture Company," and identifying El Dorado's owner (Dale "Charlie" Becker) as the president of Bruce Transporters. *See* brucetransporters.com/meet-the-team/. Bruce Transporters' "news" page still includes a second announcement that describes El Dorado's purchase of Bruce Transporters as an "acquisition" and a "merge between our two related companies." *See* brucetransporters.com/news.

C. El Dorado Completes The Trailer As Bruce Transporters.

After completing the purchase, El Dorado hired the staff of Bruce High Performance and continued its trailer manufacturing business. As contemplated, it adopted the shortened trade name "Bruce Transporters," hired the owner of Bruce High Performance (Bruce Hanusosky), and completed projects that Bruce High

[4] The URLs cited in this brief were visited May 22, 2017.

Performance had started, including the trailer commissioned and fully paid for by Level 5. ER 109; SER 9-10; SER 85, 87.

El Dorado has acknowledged that it was "restart[ing] the trailer manufacturing business," ER 110, and has admitted by implication in other court filings that it completed the trailer expecting that it would deliver it to Level 5, *see* SER 85-87. In those filings, El Dorado claimed that it bought Bruce High Performance in part because it expected to receive a payment when the trailer was complete "from Level 5's deposit," which, it claims to have believed, Bruce High Performance was holding as "deferred income." SER 87. Thus, by its own telling, El Dorado would have had a right to the money paid by Level 5 only if it built and delivered the trailer to Level 5 under Level 5's contract with Bruce High Performance. El Dorado also admits that this understanding underlay the basis of its continued work until the trailer "was nearing completion." SER 87.

The record contains an itemization of the costs to finish the trailer. ER 156-203. The document confirms both that El Dorado completed the trailer *as* "Bruce Transporters" and that it did so *for* Level 5 Motorsports. *See* ER 156. The heading on the document says "Bruce Transporters"; it confirms that the document details the expenses for a "job"; it specifies that the customer for that job is "Level 5 Motorsports LLC"; and it states that the contract price for the job is $578,046—the same amount that Level 5 paid for the trailer. *Compare* ER 156 *with* ER 121. Each

subsequent page of the report lists both the customer, "Level 5," and the manufacturer, "Bruce Transporters." ER 157-203.

But when the trailer was finished, El Dorado determined that the project would not be profitable and it decided not to deliver the trailer to Level 5 after all. *See* SER 87. Instead, El Dorado issued a certificate of origin for the trailer on behalf of Bruce Transporters, declaring itself the owner. ER 110, 205. The certificate is signed by El Dorado's owner (Dale Becker) as the purported "authorized representative" of Bruce Transporters. ER 205. El Dorado then used that self-issued certificate to obtain a title from the State of Wisconsin. ER 110, 207, 209.

D. The District Court's Prejudgment Asset Freeze Order

Shortly after El Dorado/Bruce Transporters completed the trailer, the district court entered a prejudgment freeze on the assets of Level 5 and the other defendants. ER 17-37. The court found that the defendants were likely to conceal and dissipate their assets, based in part on their having written "thousands of checks to their wholly owned companies" and "using corporate assets for personal expenditures, including jet travel, luxury automobiles, a vacation home, and personal credit card expenses." ER 25. The asset freeze order forbade "any person who receives actual notice" of the order and who "holds, controls, or maintains custody" of any "asset of any Defendant" from transferring or selling the asset except by order of the court. ER 32. The order provided that it may be served on any "entity or person

that may have possession, custody or control of any documents or assets of any defendant." ER 36.

The FTC soon learned that El Dorado had possession of the trailer and intended to sell it. *See* SER 43-45. The FTC therefore served El Dorado with the order, informed it that it may be holding an asset belonging to Level 5, and informed it of the district court's prohibition on sale. SER 1-2; SER 43-45. In response, El Dorado insisted that Level 5 had purchased the trailer from Bruce High Performance, not El Dorado, and declared that it would make the trailer "ready for sale" within two weeks. SER 48. El Dorado warned that "unless someone contacts us with a claim to ownership of the trailer or a legal document restraining sale . . . [El Dorado] will move forward with the sale of the trailer to a third party." *Id*.

Although FTC staff explained that the FTC was not trying to seek any waiver from El Dorado or finally adjudicate the ownership of the trailer, El Dorado was unwilling to voluntarily comply with the asset freeze. SER 2. The FTC therefore asked the district court to enforce the asset freeze to prevent El Dorado from unilaterally selling the trailer. *See* Docket No. 1031. The FTC informed El Dorado of its motion and El Dorado's attorney sought to enter his appearance the same day. *See* El Dorado Br. 38; SER 11-16.

The district court granted the FTC's motion. ER 15. The court held that the trailer is "subject to this Court's asset freeze order" and "shall be treated for all

purposes as an asset owned by Level 5 Motorsports, LLC . . . until further order of this Court." *Id.* The court ordered El Dorado not to sell or otherwise transfer the trailer, except to surrender it to the FTC. *Id.* Four days later, El Dorado moved to dissolve the district court's order. SER 17-36.

In light of El Dorado's claim, the FTC sought to resolve the disputed ownership of the trailer through an expedited process that would have allowed dispositive motions on the ownership question 90 days after the court entered a discovery plan. *See* SER 37-39. The magistrate judge held a hearing on the FTC's request, which El Dorado's counsel attended. *See* ER 212-221. Following the hearing, the magistrate judge directed expedited proceedings, with written discovery and depositions to be completed in December 2016 and dispositive motions the following month. ER 210. Despite that order, El Dorado did not answer the FTC's discovery requests or otherwise participate in discovery. It asserted instead that the district court lacked jurisdiction to decide the trailer's ownership. *See* SER 99-101.

E. The District Court's Postjudgment Asset Freeze Order And Denial Of El Dorado's Motion To Dissolve The Freeze

While El Dorado's motion to dissolve the prejudgment asset freeze was still pending, the district court granted summary judgment to the FTC in the underlying case and ordered the defendants to disgorge $1.3 billion. ER 70-106. At the FTC's request, the Court entered a postjudgment asset freeze and appointed a monitor to preserve the defendants' assets. SER 58-80 (Docket No. 1099).

El Dorado responded to the FTC's motion to appoint a receiver. SER 53-57. In its filing, El Dorado contested whether the district court should decide the ownership of the trailer, claiming that the question should be decided in separate proceedings. SER 54-55. El Dorado also asserted its view that the prejudgment asset freeze had dissolved and asked the court to affirm as much. SER 56. Assuming the prejudgment asset freeze had in fact dissolved, El Dorado took the position that its motion seeking to dissolve the asset freeze "is now moot." *Id.*

In its order appointing the monitor, the court entered a new asset freeze "to preserve the status quo" during the anticipated appeal of the summary judgment order. SER 59.[5] Although the district court did not address El Dorado's arguments directly, the postjudgment asset freeze requires anyone who receives notice of the order and who has custody of any defendant's asset to prevent the sale or transfer of the asset—plainly including the trailer. SER 65-66. The order defines "asset" to include "any legal or equitable interest in, right to, or claim to, any real, personal, or intellectual property wherever located," and it defines Level 5 as one of the entities whose assets are frozen. SER 59, 60, 73. The court also reserved "exclusive jurisdiction" to itself over "any dispute" about "whether any asset is included in the monitorship estate." SER 68.

[5] The appeal from the district court's summary judgment order is pending before this Court in case no. 16-17197.

Despite the district court's pre- and postjudgment asset freezes, the monitor soon discovered that El Dorado had listed the trailer for sale and had quietly filed a declaratory judgment action in Ohio seeking to extinguish any claim to the trailer by Level 5. *See* SER 82-97. El Dorado's state-court complaint did not mention or even acknowledge the proceedings in this case. *See id.* The monitor therefore sought an emergency order to show cause why El Dorado should not be held in contempt. *See* Docket No. 1104. In response, El Dorado began negotiating a schedule to brief the motion with the monitor, *but on the very next day* El Dorado sought a default judgment against Level 5 in its state court case. SER 102-108.[6]

The district court then took up El Dorado's motion seeking to release the trailer from the asset freeze and issued the order under review in this appeal. ER 10-14. Although El Dorado's motion was directed to the prejudgment asset freeze, the district court construed it as a request that the trailer be removed from the then-

[6] The magistrate judge ultimately recommended that El Dorado be held in contempt. Docket No. 1123. El Dorado then stayed its state-court action. Docket No. 1116-1.

applicable postjudgment asset freeze.[7] *See id.* The court rejected El Dorado's argument that it lacked jurisdiction solely because El Dorado is a non-party and was not named in the court's prejudgment asset-freeze order. ER 12. The court explained that district courts enjoy broad equitable power to issue ancillary relief in government enforcement actions, including authority to issue an *in rem* injunction. *Id.* The court observed that its equitable authority is broader than its authority to enter an injunction under Federal Rule of Civil Procedure 65(b), and that "[a]n order issued to preserve the assets of a receivership estate is a classic example of an *in rem* injunction." ER 12-13. The court noted that in *SEC v. Wencke*, 622 F.2d 1363 (9th Cir. 1980) ("*Wencke I*"), this Court held that "rule 65(b) does not limit the power of a federal court" to issue injunctive orders that are "necessary to achieve the purposes of the receivership." ER 12-13 (quoting *Wencke I*, 622 F.2d at 1371).

[7] As further explained below, El Dorado's brief rests on the idea that the district court's order addressed only the prejudgment asset freeze and not the postjudgment freeze, *e.g.* Br. 41. Not so. The court expressly noted its "*new* Asset Freeze Order" and stated that it was addressing El Dorado's request "to dissolve the Asset Freeze Order with regard to the trailer." ER 11-12. The court went on to discuss its authority over receiverships (and monitorships)—relevant only to the postjudgment freeze—before concluding that the asset freeze "is necessary to achieve the purposes of the receivership," and declining "to dissolve any aspect of it." ER 14. The clear import and practical effect of the court's order is that the court declined to unfreeze the trailer from the order under which it was then frozen. El Dorado ignores this, describing the order as "bizarre" and suggesting that it reinstated the court's prejudgment order enforcing the prejudgment asset freeze, which El Dorado says was dissolved with the final judgment. Br. 41-42. That claim overlooks the court's separate postjudgment freeze order.

The court explained further that the monitorship "was instituted to preserve the assets" of the defendants "in order to provide redress for defrauded consumers," and that "permitting El Dorado to retain assets that are properly part of the Monitorship Estate would therefore thwart the purpose of the receivership." ER 13.

El Dorado appealed the district court's decision not to unfreeze the trailer.

SUMMARY OF THE ARGUMENT

The district court properly exercised its discretion both when it found the trailer, bought and paid for by underlying defendant Level 5, to be part of the monitorship estate and when it declined to exempt the trailer from the postjudgment asset freeze. The order under review and the associated orders freezing assets in the underlying litigation were unremarkable exercises of the court's broad inherent authority to preserve assets necessary to satisfy a monetary judgment—wherever they are located and whether or not there are competing claims to their ownership. El Dorado provides no reason to question the district court's judgment.

El Dorado's brief rests largely on a fundamental misconception of the order it appeals. Its arguments are premised on the theory that the order declined to exempt the trailer from the district court's *prejudgment* asset freeze; in fact, as the order itself indicates, it applies to the *postjudgment* asset freeze. El Dorado therefore spends most of its energy attacking an order from which El Dorado has not appealed—the district court's prejudgment order finding that the trailer was subject

to the prejudgment asset freeze. As a result, many of its arguments are simply beside the point.

Even if the arguments were apt, however, they would still be wrong. The district court had inherent authority to freeze the underlying defendants' assets—both before and after judgment—to protect the efficacy of its final judgment. Otherwise, defendants or third parties holding their assets could dissipate those assets, rendering a final judgment meaningless. Here, there is no dispute that defendant Level 5 Motorsports had a claim to the trailer—it paid for it after all—and the district court thus acted properly when it prohibited the sale of the trailer pending resolution of its ownership. Had El Dorado been left free to dispose of the trailer as it threatened to do, defrauded consumers likely would have lost any chance to recover more half a million dollars of their money that Level 5 spent on the trailer. The court thus had jurisdiction over the trailer, and therefore over El Dorado's actions regarding the trailer, as a necessary adjunct to its jurisdiction over defendant Level 5.

Because the district court had *in rem* jurisdiction over the trailer itself, it did not need *in personam* jurisdiction—the power to enter judgment against a person—over El Dorado. El Dorado faces no prospect of a judgment against it here; this case involves only the contested ownership of property. The court has *in rem* jurisdiction over the trailer as an asset of defendant Level 5, and it therefore may issue

an *in rem* injunction that prevents nonparties such as El Dorado from interfering with the asset.

Principles of due process do not require that El Dorado be served with a separate complaint in its home state before the court could freeze an asset in its possession. As this Court has held, due process is satisfied so long as an asset custodian such as El Dorado is afforded notice and the opportunity to be heard before being deprived of a property right. Here, El Dorado has not been deprived of any property right and it will receive notice and the opportunity to be heard in the district court before any final determination of ownership. Nor does due process require that El Dorado have minimum contacts with Nevada. In the circumstances here, it need only have minimum contacts with the United States as a whole, which it unquestionably does. El Dorado's suggested approach could require receivers in almost every case to file lawsuits throughout the country, an unworkable arrangement that would waste the very assets that the court is trying to preserve for victims' recovery.

Even if El Dorado had appealed the district court's prejudgment order applying the asset freeze to the trailer, El Dorado is incorrect that the order exceeded the scope of a temporary restraining order under Federal Rule of Civil Procedure 65(d). The order was not a TRO. It was an asset freeze, and the law is clear that a district

court's authority over such relief is broader than its authority under Rule 65, which does not limit the court's powers under common law.

El Dorado is also incorrect that the district court abused its discretion when it declined to exempt the trailer from its asset freeze. The applicable test for such relief (which El Dorado does not identify, let alone contest) asks (1) whether keeping the asset frozen truly maintains the status quo; (2) how long an asset has been frozen; and (3) the merits of the claim. All of those factors overwhelmingly favor maintaining the freeze on the trailer. The last factor, El Dorado's claim of ownership, is particularly weak. El Dorado purchased Bruce High Performance in toto—liabilities as well as assets—and it finished the trailer project on the same site, with the same employees, and under almost the same name. Its own documents show that it completed the trailer for its customer Level 5 Motorsports, which had paid for it in full, and that it expected to deliver the trailer to Level 5. Ohio law ascribes to El Dorado all of Bruce High Performance's obligations. El Dorado has no good claim on an asset that it built to fulfill its predecessor's contract.

STANDARD OF REVIEW

The order on appeal declines to exempt property from a postjudgment order appointing a monitor and freezing the defendants' assets. The district court's decision to include assets within a receivership is reviewed for an abuse of discretion. *SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986). The Court avoids "placing it-

self in the position of second guessing" district court decisions in receivership cases, "particularly where there appears to be no clear abuse of discretion." *Id.* (quoting *SEC v. Lincoln Thrift Ass'n*, 577 F.2d 600, 609 (9th Cir. 1978)). The Court likewise reviews for abuse of discretion a district court's decision whether to release assets from an asset freeze entered pursuant to a receivership. *SEC v. Universal Fin.*, 760 F.2d 1034, 1038 (9th Cir. 1985).

As explained below, El Dorado's jurisdictional challenges do not engage the basis for the order it appeals from and thus provide no reason to overturn it. Nevertheless, the court reviews questions of jurisdiction de novo. *Burlington N. Santa Fe Ry. v. WT Local 174*, 203 F.3d 703, 707 (9th Cir. 2000) (en banc).

ARGUMENT

In the order on appeal, the district court held the trailer in El Dorado's possession to be part of the court's receivership. ER 13. The court determined further that the trailer should remain frozen to achieve the purpose of the receivership: preserving the defendants' assets to satisfy the $1.3 billion judgment against them. *Id.* The order was an unremarkable exercise of the court's jurisdiction over the defendants (and their assets) in the underlying fraud case, and it was proper despite El Dorado's competing claim to own the trailer. The same is true of the orders that led up to the order on appeal—the prejudgment asset freeze (Docket No. 960, ER 17-37), the order applying the prejudgment freeze to the trailer (Docket No. 1036,

ER 15-16), and the postjudgment monitorship order and asset freeze (Docket No. 1099, SER 58-80). The court's authority to enter those orders flows from its authority over the underlying action and the parties to that action.

El Dorado's brief misunderstands what the order on appeal held. El Dorado assumes that because it moved to unfreeze the trailer *before* the court entered summary judgment, the order on appeal must have continued or revived only the prejudgment order directing El Dorado not to sell the trailer (Docket No. 1036). *See*, *e.g.*, Br. 3 ("The January 26, 2017 Order further indefinitely continues the prior orders prohibiting El Dorado's sale of the Trailer."). El Dorado thus ignores the effect of the postjudgment asset freeze/monitorship order entirely. As a result, El Dorado fails to engage what the order on appeal did or why, much less provide any reason to upset it.

Because El Dorado's arguments flow from an incorrect understanding of the order on appeal, they largely pertain to matters that are not on appeal and are therefore beside the point. El Dorado devotes much of its brief to attacking the district court's jurisdiction to enter the prejudgment order (Docket No. 1036) holding the trailer subject to the court's prejudgment asset freeze order. It makes several arguments against the court's jurisdiction: that the court lacked *in personam* jurisdiction over El Dorado because it is not a party (Br. 16-17), was not served with a claim for relief (Br. 15-18), and lacks contacts with Nevada (Br. 20-22); that the

order exceeded the permissible scope of a Rule 65 injunction (Br. 18-20); that enforcing the asset freeze violated El Dorado's right to due process (Br. 24-26); and that the prejudgment asset freeze order dissolved when the court entered final judgment and therefore could not serve as the basis for further proceedings (Br. 38-42).

These arguments are irrelevant because the district court's prejudgment orders are not on appeal. The order on appeal declined to exempt the trailer from the *postjudgment* asset freeze (Docket No. 1099, SER 58-80). They also lack merit because they fail to contend with the context of the prejudgment asset freeze within the overarching fraud litigation. El Dorado reads out of the picture the FTC's underlying enforcement lawsuit against the perpetrators of a $1.3 billion fraud scheme. The district court unquestionably had personal jurisdiction over the fraud defendants, including Level 5 Motorsports, and it therefore had the authority to control their assets to ensure meaningful equitable relief to defrauded consumers. The narrower dispute presented here over the ownership of the trailer involves ancillary orders freezing the defendants' assets. The district court's authority to enter such ancillary orders, and the applicability of such orders to nonparties are well established. The district court's exercise of that authority was unremarkable and comfortably within its jurisdiction. Thus, because the court's orders had a proper jurisdictional grounding, El Dorado is wrong that it should have been served with a

separate claim for relief, that the FTC failed to establish *in personam* jurisdiction, that it matters whether El Dorado has minimum contacts with Nevada, and that the orders exceeded the permissible scope under Rule 65.

I. THE DISTRICT COURT HAD JURISDICTION TO FREEZE ALL ASSETS THAT COULD BELONG TO LEVEL FIVE.

Both the district court's pre- and postjudgment asset freeze orders were proper exercises of its statutory and inherent authority. The underlying case was brought under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which allows the FTC to enforce statutes it administers and authorizes district courts to issue "a permanent injunction." That grant of authority also makes "all the inherent equitable powers of the District Court . . . available for the proper and complete exercise of that jurisdiction." *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *see FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994). Indeed, the equitable powers conveyed by the statute "assume an even broader and more flexible character" when the government acts to protect the public interest than "when only a private controversy is at stake." *Porter*, 328 U.S. at 398.

A. The Prejudgment Asset Freeze

The district court's prejudgment asset freeze was a proper exercise of its authority. Under its equitable powers, the district court could properly freeze the defendants' assets to protect its ability to render a meaningful final judgment. *See SEC v. Hardy*, 803 F.2d 1034, 1037 (9th Cir. 1986); *FTC v. Stefanchik*, 559 F.3d

924, 931 (9th Cir. 2009); *Pantron I*, 33 F.3d at 1102; *see also, e.g.*, *United States v. Hall*, 472 F.2d 261, 265 (5th Cir. 1972) (Wisdom, J.) (court has "inherent jurisdiction to preserve [its] ability to render judgment"). A prejudgment asset freeze serves to preserve the possibility of full relief. *See, e.g.*, *Johnson v. Couturier*, 572 F.3d 1067, 1085 (9th Cir. 2009); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1433-1434 (11th Cir. 1984). As this court has held, "the district court has power to issue a preliminary injunction to preserve the status quo in order to protect the possibility of that equitable remedy." *FTC v. H. N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982).

The district court's factual findings support its entry of a prejudgment freeze. The court found that (1) the FTC was likely to succeed on the merits of its claims that the defendants had violated the FTC Act; and (2) the defendants had already dissipated assets that could potentially satisfy a future judgment and were likely to continue doing so. ER 17-37. The district court's prejudgment asset freeze was thus necessary to protect the court's ability to order effective relief and an appropriate exercise of the court's jurisdiction over the defendants in the underlying case.

B. The Order Applying The Prejudgment Asset Freeze To The Trailer

The court also acted within its jurisdiction to find that the trailer was subject to the prejudgment asset freeze order. ER 15-16. By its terms, the asset freeze or-

der applied to the assets "owned" or "held for the benefit of" any defendant, whether "in whole or in part." ER 30. El Dorado admits that Level 5 Motorsports ordered the trailer from Bruce High Performance and paid for it in full. Br. 7. Although El Dorado denies that Level 5's payment-in-full means that Level 5 *owns* the trailer, the denial simply creates a dispute over who owns the asset; the trailer remains subject to the court's authority so long as there is any reason to believe that it belongs (in whole or in part) to Level 5.

The district court itself may decide such disputes. A district court has "authority 'to decide the legitimacy of ownership claims made by non-parties to assets alleged to be proceeds from [the actual defendant's] . . . violations.'" *SEC v. Ross*, 504 F.3d 1130, 1144 (9th Cir. 2007) (quoting *SEC v. Cherif*, 933 F.2d 403, 414 n.11 (7th Cir. 1991)). It does not matter that the asset was in El Dorado's possession rather than Level 5's. *See FDIC v. Garner*, 125 F.3d 1272, 1280 (9th Cir. 1997). Because the asset was at least potentially owned by Level 5, the court was authorized "to preserve the status quo in order to protect the possibility" that the asset could be used to satisfy a judgment in the case. *H. N. Singer*, 668 F.2d at 1112.

The court's jurisdiction to protect defendants' assets and decide the ownership of the trailer necessarily includes the authority to direct El Dorado not to sell the trailer before its true ownership has been determined. El Dorado complains that

the district court lacked that authority because it "ma[de] specific orders to El Dorado" even though El Dorado is not a party to the underlying case. Br. 16. But the court's order enforcing the asset freeze was plainly necessary to preserve the status quo. *H. N. Singer*, 668 F.2d at 1112. The court entered the order because El Dorado had expressly threatened to sell the asset even after it had been served with the asset freeze order and informed that the order applied to the trailer. *See* SER 47-48. El Dorado simply insisted that the asset freeze "does not apply" and said it would "move forward with the sale of the trailer to a third party" within two weeks unless it received "a claim to ownership of the trailer *or a legal document restraining a sale*." SER 48 (emphasis added). The court entered the very type of order that El Dorado itself insisted was necessary to prevent it from the sale. Having insisted on an order that would keep it from selling, El Dorado cannot now dispute that the order was necessary to maintain the status quo. *See H. N. Singer*, 668 F.2d at 1112.

C. The Postjudgment Asset Freeze

The court likewise had authority to enter an order freezing the defendants' assets postjudgment as part of its appointment of a monitor. "[A] federal court generally has the equitable authority to impose a receivership . . . if the court determines a receivership is necessary." *In re San Vincente P'ship*, 962 F.2d 1402, 1406 (9th Cir. 1992); *Wencke I*, 622 F.2d at 1369 ("[T]he inherent power of a court of equity to fashion effective relief" includes the authority to "impos[e] a receiver-

ship in appropriate circumstances.").[8] A district court's power "to supervise an equity receivership and to determine the appropriate action to be taken in the administration of the receivership is extremely broad." *Hardy*, 803 F.2d at 1037. To ensure effective relief, district courts may therefore enter an asset freeze along with the creation of a receivership to preserve assets that may satisfy the judgment. *See, e.g.*, *Johnson*, 572 F.3d at 1085.

Moreover, the authority to appoint a monitor necessarily includes authority to decide the "claims of nonparties" to property claimed by a monitor. *SEC v. Wencke*, 783 F.2d 829, 836 (9th Cir. 1986) ("*Wencke II*"); *Universal Fin.*, 760 F.2d at 1037. The district court's power to impose a receivership extends to nonparties through both "its control over the property placed in receivership" and "its jurisdiction over the parties." *Wencke I*, 622 F.2d at 1369. A district court thus has the power to enter an order that applies to nonparties if the order is "necessary to achieve the purposes of the receivership." *Id.*

Contrary to El Dorado's argument (Br. 24-25), principles of due process do not require that a third party with a competing claim to receivership property be

[8] El Dorado is wrong to suggest (Br. 20-21), that there is any meaningful difference between the "monitor" appointed by the court and a "receiver." Like a receiver, the monitor was appointed as the court's agent to oversee property subject to the court's judgment. SER 67. The court used the two terms interchangeably and expressly required the monitor to comply with the laws and rules "governing receivers," including 28 U.S.C. § 959, which applies to "trustees, receivers or managers of any property" who are appointed by a district court. SER 67.

named as a defendant or that the monitor bring a new proceeding in a different venue against the claimant. *San Vincente*, 962 F.2d at 1407. Rather, this Court has recognized that "[a] mere custodian is generally entitled simply to notice and an opportunity to be heard." *Ross*, 504 F.3d at 1142. "It is well settled" that those steps satisfy due process. *San Vincente*, 962 F.2d at 1407. El Dorado's approach would stymie the purposes of a receivership by requiring the receiver to bring a multiplicity of claims in courts across the country. *See Wencke I*, 622 F.2d at 1372-1373.

Moreover, no due process violation can occur unless there is a "material deprivation of a property interest," *San Vincente*, 962 F.2d at 1407, which has not happened here. The asset freeze orders have simply maintained the status quo—El Dorado even remains in possession of the trailer. El Dorado will have the opportunity to present its competing claim of ownership in the district court.

Indeed, district court's prejudgment discovery order provided El Dorado with the opportunity to adjudicate its claim to own the trailer, but El Dorado declined that opportunity. *See* ER 210-211 (discovery order); SER 99-101 (El Dorado objections to discovery requests). Moreover, even if the receivership proceeding materially affected El Dorado's ownership interest, El Dorado received actual notice of the receivership proceeding through the appearance of its lawyer in the

district court and participated in the proceedings, filing comments on the proposed order to appoint a monitor. *See* SER 53-57.

The court did not, as El Dorado wrongly claims, expand its jurisdiction by entering the postjudgment order. *See* Br. 21. As explained above, the court properly had jurisdiction over Level 5 and all of its assets. That jurisdiction included the authority to adjudicate whether a particular asset belongs to Level 5 or a competing claimant such as El Dorado. *See Ross*, 504 F.3d at 1144.

D. The Court Did Not Need To Establish *In Personam* Jurisdiction Over El Dorado Or Show Minimum Contacts With Nevada.

As the discussion above shows, the district court acted within its authority when it entered both the prejudgment and postjudgment asset freeze orders, and those orders were properly applied to the trailer despite El Dorado's competing assertion of ownership. The district court's jurisdiction to enter those orders flowed from the underlying case and its authority over the parties. Accordingly, El Dorado's complaint that the court failed to establish *in personam* jurisdiction over El Dorado is beside the point. The court had jurisdiction over the trailer; it did not need jurisdiction over El Dorado.

The trailer proceedings implicate the court's jurisdiction over property—*in rem*—not the court's jurisdiction over a party—*in personam.* A federal court's *in rem* jurisdiction permits it to issue orders "binding on all persons, regardless of notice, who come into contact with [the] property." *Wencke I,* 622 F.2d at 1370 n.11

(quoting *Hall*, 472 F.2d at 265-266). Establishing that a third party has "no independent legitimate claim" to such property is merely "an adjudication of ownership" that does not require that the court obtain personal jurisdiction over the third party. *Ross*, 504 F.3d at 1142. As this Court has held, when a dispute involves a claim "to receivership property claimed by the Receiver," "the full *in personam* jurisdiction" is not required. *Id.* at 1144.

Indeed, "[*i*]*n personam* jurisdiction, simply stated, is the power of a court to enter judgment against a person." *Ross*, 504 F.3d at 1138. The dispute over the ownership of the trailer, however, does not involve a judgment against El Dorado. No judgment has been entered against the company, nor has the FTC or the receiver sought such a judgment. The court thus did not need to establish *in personam* jurisdiction over El Dorado, and El Dorado's contacts (or lack thereof) with Nevada are irrelevant.

El Dorado argues, however, that the court's order offends due process because *in rem* jurisdiction also requires a showing of minimum contacts. Br. 27. That argument fails for two reasons. First, El Dorado ignores that the court's *in rem* jurisdiction over the trailer is based on its jurisdiction over Level 5 and Level 5's claim to the trailer. *See Wencke I*, 622 F.2d at 1370 n.11. There was no need for an additional showing that El Dorado—a competing claimant—had minimum contacts with the forum state. *See id.*

In addition, the minimum contacts test is not even applicable to cases in which a federal statute provides for nationwide service of process. *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 824-826 (6th Cir. 1981). The minimum contacts test is "applied to the power of *state courts*, and *federal courts sitting in diversity*, to extend their process beyond the borders of the state in order to compel the presence of non-residents." *Haile*, 657 F.2d at 822 (emphasis added). The test does not apply in cases where a federal law permits nationwide service of process because they involve *federal* courts ruling on *federal questions*; they do not require extending the court's territorial jurisdiction through a state long-arm statute. *Id.* at 823. In such cases, "empowering the district court to serve process nationwide" gives the district court "jurisdiction over any party with minimum contacts with the United States." *Ross*, 504 F.3d at 1140.

This is one of those cases. Section 13(b) of the FTC Act provides that "process may be served on any person, partnership, or corporation wherever it may be found." 15 U.S.C. § 53(b). Accordingly, even bringing El Dorado as a party would not have required any showing that it has minimum contacts with Nevada; El Dorado cannot deny that it has minimum contacts with the United States.

El Dorado's reliance on *Shaffer v. Heitner*, 433 U.S. 186 (1977) and *In re San Vincente Partners, Ltd.*, 962 F.2d 1402 (9th Cir. 1992), is inapt. *Shaffer* arose from Delaware state court; the Supreme Court held that "assertions of *state-court*

jurisdiction must be evaluated according to the standards set forth in *International Shoe*." 433 U.S. at 212 (emphasis added). This is not a state court case.

San Vincente compels no different result. Although the Court there concluded there that there were "sufficient contacts with the forum to support [the] assertion of quasi *in rem* jurisdiction" over a non-party's property, the Court did not reach whether such contacts were necessary in the first place. The Court did not need to decide the issue because the nonparty's objection to the forum was frivolous. It objected to the jurisdiction of a California court, but was organized and had its principal place of business there, and was controlled by a party over whom the district court's jurisdiction was uncontested. *San Vincente,* 962 F.2d at 1407. Indeed, the court found that "no other forum would be more convenient" for the party. *Id.* Moreover, unlike this case, there was no question in *San Vincente* that the property at issue belonged to the non-party. The question here is not whether the court can assert jurisdiction over El Dorado's property (which would be analogous to the question presented in *San Vincente*) but whether the district court can determine if the property is part of the receivership estate because it belongs to Level 5. As this court has repeatedly held, the district court's authority to appoint a receiver includes the power decide the "claims of nonparties" to receivership property. *Wencke II,* 783 F.2d at 836; *Universal Fin.,* 760 F.2d at 1037.

El Dorado's heavy reliance (Br. 16-17) on *SEC v. Ross* is also misplaced. There, this Court held that a district court improperly exercised jurisdiction over a receiver's attempt to disgorge brokerage fees purportedly received from illegal securities sales. The court held that the brokers had a right to be named as parties and to other procedural rights because the receiver based its claim on their wrongdoing. *Ross*, 504 F.3d at 1144-1145. This case is not like *Ross* because it does not involve "a determination that a non-party has violated the law." *Id.* at 1142. The Court specifically distinguished that situation from the issue here: "an adjudication of ownership," which does not call for enhanced due process. *Id.* "A mere custodian," the Court explained, "is generally entitled simply to notice and an opportunity to be heard." *Id.* This case involves only an asset freeze and ultimately will present only a question of ownership. It therefore does not fall under the holding of *Ross* for the reasons set forth in *Ross* itself.

E. Rule 65(d) Does Not Apply To The District Court's Order.

El Dorado argues that the district court's prejudgment order enforcing the asset freeze amounted to "injunctive relief in excess of that authorized by Fed. R. Civ. P. 65." Br. 18-19. The claim is that it was subjected to the district court's asset freeze order though it was not in "active concert or participation" with the defendants. *Id.* El Dorado relies on Rule 65(d)(2), which specifies that injunctions and restraining orders are binding only on the parties; their officers, agents, and employ-

ees; and "other persons who are in active concert or participation" with the parties. Rule 65(d) has no bearing here.

First, as this Court has explained, a district court's power to enter a stay in a receivership is "broader than the court's authority to grant or deny injunctive relief under [Rule] 65." *Universal Fin.*, 760 F.2d at 1038; *Wencke I*, 622 F.2d at 1371. In *Wencke I*, the Court declined to apply Rule 65(d) to a receivership order, relying instead on "the broad equitable powers of the federal courts to shape equitable remedies to the necessities of particular cases, especially where a federal agency seeks enforcement in the public interest." 622 F.2d at 1371. The Court therefore approved the district court's authority, notwithstanding Rule 65(d), to "stay proceedings against a court-imposed receivership" and to make the stay "effective against persons [who were] not parties to the SEC action who have notice of the stay." *Id.* Here, the district court had inherent equitable authority to protect the trailer as an asset subject to the receivership and El Dorado had notice of the order.

Second, Rule 65(d) is "a codification rather than a limitation of courts' common-law powers," and thus it "cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment." *Hall*, 472 F.2d at 267. When a court issues "a decree binding on a particular piece of property"—as with the asset freeze orders here—the court is "faced with the danger that its judgment may be disrupted in the future by members of an undefinable class—those who

may come into contact with the property." *Id.* at 266. "The *in rem* injunction protects the court's judgment" by "binding . . . all persons, regardless of notice, who come into contact with property which is the subject of a judicial decree." *Id.* at 265-266. The limitation that Rule 65 places on injunctions therefore did not limit the district court's ability to entering an *in rem* order restraining the sale or transfer of the race car trailer.

Third, the All Writs Act, 28 U.S.C. § 1651(a), independently justifies the court's order. The Act permits a court to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." As this Court has held, a district court's authority under the All Writs Act "should be broadly construed." *SEC v. G.C. George Sec. Inc.*, 637 F.2d 685, 688 (9th Cir. 1981) (citation omitted). And the Supreme Court has "repeatedly recognized" that a court may issue commands under the All Writs Act that are "necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued." *United States v. New York Tel. Co.*, 434 U.S. 159, 172 (1977); *see also NORML v. Mullen*, 828 F.2d 536, 544 (9th Cir. 1987).

The district court's orders fit precisely within the contours of the All Writs Act. The prejudgment order enforcing the asset freeze order and preventing El Dorado from selling the trailer was necessary to protect the asset so that it could be

used to satisfy the judgment. The postjudgment asset freeze, and the order refusing to exempt the trailer from the freeze served the same purpose.

F. The Court's Order Was Not A Temporary Restraining Order.

As explained in part I.B above, the district court had jurisdiction to enter the prejudgment order enforcing the asset freeze (Docket No. 1036, ER 15-16) by virtue of its jurisdiction over the underlying dispute and its inherent authority to protect the efficacy of its judgment. El Dorado's argument that the order was actually a temporary restraining order (Br. 25) does not undermine that authority.

Nothing about the court's order suggests that it was a temporary restraining order. The FTC did not seek a temporary restraining order; it was not entered without notice to El Dorado; and the district court did not call the order a temporary restraining order or suggest that it intended the order to be time-limited like a temporary restraining order. To the contrary, the order states that it is to remain in effect "until further order" of the district court. ER 15. Under Rule 65(b)(1), a temporary restraining order is one issued "without written or oral notice to the adverse party or its attorney." But El Dorado admits that it received notice of the FTC's motion. Br. 38. Indeed, El Dorado's counsel filed a notice of appearance that same day. SER 11. Accordingly, El Dorado's argument that it did not receive a Rule 65(b)(4) hearing (Br. 25), and that the order thus must have automatically dissolved 14 days later because it was a TRO (Br. 39-40) are baseless.

II. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED EL DORADO'S MOTION TO DISSOLVE THE FREEZE WITH RESPECT TO THE TRAILER.

As explained in Part I.C above, the district court was within its authority to enter a postjudgment asset freeze as part of its appointment of a monitor to oversee the defendants' assets. *Wencke II*, 783 F.2d at 836; *Universal Fin.*, 760 F.2d at 1037. The court was likewise within its discretion when in the order on appeal it declined to exempt the trailer from the asset freeze. *See Universal Fin.*, 760 F.2d at 1038.

As described above, El Dorado's argument does not engage the actual basis for the order on appeal. It argues instead that the district court's prejudgment order enforcing the asset freeze (Docket No. 1035, ER 15-16) was an abuse of discretion. Br. 26-38. According to El Dorado, the FTC failed to show, in its motion seeking that order, that it was "likely to succeed on the merits" or "make a showing of irreparable injury," and the balance of the equities favors El Dorado. Br. 26, 36, 37. But El Dorado is barking up the wrong tree. Its arguments all rest on the traditional factors for granting preliminary injunctions. But "[t]his circuit has not applied the traditional preliminary injunction test in ruling on motions to except applicants from a blanket receivership stay." *Universal Fin.*, 760 F.2d at 1038.

In that situation, the Court applies a different three-factor test: (1) "whether refusing to lift the stay genuinely preserves the status quo or whether the moving party will suffer substantial injury if not permitted to proceed," (2) when the mo-

tion is made; and (3) "the merit of the moving party's underlying claim." *Id.* (quoting *Wencke II*, 742 F.2d at 1231). This test, which El Dorado doesn't even acknowledge, "simply requires the district court to balance the interests of the receiver and the moving party." *Id.* A receiver's interest is "very broad" and includes "not only protection of the receivership *res*, but also protection of defrauded [consumers] and considerations of judicial economy." *Id.* Each factor shows that the district court acted well within its discretion when it declined to remove the trailer from its asset freeze order.

The first factor weighs heavily against releasing the trailer from the asset freeze. Refusing to lift the stay "genuinely preserve[d] the status quo." *Universal Fin.*, 760 F.2d at 1038. El Dorado has continually asserted that it owns the trailer without reservation and that it would sell the trailer but for the asset freeze. Once the asset is sold, nothing would prevent El Dorado from rendering the proceeds unavailable to satisfy a judgment against Level 5. Moreover, a court is justified in refusing to lift a stay where the alternative would "result in a multiplicity of actions in different forums," "increase litigation costs," and "diminis[h] the size of the receivership estate." *Id.* Here, El Dorado has already tried to persuade an Ohio state court to declare the trailer El Dorado's property and has argued in its brief that proceedings in a different forum would be more appropriate. Br. 23; ER 6, SER 82-97. Such proceedings would increase the monitor's costs (which ultimately

come from the defrauded consumers' pockets) and reduce the assets available to satisfy the underlying judgment.

The timing of El Dorado's request also supports the court's refusal to release the trailer under the second factor. When a receivership has only recently been established, "the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim." *Universal Fin.*, 760 F.2d at 1038 (*quoting Wencke II*, 622 F.2d at 1373-1374). Here, the receivership was established less than six months ago, and the monitor must track down more than a billion dollars in ill-gotten gains. Given that short period, the district court was within its discretion to deny El Dorado's motion to release the trailer from the asset freeze.

Finally, El Dorado's claim to ownership on the merits is weak. El Dorado claims that its title to the vehicle is conclusive and there is "no theory under which Level 5 can claim to be an owner of the Trailer." Br. 34. Not true.

El Dorado first argues that because (1) it is the "sole titled owner" of the trailer, and (2) in Ohio "ownership of a vehicle passes only through the issuance of legal title," Level 5 cannot own the trailer because no title was ever issued to it. Br. 28-29. But that argument proves too much. Level 5 never received a title from Bruce High Performance, but *neither did El Dorado*. El Dorado claims title only through a manufacturer's certificate of origin that El Dorado issued *to itself* using

the name "Bruce Transporters." ER 110, 205. El Dorado's bootstrapping theory would thus have the Court hold that it has established conclusive ownership by virtue of its own say-so.

El Dorado next argues that Level 5's contract was with Bruce High Performance, not El Dorado. Br 30. But as set forth at length above, El Dorado's own court filings show that the company purchased Bruce High Performance and continued the business under the trade name "Bruce Transporters." *See* ER 109-110; SER 85-87. Indeed, the trailer was not even listed on the 14-page itemized list of assets purchased by El Dorado. *See* ER 139-152. And as El Dorado admits (BR 32-33), under Ohio law the purchaser of a company's assets assumes the company's obligations when "the transaction amounts to a *de facto* consolidation or merger" or "the buyer corporation is merely a continuation of the seller corporation." *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 861 N.E.2d 121, 130 (Ohio 2006).

Under that standard, El Dorado acquired Bruce High Performance's liabilities when it bought the business. The owner of Bruce High Performance offered to "sell the business" and said El Dorado would "own the business"; El Dorado expected to profit from completing Bruce High Performance's projects; so it "restarted" the business, hired its employees, adopted its trade name, and took over its website. Docket No. SER 85-87; ER 110. The asset purchase agreement reveals

that El Dorado assumed Bruce High Performance's "accounts payable," ER 129; El Dorado still operates as Bruce Transporters; and its website still describes its "acquisition" of Bruce High Performance as a "merge" between the two companies. *See* brucetransporters.com/news. El Dorado's so-called "asset purchase" was a de facto merger or a continuation of Bruce High Performance. Under Ohio law, El Dorado thus assumed Bruce High Performance's obligations, including the obligation to deliver to Level 5 the trailer that Level 5 paid for. El Dorado's opening brief does not own up to any of this. Instead, El Dorado simply asserts without explanation that the purchase was neither a "merger or a continuation of the seller corporation." Br. 34. El Dorado's own statements, documents, and court filings show otherwise.

The *Wencke I* factors show that the district court properly exercised its discretion. Their application here is not difficult because they all favor the court's decision to deny El Dorado's motion. The public interest likewise favors preserving the trailer to contribute to satisfaction of a judgment disgorging assets derived from fraud.

CONCLUSION

The order on appeal should be affirmed.

Respectfully submitted,

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RULE 28-2.6 STATEMENT OF RELATED CASES

A related appeal is currently pending before this Court in case no. 16-17197, *FTC v. AMG Services, Inc.*, in which the defendants in the underlying FTC Act case challenge the district court's order granting summary judgment.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 9804 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 22, 2017. All case participants are Registered for the Appellate CM/ECF System

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CERTIFICATE FOR BRIEF IN PAPER FORMAT

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I certify that this brief is identical to the version submitted electronically on May 22, 2017.

May 24, 2017

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