IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 09-3357

FEDERAL TRADE COMMISSION,
Plaintiff/Appellee,

v.

RICHARD C. NEISWONGER,
Defendant/Appellant.

Appeal from the U.S. District Court for the
Eastern District of Missouri, Eastern Division

BRIEF OF APPELLEE FEDERAL TRADE COMMISSION

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

DAVID L. SIERADZKI
Attorney
Office of General Counsel
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-2092

Of Counsel:

JOSHUA S. MILLARD
Attorney
Enforcement Division
Bureau of Consumer Protection

FEDERAL TRADE COMMISSION
601 New Jersey Ave., NW
Washington, DC 20580

February 12, 2010

SUMMARY OF THE CASE

Nature of the Case. In a prior appeal, this Court affirmed the District Court's orders holding Defendant/Appellant Richard Neiswonger ("Neiswonger") in civil contempt for misrepresentations and deception of consumers in the marketing and sales of business opportunity programs, in violation of an earlier injunction. In particular, this Court affirmed the requirement that Neiswonger turn over title to real property in Las Vegas, Nevada, to the Receiver, in partial satisfaction of the civil contempt judgment requiring disgorgement, despite his wife's marital interest in the property. *FTC v. Neiswonger*, 580 F.3d 769, 776 (8th Cir. 2009), *affirming* 494 F. Supp. 2d 1067 (E.D. Mo. 2007) (D.E.123) ("First Contempt Order"), and Amended Civil Contempt Order (July 30, 2008) (D.E.275) ("Second Contempt Order"). On Sept. 15, 2009, the District Court issued the order on appeal (D.E.367) ("Third Contempt Order"), again holding Neiswonger in civil contempt, for failing to convey title to the Las Vegas property as required.

Statement Regarding Oral Argument. Pursuant to 8th Cir. R. 28A(f)(1), Plaintiff/Appellee the Federal Trade Commission ("FTC") respectfully submits that oral argument is unnecessary because this appeal is largely frivolous, and any remaining facts and legal arguments are adequately presented in the briefs and record. At most, the Court should allot 15 minutes per side.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION, STATUTES AND RULES

JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction over the case below, a civil law enforcement action brought by th

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Is an appeal of a civil contempt order moot where the actions mandated by the District Court have been performed, effectively purging the contempt? *United States v. Watson Chapel School Dist. No. 24*, 446 F.2d 933 (8th Cir. 1971); *FTC v. Stroiman*, 428 F.2d 808 (8th Cir. 1970) (*per curiam*); *St. Pierre v. United States*, 319 U.S. 41 (1943) (*per curiam*).

2. Can a contempt defendant appeal a purported requirement that he "compel" his wife to execute real estate transfer documents, when the District Court in fact never imposed any such obligation? *FTC v. Productive Marketing, Inc.*, 136 F. Supp. 2d. 1096 (C.D .Cal. 2001); *FTC v. Pacific First Benefit, L.L.C.*, 472 F. Supp. 2d. 981 (N.D. Ill. 2007); *SEC v. Universal Financial*, 760 F.2d 1034 (9th Cir. 1985).

3. Does Neiswonger lack standing to appeal a requirement that the District Court imposed not on him, but on his wife? *Powers v. Ohio*, 499 U.S. 400 (1991); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Smith v. Armontrout*, 812 F.2d 1050 (8th Cir. 1987).

STATEMENT OF THE CASE AND SUMMARY OF THE FACTS

A. Neiswonger's Unlawful Conduct and the Initial Injunction

Neiswonger is an intransigent contemnor who is subject to civil contempt judgments in connection with misleadingly marketing methods for "bulletproof asset protection" – *i.e.*, schemes for concealing one's assets from government agencies, receivers, the courts, and other potential creditors, through vehicles such as sham corporate entities chartered in Nevada and overseas. Ironically, the instant case concerns Neiswonger's attempts to avoid paying the contempt judgment against him, in part using similar "asset protection" tactics.

The underlying facts are summarized in this Court's *Neiswonger I* opinion (580 F.3d at 771-73) and the District Court's First Contempt Order (494 F. Supp. 2d at 1069-78). In brief, the FTC first filed a civil complaint (D.E.1) against Neiswonger and others on November 13, 1996, pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). The complaint alleged that Neiswonger and others, through an enterprise known as Medical Recovery Systems, Inc., deceptively sold training programs for $10,000 or more based on misrepresentations that, *inter alia*, purchasers would likely earn six-figure incomes as financial consultants, when in reality, such incomes were rarely if ever achieved. The complaint sought to enjoin and remedy the defendants' deceptive practices in the advertising,

marketing and sale of business opportunity

clients to completely protect themselves against asset seizure by the IRS or other government agencies, as well as other creditors and the federal courts. APG's asset protection services included the formation and use of Nevada companies and offshore corporate entities, and the encumbrance of property with so-called "friendly" liens—liens made for no real consideration, in favor of the owners of the property, to conceal the owners' equity in the property and deter or obstruct future collection efforts. *See* First Contempt Order, 494 F. Supp. 2d at 1072.

After leaving prison in 2001, Neiswonger directed the nationwide marketing and sale of the APG program. Consumers paid $9,800 for training to become certified "asset protection consultants," and were promised that, even if they had no prior sales experience, they would earn six-figure incomes—potentially working on a part-time schedule—and that they would receive referrals to prospective clients. Based on these and many more misrepresentations and failures to disclose material information, nearly 2,000 consumers paid Neiswonger and his associates for the proer l Tm Basedpe schedu"a07 Tc-sz56j-16.3(erseth)tectionut 94%-2.ey woul

records, enjoining further violations of the 1997 injunction, and appointing a Receiver to assume control of the business. Following extensive briefing, review of numerous exhibits, and several days of hearings, on April 23, 2007, the District Court issued the First Contempt Order, finding overwhelming evidence that Neiswonger and others in active concert and participation with him had directly violated numerous specific prohibitions in the 1997 injunction. The District Court held them in civil contempt for those violations, stating that it would amend the civil contempt order with a monetary judgment after the Receiver completed an accounting of the proceeds that Neiswonger and the other contempt defendants took from the scheme. The District Court also adopted modifications to the

Court that they were trying to sell this property. When FTC counsel contacted the realtor who was listing the property, the realtor advised counsel that a buyer had been found, earnest money had been tendered, and a sales transaction was already in escrow. The sale was averted only after FTC counsel provided the escrow agent with a copy of the Court's asset freeze order. *See* FTC Supp. Mem. In Support of Mo. For Civil Contempt at 5 & n.4, 10 (July 13, 2009) (D.E.344).

Subsequently, based on the Receiver's accounting, the District Court issued the Second Contempt Order on July 30, 2008, requiring Neiswonger to disgorge over $3.2 million that he had obtained from the APG scheme. The Second Contempt Order also provided that, if Neiswonger did not pay this amount in full within 20 days of entry of the order, he would be required to transfer certain specified assets to the Receiver in partial satisfaction of the civil contempt judgment, including title to the Las Vegas property. *See* Second Contempt Order (D.E.275) at 3-4, ¶¶I.A, II.B.3 & 4.

C. The Neiswongers' Personal "Asset Protection" Scheme

While the APG scheme was underway, the Neiswongers implemented an "asset protection" stratagem of their own. They employed a local attorney to put their Verlaine Court home and other properties into a revocable trust under their control—the "SRN Trust," in which Richard and Shannon Neiswonger were the trustors/grantors and the sole trustees, and they and their children were the

beneficiaries. Third Contempt Order (D.E.367) at 3-4; FTC Supp. Mem. In Support of Mo. For Civil Contempt (D.E.344) at 6-7. Neiswonger subsequently purported to resign as a trustee, in order to divest himself of authority to convey title to the property as required by the District Court's contempt orders (although he failed to have his statement of resignation notarized or recorded at the time it was executed, rendering his resignation ineffectual). Third Contempt Order at 3-4.

As a second step in their "asset protection" scheme, the Neiswongers encumbered their home with a mortgage lien in favor of a Nevada partnership under their control. (Such "friendly liens" were among the techniques recommended by the APG program.). In July 2005, the Neiswongers, as trustees of the SRN Trust, executed a deed of trust in the amount of $1.975 million in favor of Rishne LP ("Rishne"), a limited partnership named after themselves. Shannon Neiswonger is Rishne's general partner, with a 1% interest in the partnership; defendant Neiswonger and the SRN Trust serve as Rishne's limited partners, with 1% and 98% interests, respectively. However, there is no evidence that Rishne ever actually loaned the SRN Trust $1.975 million; indeed, there is no evidence that Rishne ever held a bank account or any other assets. The lien is an artificial contrivance, created in order to further the Neiswongers' asset protection strategem. FTC Supp. Mem. In Support of Mo. For Civil Contempt (D.E.344) at 7-9; Third Contempt Order at 5-6 n.5.

Third, as noted above, the Neiswongers attempted to sell the Verlaine property in defiance of the freeze on Neiswonger's assets, and purported to divest Neiswonger of his control of that property despite the asset freeze in this case.

D. Neiswonger's First Appeal to this Court

Neiswonger appealed both the 2007 First Contempt Order and the 2008 Second Contempt Order to this Court. On Sept. 9, 2009, this Court issued its *Neiswonger I* Opinion, affirming both Contempt Orders and rejecting Neiswonger's arguments in their entirety. Specifically, this Court found that the District Court afforded Neiswonger due process (580 F.3d at 774-75), that the District Court did not abuse its discretion or clearly err in admitting into evidence the Court-appointed Receiver's calculation of Neiswonger's proceeds and relying on that calculation in determining the amount to be disgorged (*id.* at 775-76), and that the District Court acted properly in requiring the disgorgement of funds in Neiswonger's individual retirement account (*id.* at 777).

Most significantly for present purposes, this Court specifically affirmed the District Court's conclusion that Neiswonger could be compelled to transfer ownership of the residential real estate on Verlaine Court, even though Shannon Neiswonger has a marital interest in the property. *Id*

spouses were a party to the action." *Id.*, *quoting Jones v. Swanson*, 341 F.3d 723, 738 n. 6 (8th Cir. 2003); and *citing Randono v. Turk*, 86 Nev. 123, 466 P.2d 218, 224 (Nev. 1970); and *Cirac v. Lander County*, 95 Nev. 723, 602 P.2d 1012, 1017 (Nev. 1979). The Court also affirmed the District Court's conclusion that it was

[1] Both the District Court and this Court denied Neiswonger's request for a stay of the Second Contempt Order pending the appeal to this Court. Order (D.E.303) (Oct. 16, 2008); Order, No. 08-3077 (8th Cir. Nov. 14, 2008).

On Sept. 14, 2009, the District Court held another hearing, focused on the specific means by which Neiswonger could transfer title in the real estate to the Receiver, given Shannon's marital interest in the property. *See* Transcript (D.E.369). Shannon Neiswonger did not attend this hearing, nor did an attorney enter an appearance on her behalf, seek to intervene, or participate directly in the case in any other way. However, her attorney, Robert McAllister, had notice of the hearing and attended it—although he participated only on behalf of his other client, Richard Neiswonger, and not on behalf of Shannon. (During the deposition of Shannon Neiswonger, both she and Mr. McAllister made it clear that he represented her and that he had an attorney-client relationship with her. *See* Transcript, Deposition of Shannon Neiswonger (D.E.344-3), at 155.)

On Sept. 15, 2009, the District Court issued the Third Contempt Order (D.E. 367)—the order that is the subject of the current appeal—holding Neiswonger in contempt for "failing to convey good and marketable title" to the real property at issue. *Id.* at 2-3. The District Court ordered that "defendant Richard C. Neiswonger shall fully comply with all dir

essence of this order was summarized by the District Judge at the conclusion of the Sept. 14, 2009 hearing: "[I]t is my intention to hold you in contempt of Court and to have you taken into custody by United States marshals one week from today in the event that the paperwork has not been executed to accomplish the disgorgement of the residence in Nevada and the transfer of that property to the Receiver." Transcript (D.E.369) at 30. The content of the order is analyzed in greater detail below (Argument, Section II).

Immediately following the issuance of the Third Contempt Order, documents were executed to transfer title to the Verlaine Court property to the Receiver, thereby accomplishing the disgorgement of the asset as required under the Second and Third Contempt Orders. Specifically, Shannon Neiswonger, as trustee of the SRN Trust, executed a grant-bargain-sale deed conveying the Verlaine Court property from the SRN Trust to the Receiver on Sept. 15, 2009.[2] Accordingly, Neiswonger was never taken into custody.

---

[2] Shannon Neiswonger later contended that she had executed this deed unwillingly and under duress, and brought suit against the FTC and the Receiver seeking remedies including having title to the property transferred back to her. She filed a complaint in state District Court for Clark County, Nevada. The FTC exercised its right under 28 U.S.C. § 1442(a)(1) to remove that case to the U.S. District Court for the District of Nevada. No. 2:09-cv-02271-RCJ-PAL. The FTC and the Receiver view the case as a collateral attack on the Second and Third Contempt Orders here, and have moved to transfer the case to the Eastern District of Missouri so it can be consolidated with the instant case.

SUMMARY OF THE ARGUMENT

This case should be dismissed as moot. The ordering clauses of the order under review were all directed to a single goal, expeditious transfer of title to the real estate at issue so as to satisfy, in part, an earlier civil contempt judgment. That goal has been accomplished and the civil contempt has been purged. Neiswonger remains subject to no further sanction based on his contempt, and there is therefore no live case or controvery before this Court. (Section I.)

Moreover, Neiswonger's appeal is premised upon an assertion that the District Court improperly held him in contempt for failing to "compel" his wife to execute the real estate transfer documents, when in fact the District Court did not impose a contempt sanction on that basis. To the contrary, the District Court specifically disavowed such an approach, and instead exercised the Court's own authority to order Neiswonger's wife to execute the documents. (Section II.)

Finally, to the extent Neiswonger seeks to advocate on behalf of his wife, he lacks standing to do so. Third parties generally lack standing to assert the rights of others, except in rare cases where the party faces some hindrance to the ability to press his or her own rights, such as mental incompetence, insurmountable privacy concerns, or a very small or diffuse economic interest in the outcome. None of these factors apply here. There are no obstacles preventing Shannon Neiswonger from acting independently to protect her own rights—as evidenced by the related

litigation she has commenced in Nevada—and the fact that she voluntarily declined to appear before this Court or the District Court below does not create a basis for her husband to assert claims on her behalf. (Section III.)

ARGUMENT

This Court "review[s] a district court's imposition of a civil contempt order and assessment of monetary sanctions for abuse of discretion." *Neiswonger I*, 580 F.3d at 773, *citing*

all reasonable efforts to comply in good faith. *Chicago Truck Drivers*, 207 F.3d at 505; *Affordable Media*, 179 F.3d at 1239.

I. THIS APPEAL IS MOOT BECAUSE THE CIVIL CONTEMPT HAS

subpoena, the District Court held him in civil contempt. Thereafter, the defendant immediately complied, but appealed the civil contempt order anyway, on the basis that he feared prosecution for criminal contempt for his past contemptuous conduct. This Court dismissed the a

U.S. 41, 42 (1943) (*per curiam*) (dismio13.9lng as (i)-oot appeal of cri(i)-.nal conte(i)-pt

effectuate the transfer of marketable title to the Receiver[.]" *Id.* (emphasis added). That is precisely what the Court did in the Order.

Nor do any of the factual findings underlying the specific directives of the Third Contempt Order reflect any court-imposed requirement that Neiswonger "compel" his wife to do anything. Rather, the court below found—in findings that Neiswonger makes no serious effort to challenge as clearly erroneous—that Neiswonger had failed to do "everything possible to convey the property" – *i.e.*, to take actions that were within his capability to transfer title to the Las Vegas real estate. Third Contempt Order at 3; *see Neiswonger I*, 580 F.3d at 776 (affirming that Neiswonger could convey the Las Vegas real estate, as community property, despite his wife's marital interest in the property, and notwithstanding that it was nominally owned by the SRN Trust).

Specifically, the District Court found, as a factual matter, that Neiswonger could have unilaterally dissolved the SRN Trust, an entity consisting of the two spouses as trustors, trustees, and beneficiaries, which nominally held the title to the property. "Upon revocation of the trust, the property * * * indeed [would have] descend[ed] to the community property of Richard and [Shannon] Neiswonger," as Neiswonger concedes. Br. at 9. If he had done so, the property would have been available to satisfy Neiswonger's obligations under the earlier Contempt Orders. *Neiswonger I*, 580 F.3d at 777. But Neiswonger failed to do so. Third Contempt

Order at 3-5. The District Court committed no clear error in reaching this conclusion.

The District Court also found that Neiswonger could have "sought" – not "compelled," but "sought" – his wife's signature on certain documents to convey the property, but that he made no effort to do so. *Id.* at 5-6. Neiswonger argues forcefully in his brief that he could not "compel" his wife to sign these documents, Br. at 9-10, but he does not contest that he could have at least asked her to do so, but did not. The District Court did not clearly err in finding that he "offered no evidence that he ever sought or [was] willing to seek his wife's signature on these documents." Third Contempt Order at 5-6.

Neiswonger erroneously asserts that the FTC's counsel asked the District Court to require him to "compel" his wife to sign the documents. During the Sept. 14, 2009 hearing, it was the attorney for the Receiver (Mr. Caris) – not the FTC – who suggested that the Court should "require Mr. Neiswonger to get Mrs. Neiswonger to sign the necessary documentation * * * ." Transcript (D.E.369), at 19, lines 23-24; *see also id.*

hesitate to base an order requiring Mr. Neiswonger to require Mrs. Neiswonger to sign paperwork." *Id.* at 20, lines 2-6, and at 25, lines 20-22.

Counsel for the FTC (Mr. Millard) argued for a different approach: that "the Court has the power to order non-parties, third parties, to turn over assets that are being held for the benefit of the defendant." *Id.* at 20, lines 17-19. Mr. Millard directed the Court's attention to cases cited in the FTC's Supplemental Memorandum in Support of its Motion for Civil Contempt (filed Aug. 25, 2009) (D.E.344) (at 23-24 & n.18). The Court cited these and other cases in the Third Contempt Order for the proposition that, "[o]nce this Court established a receivership for the defendant's assets, all property in the possession of defendant passed into the custody of the receivership court (this Court) and became subject to its authority and control. As such, pursuant to the exercise of its broad equitable powers to protect the assets of the receivership estate, this Court may order non-parties to turn over receivership assets to the Receiver. * * * Permitting Shannon Neiswonger to retain the residence which is properly part of the receivership estate would thwart the purpose of the receivership * * *." Third Contempt Order at 6, *citing FTC v. Productive Marketing, Inc.*, 136 F. Supp. 2d. 1096 (C.D .Cal. 2001); *FTC v. Pacific First Benefit, L.L.C.*, 472 F. Supp. 2d. 981 (N.D. Ill. 2007); *Eller Industries v. Indian Motorcycle Mfg.*, 929 F. Supp. 369 (D.

Col. 1995); *FTC v. Vocational Guides, Inc.*, 2009 WL 943486 (M.D.Tenn. Apr. 6, 2009); *SEC v. Universal Financial*, 760 F.2d 1034, 1038 (9th Cir. 1985).

In response to Neiswonger's arguments that he could not unilaterally convey title because the property was held in the name of the SRN Trust, in which Shannon Neiswonger had a majority interest, the District Court parsed the terms of the trust document and determined that Neiswonger had authority to dissolve the trust unilaterally, both in his role as a Trustor/Grantor and as a Trustee. *Id.* at 3-5. Neiswonger claimed to have resigned as a Trustee of the SRN Trust, but the District Court found his resignation to have been ineffectual because his statement of resignation was not notarized or recorded at the time it was executed. *Id.* at 4. The Court also disregarded as a sham the SRN Trust's grant of a deed of trust in the amount of $1.975 million to Rishne, in which the Neiswongers were the sole general and limited partners. *Id.* at 4-5, n.5. Neiswonger apparently does not take issue with these findings of the District Court in his brief. Br. at 9.

Finally, there is no merit to Neiswonger's defense based on his purported "inability" to comply with the Third Contempt Order, because any such inability was "self-induced." Neiswonger was fully complicit in setting up the complicated "asset protection" ownership scheme in which the home was owned by the SRN Trust, subject to a lien to the fictitious Rishne partnership. By establishing the

scheme, the Neiswongers intended to make it more difficult for a federal court to reach the property. *See supra*. "[W]hile a person may defend a contempt charge on the ground that compliance is impossible, 'self-induced inability' does not meet the test * * * [particularly] in cases where the inability was the *intended* result of the contemnors' own conduct." *Chicago Truck Drivers Union Pension Fund v. Brotherhood Labor Leasing*, 207 F.3d at 506 (citations and elipses omitted; emphasis added); *see also United States v. Santee Sioux Tribe of Nebraska*, 254 F.3d 728, 736 (8th Cir. 2001).

III. NEISWONGER CANNOT APPEAL AN INJUNCTION IMPOSED ON HIS WIFE, SHANNON NEISWONGER

Neiswonger's brief, after only two pages discussing the District Court's contempt judgment against *him* (Br. at 8-9), spends the next five pages on arguments regarding the District Court's authority to impose an injunction on Shannon Neiswonger. *Id.* at 10-14. Neiswonger, however, cannot present these arguments on behalf of his wife. Ordinarily, "a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 474 (1982), *quoting Warth v. Seldin*, 422 U.S. 490, 499, (1975). Even when "the very same allegedly illegal act

that affects the litigant also affects a third party," a plaintiff "cannot rest his claim to relief on the legal rights and interests of [the] third part[y]." *U.S. Department of Labor v. Triplett*, 494 U.S. 715, 720 (1990); *United States v. Payner*, 447 U.S. 727, 731-732 (1980).

The Supreme Court has recognized limited exceptions to this general rule, but only where "three important criteria are satisfied: (1) The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute; (2) the litigant must have a close relation to the third party; and (3) there must exist some hindrance to the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991) (citations omitted; numbering added). Here, the third criterion is not met: there is no hindrance to Shannon Neiswonger's ability to protect her own interests.

Unlike the black citizens allegedly excluded from serving on grand juries in *Powers*, Shannon Neiswonger does not face "practical barriers to suit * * * because of the small financial stake involved [and] * * * little incentive to set in motion the arduous process needed to vindicate [her] own rights." *Id.*, 499 U.S. at 415. Unlike the impoverished pregnant women seeking Medicaid-supported abortions, who needed their physicians to act to vindicate their rights in *Singleton v. Wulff*, 428 U.S. 106, 117 (1976), Shannon Neiswonger's ability to proceed is not "chilled

* * * by a desire to protect the very privacy of her decision from the publicity of a court suit," nor does she face the "obstacle [of] the imminent mootness * * * of [her] claim [within] [o]nly a few months, at the most." Unlike a prisoner awaiting capital punishment who [lacked] the capacity to appreciate his [or her] position and make a rational decision, or was suffering from a mental disease, disorder, or defect that substantially affected his [or her] capacity," *Smith v. Armontrout*, 812 F.2d 1050, 1053 (8th Cir. 1987), Shannon Neiswonger clearly is mentally competent and capable of defending her own rights. *Cf.* Transcript, Deposition of Shannon Neiswonger (D.E.344-3), at 16-17 (she feels "100 percent" well enough to testify). *See Whitmore v. Arkansas*, 495 U.S. 149, 163 (1990) ("a 'next friend' must provide an adequate explanation—such as inaccessibility, mental incompetence, or other disability—why the real party in interest cannot appear on his own behalf to prosecute the action"); *Davis v. Scott*, 176 F.3d 805 (4th Cir. 1999) (affirming dismissal of wife's habeas petition on behalf of husband).

In the cases where the courts have allowed a party's interests to be represented by someone other than himself or herself, the party has faced a "hindrance" to eas p0018]acgw" explanShannon Neiswonger 2r p706.92a 9osusD.00yself (etent

participate in the litigation "lie beyond the control of the rightholder." *Miller v. Albright*, 523 U.S. 420, 450 (1998) (O'Connor, J., concurring). No such obstacles exist here.

Shannon Neiswonger does not need, and is not entitled to, her husband's assistance to protect her rights. To the contrary; as demonstrated by the lawsuit she has initiated in Nevada, she is perfectly capable of retaining counsel and defending her own rights in court, and apparently believes that she has a sufficiently significant financial stake to give her an economic incentive to do so. Shannon Neiswonger faced no obstacles and could have asserted the arguments that her husband now attempts to raise, either before the District Court below or before this Court, but has voluntarily declined to appear before either tribunal to do so (even though, presumably, she has had notice of both the District Court's and this Court's proceedings on this issue, if not through her husband, then through her attorney, Mr. McAllister). Neiswonger did not provide any explanation for why his wife could not appear voluntarily.

Moreover, given Neiswonger's vociferous arguments that "[w]e have nothing to show that she * * * must be legally identified with him," and that "third parties [are] independent actors and * * * litigants [have] no responsibility for

[3] *See Neiswonger I*, 580 F.3d at 776 ("The subject Neiswonger real property is located in Nevada. Nevada is a community property state, and under the law of Nevada, 'community property is subject to a spouse's debt irrespective of whether both spouses were a party to the action.'"), *quoting Jones v. Swanson*, 341 F.3d 723, 738 n. 6 (8th Cir. 2003); and *citing Randono v. Turk*, 86 Nev. 123, 466 P.2d 218, 224 (Nev. 1970) ("the community property of appellant and his wife [was] liable for the judgment, even though she was not a party to the suit in the

[I]f necessary, persons not originally connected with the litigation may be brought before the court so that their rights in the subject matter may be determined and enforced." *Parker v. Bowles*, 328 U.S. 395, 397-98 (1945).

CONCLUSION

For the reasons set forth above, this appeal should be dismissed or denied.

Respectfully submitted,

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

Of Counsel:

JOSHUA S. MILLARD
Attorney
Enforcement Division
Bureau of Consumer Protection

FEDERAL TRADE COMMISSION
601 New Jersey Ave., NW
Washington, DC 20580

DAVID L. SIERADZKI
Attorney
Office of General Counsel
FEDERAL TRADE COMMISSION
600 Pennsylvania Ave., NW
Washington, DC 20580
(202) 326-2092

February 12, 2010

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,700 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word Perfect X3, in 14-point Times Roman font.