UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION, Plaintiff, v. **SIMPLE HEALTH PLANS LLC, et al.,** Defendants.	**Case No.: 18-cv-62593-DPG**

DEFENDANT STEVEN DORFMAN'S MOTION
TO STRIKE TEMPORARY RESTRAINING ORDER

Respectfully submitted by:

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Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Rules

Other Authorities

Defendant, Steven Dorfman, by and through undersigned counsel, pursuant to Rule 65 of the Federal Rules of Civil Procedure, files this motion seeking an order of the Court striking the temporary restraining order imposed in this matter and the corresponding asset freeze and receivership. Pursuant to Rule 65(b)(4) of the Federal Rules of Civil Procedure, Defendant requests that the Court authorize the relief requested on two days' notice. In support of this motion, Defendant states:

INTRODUCTION

The Federal Trade Commission ("FTC") obtained the *ex parte* temporary restraining order ("TRO") in this case on October 31, 2018, and the first substantive hearing to address the merits of the FTC's action is scheduled for no earlier than April 2019. This Court issued the TRO against Defendants under the putative authority of Section 13(b) of the Federal Trade Commission Act ("FTC Act"). Defendant Steven Dorfman asks this Court to strike the TRO on the grounds (1) that Section 13(b) of the FTC Act does not authorize the remedy issued by the Court and (2) that, in any event, the TRO has expired by operation of law. *See* Fed. R. Civ. P. Rule 65(b)(2) (providing that TROs are available in support of equitable remedies and that they expire after 14 days).

The FTC has long operated under the assumption that part of its arsenal, bestowed by Congress, to protect the public is the power to seek disgorgement and restitution even before the merits of its allegations against a target are resolved. The FTC derives this perceived authority from Section 13(b) of the FTC Act, and federal courts have consistently approved the use of Section 13(b) to obtain the legal and punitive remedies of disgorgement and restitution even though the provision only expressly authorizes the FTC to seek injunctive relief. That longstanding assumption has formally been undermined by a conspicuous footnote in the Supreme Court's decision in *Kokesh v. SEC* (S. Ct. 2017), as well as by a federal appellate court decision from this Circuit, *SEC v. Graham* (11th Cir. 2016). It is only a matter of time before the proper scope of the FTC's authority is reviewed and revisited, and its action in this case presents an appropriate occasion to correct and clarify the applicable law.

Accordingly, Defendant Dorfman asks this Court to strike the TRO because the FTC lacks authority to seek disgorgement or restitution under Section 13(b) and because the TRO has now expired. Defendant's contentions do not require clever lawyering, judicial imagination, or innovative, untested legal theories; quite the contrary, Defendant's argument merely requires the straightforward application of ordinary rules of statutory construction, as confirmed by recent federal precedent. Ultimately, Defendant asks this Court to dissolve the TRO on four grounds:

First, the plain text of Section 13(b) expressly gives the FTC authority to obtain preliminary and permanent injunctive relief, nothing less and nothing more. Congress has long been aware of the differences between injunctive relief, on the one hand, and broader equitable powers, legal remedies, and punitive measures, on the other. Congress has, in fact, devised a variety of federal statutes to empower different enforcement agencies to pursue different remedies in different contexts. Congress's declination to give the FTC broader equitable remedies, or for that matter to provide for legal or punitive relief, cannot be blithely ignored any longer.

Second, the structure of the FTC Act as a whole confirms the natural, plain-text interpretation of Section 13(b). After all, a different provision of the same Act (*i.e.*, Section 19b) confers upon the FTC the authority to obtain equitable remedies. The FTC could plainly use this provision to accomplish the same objective. The agency has presumably declined to do so because Congress has imposed additional requirements before Section 19b's equitable remedies are available. To interpret Section 13(b) as providing the very same remedy established by Section 19b not only renders Section 19b superfluous, it defies the manifest intent of Congress to make it more cumbersome and to require certain predicates before the FTC could access or exercise this more potent weapon.

Third, the legislative history of Section 13(b) reinforces the plain reading of this provision. Congress established 13(b) in response to the problem of rogue actors continuing to harm consumers during the pendency of an enforcement action. Thus, legislators explicitly called for a provision that

gave the FTC the ability to suspend the actor's conduct in the market until the merits of the FTC's claim could be litigated and resolved.

Fourth, the assumption that previous federal courts have made that Section 13(b) and Rule 65, together, allow a federal court to issue a preliminary injunction to freeze assets to further disgorgement and restitution has been undermined by a series of binding appellate decisions from the Supreme Court's decisions in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, and *Kokesh v. SEC*, to the Eleventh Circuit's ruling in *SEC v. Graham*. Today, that earlier assumption is simply no longer valid. Collectively, these decisions make clear that disgorgement is a form of forfeiture or penalty, which removes them from the scope of Section 13(b) and prohibits courts from using Rule 65 TROs or preliminary injunctions to restrain assets for subsequent legal judgments.

Finally, the Court should grant Defendant's motion because the TRO in this case automatically expired — at the latest — on February 12, 2019. A hearing concerning the TRO, which was originally issued on October 31, 2018, is not scheduled until April 2019. Because TROs expire after 14 days by operation of law, on the basis of this independent ground, the Court should promptly strike the TRO and lift the corresponding restrictions on Defendants' assets.

BACKGROUND

I. Procedural history

On October 29, 2018, the FTC filed the complaint ("Complaint") initiating this matter against Steven Dorfman and his corporate co-defendants (collectively, "Defendants"). Compl. ¶ 6-12. The FTC alleges that the Defendants violated the FTC Act by convincing consumers to purchase health insurance plans that were less comprehensive than advertised. Compl. ¶ 15-20. The FTC alleges the companies' advertisements and employees' representations were deceptive and harmed consumers. Compl. ¶ 51-54. Based on these alleged violations, the FTC sought and obtained disgorgement and restitution, among other forms of relief, under Section 13(b) of the FTC Act. Compl. ¶ 67.

Since the Complaint was filed, the Court has issued a TRO and frozen all of Defendants' assets; a preliminary injunction hearing was scheduled and then rescheduled for April 2019; and the Court granted the FTC's motion to stay the hearing based on the federal government shutdown in late 2018 through early 2019. The result of the procedural rigmarole is Defendants' assets have been frozen, in anticipation of an eventual disgorgement and restitution judgment, for months without Defendants having a meaningful opportunity to be heard. In effect, a TRO that is supposed to naturally expire after 14 days and whose legal basis is dubious, will operate for nearly six months or longer without substantive judicial review.

The protracted operation of the TRO in this case presents a clear and independent reason to grant Defendant's motion and distinguishes the Court's order from the typical case. The FTC's action here, however, is like numerous comparable actions filed by the FTC over the past several decades. Those actions are all premised on an understanding of the scope of the FTC's powers under Section 13(b) that is no longer defensible.

II. Equitable v. Legal Relief

Resolution of this motion depends in part on whether disgorgement and restitution in the context of this case are "penalties" and hence "legal" rather than "equitable" remedies. Federal courts have previously assumed that disgorgement and restitution are equitable, but recently courts have found that they are properly classified as "legal" remedies, which courts may not issue pursuant to their equitable powers. A brief review of the Supreme Court's directives regarding the difference between "equitable" and "legal" remedies will therefore help frame the dispute now before this Court.

The Supreme Court has expounded upon the contours of these remedies several times, most recently in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), and before that in *Great-West Life & Annuity Insurance Co. v. Knudson,* 534 U.S. 204 (2002) and *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999); *see also Montanile v. Bd. of Trs. Of Nat'l Elevator Indus. Health Benefit Plan,* 136 S.Ct. 651

(2016) (holding that statutes authorizing equitable relief limit federal courts only "to those categories of relief that were *typically* available in equity during the days of the divided bench.") (emphasis in original). Through those precedents, the Court has clarified certain features of these remedies. *First*, "equitable relief" is a term that "must mean *something* less than *all* relief." *Great-West*, 534 U.S. at 209 (emphasis supplied). *Second*, superficially labelling relief as "disgorgement" or "restitution" does not make it "equitable relief." *Id.* at 213 ("[W]hether [the sought remedy] is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought."). *Third*, for an order to turn over money or property to qualify as a form of "equitable relief," it must be an order to return "money or property identified as belonging in good conscience to the plaintiff [that] could clearly be traced to particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213. In other words, disgorgement or restitution of specifically identified property or money traced to the wrongdoing is an equitable remedy. Conversely, disgorgement or restitution of non-traceable assets is an order to pay money damages and, hence, a legal remedy. Under this analysis, the *Great-West* court determined that Great-West's claim for "restitution," at its core, was not equitable, but legal, because "the funds to which petitioners claim[ed] . . . an entitlement . . . [were] not in respondents' possession." *Id.* at 225-26.

Finally, in *Kokesh*, the Court added that a judicial action is a penalty (and, thus, a legal remedy), where (1) "the wrong sought to be redressed is a wrong to the public," not to an individual; and (2) where the remedy is "for the purpose of punishment, and to deter others from offending in like manner—as opposed to compensating a victim for loss." *Kokesh*, 137 S.Ct. at 1639-40.

In sum, the Supreme Court established a clear rubric for deciding whether a demand for disgorgement or restitution is a request for "equitable" or "legal" relief. Where a request for disgorgement or restitution is tied to specifically identified, wrongfully obtained money or property, it is *equitable*. Where the request is unconnected from specific, wrongfully-obtained money, then it is just

a claim for a money judgment and, therefore, a *legal* remedy. And where the requested remedy serves to punish, deter misconduct, and correct a public wrong, it qualifies as a penalty, which is also necessarily a *legal* remedy.

III. Intervening Precedent

To be sure, Defendant's motion asks this Court to reexamine the edifice of FTC action. For purposes of background, this Court should be aware that this motion comes at the invitation of a series of federal appellate rulings, including a decision by the United States Supreme Court signaling the prospect of an imminent correction of prior rulings. Specifically, the FTC rests its authority to seek disgorgement and restitution on a peculiar interpretation of Section 13(b). Federal courts, including the Court of Appeals for the Eleventh Circuit (in a decision from over two decades ago), have upheld this interpretation of 13(b). *See, e.g.*, *FTC v. Gem Merch.*, 87 F.3d 466 (11th Cir. 1996). Recently, however, three successive federal cases make clear that courts must now reconsider the foundation of the FTC's authority.

A. *Sec v. Graham (11th Cir. 2016).*

In *SEC v. Graham*, the U.S. Securities and Exchange Commission ("SEC") brought an enforcement action against defendants for violating federal securities law by selling unregistered securities. 823 F. 3d 1357, 1359 (11th Cir. 2016). The SEC sought, amongst other forms of relief, disgorgement of all of the defendants' profits from the venture, arguing that disgorgement was not subject to a five-year statute of limitations because it did not qualify as a "forfeiture." *Id.* at 1359, 1363-64. Hence, the question of whether the statute of limitations applied depended upon whether or not disgorgement was a forfeiture. The Eleventh Circuit held that "the remedy of disgorgement is a 'forfeiture'" and hence that the statute of limitations applied. *Id.* at 1363. This decision was significant because, by classifying disgorgement as a "forfeiture," the federal appellate court indicated that

disgorgement was a non-equitable, legal remedy, which carried implications well beyond the statute-of-limitations question in that specific case.

B. *Kokesh v. Sec (S. Ct. 2017).*

One year later, because of a split in authority among federal appellate courts, the same basic question at issue in *Graham* reached the U.S. Supreme Court in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). The Supreme Court analyzed the text, history, and purpose of the relevant provision and examined the nature of a disgorgement action, ultimately agreeing with the Eleventh Circuit's conclusion. It specifically declared that, in the securities enforcement context, disgorgement is subject to a five-year statute of limitations because it is a "penalty" and does not fall within the court's "inherent equity power to grant relief ancillary to an injunction." *Id.* at 1640, 1642.[1]

Strictly speaking, the Supreme Court's decision was limited to the remedy of disgorgement in the securities context and the application of a statute of limitations provision. But the Court expressly signaled that something more far-reaching and consequential was afoot. Footnote 3 — the decision's closing footnote — contained an explicit clue that the Court had laid the foundation for a massive shift in agency enforcement powers. Specifically, the Court noted that its opinion did not answer the question of whether federal courts possess authority to order disgorgement in the first place and whether they have properly applied disgorgement principles in the securities enforcement context. *Id.* at 1642, n.3. This hint is undoubtedly found in dicta. But the footnote confirmed that the Court

[1] In reaching this conclusion, the Supreme Court found that disgorgement seeks to redress public wrongs because it "is imposed by courts as a consequence for violating . . . public laws." *Kokesh v. SEC,* 137 S. Ct. at 1643 ("[t]he violation for which [disgorgement] is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution."). The Court also ruled disgorgement serves a punitive purpose, and that the "primary purpose of disgorgement orders is to deter violations by depriving violators of their ill-gotten gains." *Id.* ("Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate non-punitive objective."). The Court emphasized that disgorged funds are often paid to the United States Treasury rather than to victims.

understood the importance of how a remedy is classified: Once the remedy of disgorgement is declared a forfeiture or penalty, the authority of a federal agency like the SEC or FTC to obtain this non-equitable remedy must be reexamined.

C. *FTC v. AMG Capital Management (9th Cir. 2018).*

It did not take long for federal appellate courts to appreciate the import of the Supreme Court's statement. The year after *Kokesh* was announced, the Ninth Circuit Court of Appeals analyzed an FTC claim analogous to the SEC claims in the Eleventh Circuit's decision in *Graham* and the Supreme Court's ruling in *Kokesh*. *See FTC v. AMG Capital Management*, 910 F.3d 417 (9th Cir. 2018). In *AMG*, the FTC sought "equitable monetary relief," including restitution and disgorgement, under Section 13(b) based on alleged violations of the FTC Act. *Id.* at 422. In his opinion for the panel, Judge Diarmuid O'Scannlain ruled that restitution and disgorgement were equitable relief, and thus fell within the scope of Section 13(b). The panel rooted its conclusion in binding precedent from an earlier Ninth Circuit decision, which had held that Section 13 "'empowers district courts to grant any ancillary relief necessary to accomplish complete justice, including restitution.'" *Id.* at 426 (*quoting FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598 (9th Cir. 2016)).

Judge O'Scannlain also took the uncommon step of issuing a second opinion, joined by Judge Carlos Bea, concurring with the panel decision that he himself had composed. In this "concurring" opinion, the federal appellate judge admits that, although he is bound to follow *Commerce Planet* because it is circuit precedent — which cannot be overruled without the Ninth Circuit sitting en banc — he no longer found tenable that decision's analysis. Absent contrary Ninth Circuit precedent, Judge O'Scannlain would have ruled that, like SEC disgorgement, FTC disgorgement (or restitution) is a penalty and does not come within Section 13(b)'s injunctive powers. *AMG*, 910 F.3d at 435-437.[2]

[2] In reaching this conclusion Judge O'Scannlain applied the *Kokesh* factors to find that restitution is a form of legal relief, not an equitable remedy. *AMG*, 910 F.3d, at 433. Specifically, he concluded that: (i) restitution seeks to redress public wrongs; (ii) restitution is "punitive" rather than "remedial";

Thus, before and after *Kokesh*, federal appellate courts have appreciated the error in conferring upon agencies like the SEC and FTC the authority to obtain restitution and disgorgement when those agencies' enabling statutes limit them to prejudgment remedies that are injunctive in character. There is now a concrete legal foundation upon which to clarify the interpretation of Section 13(b), and this specific case presents a clear occasion to do so.

ARGUMENT

I. Section 13(b) Does Not Authorize Restitution or Disgorgement.

Traditional interpretive methods on how to parse a statute all converge on one conclusion regarding what remedies are available under Section 13(b). The plain text of the federal law refers only to injunctions, and neither disgorgement nor restitution nor a freezing of assets can be accomplished under the rubric of an injunction. The context of the federal law makes clear that broader forms of equitable relief are available, but only under a different subsection with more stringent requirements than Section 13(b). And the legislative history of Section 13(b) underscores that the original aim of this provision was to protect consumers during litigation, not to deliver a premature victory to the FTC that it has not yet earned. The bottom line is Section 13(b) does not, and was never meant to, justify the remedies of restitution and disgorgement that the FTC now routinely obtains in its name.

A. The text of Section 13(b) is unmistakable.

Enacted in 1973, the plain language of Section 13(b) of the FTC Act provides only for injunctive relief. The operative section specifies that "a *temporary restraining order* or a *preliminary injunction* may be granted" and "[in] proper cases the Commission may seek, and after proper proof, the court may issue, a *permanent injunction*." 15 U.S.C. § 53(b) (emphasis added). Furthermore, this Section is as clear about what it does ***not*** provide as it is about what it does: Nowhere in Section 13(b) does the

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and (iii) that restitution is not necessarily compensatory. *Id.* Thus the court concluded that restitution "bears all the hallmarks of a penalty." *Id. citing Kokesh*, 137 S.Ct. at 1644.

FTC Act unambiguously grant or even vaguely suggest that the FTC would have the power to seek consumer redress through disgorgement, restitution, or any other monetary relief. Even the subsection's heading — "temporary restraining orders; preliminary injunctions" — betrays the provision's limited purpose.

The clear language of Section 13(b) should end the Court's inquiry as to whether the FTC is authorized to obtain legal, monetary relief such as "disgorgement" or "restitution" in this proceeding, for "[w]hen the words of a statute are unambiguous," the "judicial inquiry is complete." *See Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). Based upon a plain reading of the law alone, this Court should strike the TRO currently in place insofar as that order effectuates legal and monetary remedies beyond the FTC's statutory authority under Section 13(b).

B. The context of the FTC Act reinforces the clear language of Section 13(b).

In 1975, Congress added Section 19b to the FTC Act. 15 U.S.C. § 57b. The new provision authorized the FTC to seek "such relief as the court finds necessary to redress injury to consumers," which "may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting . . . [such] unfair or deceptive act or practice." *Id.* These expanded remedies are available under Section 19b, so long as the FTC satisfies certain enumerated preconditions. The FTC must first pursue an administrative adjudication, issue a "final cease and desist order," and subsequently prove to a federal district court that a "reasonable man" would know that the defendant's conduct was "dishonest or fraudulent." 15 U.S.C. § 57b(a)(2).

Thus, only two years after Section 13(b) was established, Congress enacted Section 19b, expressly contemplating remedies of restitution and disgorgement and imposing strict procedural requirements to trigger them. The implications of this are clear. Section 13(b) did not already provide

for these remedies. And, if the FTC wished to seek restitution or disgorgement, there were a series of obstacles to clear, which Congress declined to impose to obtain injunctive relief under Section 13(b).

The scope of remedies available under Section 13(b) and Section 19b, as well as their disparate procedural requirements, clearly distinguish one subsection from the other. The two provisions also serve different purposes. Section 13(b) empowers the FTC to halt *imminent* or *ongoing* violations, while Section 19b allows the FTC to collect monetary judgments for *past misconduct*. The legislative history and the FTC's own admissions[3] make clear that equitable, non-monetary relief to thwart current misconduct is readily available under Section 13(b), while legal and monetary redress for consumers could be obtained under Section 19b after an administrative adjudication culminating in a cease-and-desist order.[4] Thus, permitting the FTC to seek all remedial options pursuant only to Section 13 would render Section 19b a redundant nullity. *See Bilski v. Kappos*, 130 S.Ct. 3218, 3228-29 (2010) (explaining the statutory canon that courts should not "interpret[] any statutory provision in a manner that would render another provision superfluous," even when "congress enacted the provisions at different times") (internal citations omitted). Congress knows better than this. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) ("[W]here Congress includes particular language in one section of a statute

[3] The FTC has publicly indicated that Section 19b, rather than Section 13(b), is the provision in the FTC Act that permits it to request monetary remedies from the judiciary. *See Proposed Consumer Financial Protection Agency: Implications for Consumers and the Federal Trade Commission Before the Subcomm. On Commerce, Trade, & Consumer Protection of the H. Comm. On Energy & Commerce*, 111th Cong. 13-14 (2009) (statement of Jon Leibowitz, Chairman, Federal Trade Commission) (published by the FTC at *http://www.ftc.gov/os/2009/07/090708Acfpatestimony.pdf*, last visited Jan. 17, 2019). In fact, in a prepared statement to Congress where the FTC Chairman explained that the Commission had the power to obtain monetary remedies, including consumer redress and disgorgement of ill-gotten gains, the Chairman cited *only* to Section 19b. *Id.*

[4] Indeed, the very same statute that included Section 19b significantly expanded the FTC's authority to seek civil penalties through Section 5's cease-and-desist procedures. *See* Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, tit II, §§202, 205 (codified as amended 15 U.S.C. §§ 45, 57a).

but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").[5]

These differences only confirm the natural reading of these two provisions — side by side and passed one after the other. Just as courts should not artificially neuter agency authority, courts should also not give agencies authority where none exists. *Am. Bar Ass'n v. Federal Trade Comm'n*, 430 F.3d 457, 468 (D.C. Cir. 2005) ("[I]f we were to *presume* a delegation of power from the absence of an express *withholding* of such power, agencies would enjoy virtually limitless hegemony . . .") (internal quotations omitted) (emphasis in original).

Instead, read together, Sections 13(b) and 19b give the FTC two complementary tools — the former, forward-looking and prophylactic; the latter, retrospective and remedial. Injunctive relief under Section 13(b) functions as an interim measure allowing the FTC to act quickly to prevent harm. Section 19b provides the FTC the arsenal it subsequently needs to seek financial relief, to punish recalcitrant actors, and to remediate past violations. 15 U.S.C. § 57(b); *see FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 603 (9th Cir. 1993) ("The redress remedy [in Section 19] relates to past conduct.").

C. Legislative history further confirms the standard Rule 13(b) interpretation

The legislative history of Section 13(b) also shows that its modern use is incompatible with the original intent of its enactment. Congress added Section 13(b) to the FTC Act as part of the Trans-Alaska Oil Pipeline Authorization Act of 1973. Pub. L. No. 93-153, 87 Stat. 592 (1973). This provision was primarily added to give the FTC a means of enjoining deceptive practices during the pendency of an administrative proceeding. Before Section 13(b), a defendant could continue to injure

[5] One further distinction is that while Section 13(b) prescribes a specified list of remedies, *limiting* relief to temporary restraining orders, preliminary injunctions, and permanent injunctions, 15 U.S.C. § 53(b), Section 19b expressly provides for a *non-exhaustive* list — "such relief *may include, but shall not be limited to*" — that *explicitly* permits the FTC to seek monetary relief. 15 U.S.C. § 57b.

consumers until an ultimate judgment in its case. A Senate report concerning a draft of Section 13(b) plainly set out its purpose:

> The purpose of [Section 13(b)] is to permit the Commission to bring an *immediate halt to unfair or deceptive acts or practices when to do so would be in the public interest.* At the present time such practices might continue for several years until agency action is completed. Victimization of American consumers should not be so shielded. [Section 13(b)] authorizes the granting of a temporary restraining order or a preliminary injunction without bond pending the issuance of a complaint by the Commission under Section 5 . . .

S. Rep. No. 93-151, at 30 (1973) (emphasis added). In the House discussion on Section 13(b), Representative Smith noted that "[i]t is only good sense that where there is a probability that the act will eventually be found illegal and the perpetrator ordered to cease, that some method be available to protect innocent third parties while the litigation winds its way through final decision." 119 Cong. Rec. 36609 (Nov. 12, 1973). The legislative history does not contain any suggestion that Section 13(b) be used for the purpose of obtaining consumer redress.

The modern function of Section 13(b) is the product of the FTC unilaterally transforming it from an injunctive tool into a potent weapon to obtain monetary remedies. The FTC's own General Counsel once said that "the provision was expected to be used principally for obtaining preliminary injunctions against corporate acquisitions, pending completion of FTC administrative hearings."[6] It was not until the 1980s that the FTC decided to sidestep the administrative process altogether and shoehorn legal, monetary remedies into the injunctive focus of Section 13(b). Ultimately, the FTC expressly took the view "that the statutory reference to 'permanent injunction' entitled the Commission to obtain . . . various kinds of monetary equitable relief to remedy past violations." *See A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, Federal Trade Commission, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority. Whatever

[6] *See A Brief Overview of the Federal Trade Commission's Investigative and Law Enforcement Authority*, Federal Trade Commission, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority.

motivated this evolution, it cannot be squared with the legislative history of Section 13(b). And while the FTC may desire a more expedient means of remedying consumer harm, the agency is not permitted to expand the remedial scheme of Section 13(b) beyond the authority bestowed upon the FTC by Congress. *See Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power . . . is limited to the authority delegated by Congress.").

Ultimately, the FTC's unchecked accretion of authority in the four decades since the enactment of Section 13(b) has finally caught up with the agency. The provision upon which the FTC rests its demand for restitution and disgorgement speaks only of injunctive relief. That is confirmed by the plain language of Section 13(b), by the broader context of the FTC Act and Section 19b, and the legislative history of the passage of these provisions. Moreover, it no longer matters whether Section 13(b) also tacitly provides for other equitable relief — an interpretation, incidentally, that draws no support from the text, context, or history of the law — because the U.S. Supreme Court has ruled that disgorgement and restitution are legal, punitive remedies and hence cannot be properly classified as equitable in nature. Thus, in many regards, the FTC's reckoning has been preordained by the Supreme Court's recognition that the extraordinary relief routinely obtained by federal agencies has no basis in law, history, or common sense. This Court, accordingly, should strike the TRO on the ground that it was improper for the FTC to have sought and obtained it in the first place.

II. Binding Circuit Precedent Requires Dissolution of the TRO.

It is critical to note that Judge O'Scannlain was limited in a way that this Court is not. In *AMG*, the Ninth Circuit panel was bound by its own Circuit precedent, which by rule it could not overturn without sitting *en banc*. This Court, of course, is bound by the law of the Eleventh Circuit — which presents an additional and independent reason why this Court must grant Defendant's motion to strike the TRO. In *SEC v. Graham*, the Eleventh Circuit found that disgorgement and forfeiture are "effectively synonyms" and that, even where disgorgement might "only include[] direct proceeds from

wrongdoing" it is still a "redress for wrongdoing" and is therefore a legal, not equitable remedy. *Graham*, 823 F.3d at 1363-64; *see also Nat'l Parks & Conservation Ass'n v. Tenn. Valley Auth.*, 502 F.3d 1316, 1326 (11th Cir. 2007) (noting that, where plaintiffs sought an injunction to enforce EPA standards, "the statute of limitations set forth in 28 U.S.C. § 2462 applies only to claims for legal relief; it does not apply to equitable remedies"); *US v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997) ("[S]ection 2462 does not apply to equitable remedies.").

Thus, the binding law of this Circuit creates the exact opposite circumstance from what Judge O'Scannlain faced in *AMG*: Defendant does not ask this Court to adopt a new principle or ignore an old one; it requests that this Court follow the binding pronouncement in *Graham* on this exact question.

The Eleventh Circuit's ruling in *Graham*, coupled with the Supreme Court's longstanding guidance in *Grupo Mexicano*, make clear that this Court cannot issue a TRO (or preliminary injunction, for that matter) pursuant to Rule 65 for the purpose of freezing assets or creating a receivership in this proceeding. In *Grupo Mexicano*, the Supreme Court found that Rule 65 (which governs the authority of federal courts to impose preliminary injunctions) is limited by traditional principles of equity jurisdiction and cannot be expanded to authorize injunctions that benefit a prejudgment legal or monetary claim. *See Grupo Mexicano*, 527 U.S. at 318-319. ("[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.").

The combined logic of these two cases, which are binding on this Court, is as straightforward as it is inescapable: *Graham* holds that disgorgement, because it is not within the scope of § 2462, is not an equitable remedy, and *Grupo Mexicano* holds that injunctions for non-equitable remedies are outside the authority of federal courts. Therefore, a TRO or preliminary injunction in the form of a

receivership and asset freeze to further the eventual remedies of disgorgement or restitution are invalid.

III. The Legal Edifice on which the FTC Once Relied is Now Invalid.

Defendant is aware that the FTC's practice is longstanding and has been repeatedly affirmed by federal courts, including by the Court of Appeals for the Eleventh Circuit. *See, e.g.*, *FTC v. Gem Merch.*, 87 F.3d 466 (11th Cir. 1996). Defendant is also aware that the FTC proceeds under Rule 65 and has hewed closely to that Rule's requirements for obtaining a preliminary injunction. The foundation on which the FTC's action is based has now been significantly eroded by intervening Supreme Court precedent. This Court could nevertheless elect to rely upon and retreat to those prior pronouncements, but that would ignore the unmistakable direction issued by the Supreme Court and followed, for example, by Judge O'Scannlain in regard to the plain need to now reevaluate the basis upon which agencies like the FTC and SEC have long acted. It would also, as explained in the prior section, violate the Eleventh Circuit's still-binding precedent in *Graham*.

A. *Gem Merchandising* was wrongly decided and can no longer be relied upon.

FTC v. Gem Merchandising, is the Eleventh Circuit's seminal decision determining that Section 13(b) authorizes the FTC to seek disgorgement and restitution. When it was decided, *Gem Merchandising* did not answer or even attempt to analyze how restitution or disgorgement under Section 13(b) is incompatible with the enactment of Section 19b. The decision failed to consider the plain language of Section 13(b) or its legislative history. Put simply, two decades ago, the Eleventh Circuit failed to wrestle with any of the arguments set forth above as to why the FTC's preferred interpretation of Section 13(b) is wrong.

But more fundamentally *Gem Merchandising* predated the Supreme Court's decisions in *Grupo Mexicano, Great-West,* and *Kokesh*. In the course of that triad of cases, the Supreme Court clearly instructed that "disgorgement" and "restitution" are equitable remedies only when they are truly

equitable in nature, such as when funds are specifically traced to consumers. *Great-West* at 213. Nonetheless, the FTC, other regulatory agencies, and many courts incorrectly and without analysis adopted as a truism that disgorgement and restitution claims are "equitable" in all instances. Based on *Great-West, Grupo Mexicano*, and *Kokesh,* it is clear that the FTC is actually seeking civil legal penalties under the guise of disgorgement and restitution, because it makes no meaningful effort to link the relief it seeks to the allegedly wrongfully obtained "particular funds or property in the defendant's possession." *Id.*

Because penalties were not "available in equity during the days of the divided bench," *Montanile*, 136 S. Ct. at 657, the Court cannot impose such penalty here. Indeed, this incorrect equating of disgorgement and restitution with equity, combined with a failure by courts to limit equity or the civil penalties has resulted in the FTC and other regulators requesting, and courts granting, powers "not of flexibility but of omnipotence." *See Grupo Mexicano*, 527 U.S. at 322.

Moreover, beyond the multiple Supreme Court decisions undermining the foundation of *Gem Merchandising*, this Court is also of course bound by its own circuit's recent decision in *Graham*, which necessarily overruled *Gem Merchandising* by holding that disgorgement is a non-equitable remedy that falls outside the scope of § 2462's statute of limitations. *See supra* Section II.

In sum, binding precedent now makes clear that where the FTC's request for disgorgement and restitution is unconnected to specific, wrongfully-obtained money or property, the agency is making a request that, in reality, is just a legal claim for a money judgment and, consequently, should be brought under Section 19b rather than Section 13(b). Because *Gem Merchandising*'s analysis does not survive *Kokesh* or *Graham*, it is appropriate for this Court to now follow the Supreme Court's and

Eleventh Circuit's decisions and reasoning rather than reflexively abide by a doomed analysis that is formally ripe for reversal.[7]

B. Injunctions cannot be used to restrain assets for the benefit of legal remedies.

The Court's authority to issue injunctions is derived from Rule 65 of the Federal Rules of Civil Procedure. TRO, ¶¶ E and H-I. While Rule 65 specifically authorizes courts to enter a preliminary injunction in appropriate circumstances, that authority is limited by traditional principles of equity jurisdiction and cannot be expanded to allow for the entry of an injunction for the benefit of a prejudgment legal or monetary claim. *Grupo Mexicano*, 527 U.S. at 318-319. ("[T]he substantive prerequisites for obtaining an equitable remedy as well as the general availability of injunctive relief are not altered by [Rule 65] and depend on traditional principles of equity jurisdiction.").

As discussed above, the FTC brought this case against Mr. Dorfman and his co-Defendants pursuant to Section 13(b) of the FTC Act, which is limited to authorizing the FTC to obtain injunctive relief. Here, the FTC seeks the entry of a preliminary injunction, asset freeze, and receivership to restrain assets for the benefit of its legal disgorgement and restitution claims. *See* FTC's Memorandum in Support of TRO Motion [D.E. 12], pp. 39-40. A natural extension of that limitation recognized by the Supreme Court in *Grupo Mexicano* is that the FTC is not authorized to obtain an injunction (whether it be labeled a temporary restraining order, preliminary injunction, permanent injunction, receivership, asset freeze, or anything else) restraining Dorfman's or his co-Defendants' assets for the legal benefit of the FTC's non-existent disgorgement and restitution rights in this proceeding. *Grupo Mexicano*, 527 U.S. at 333 (holding that prior to entry of a money judgment, a district court is not

[7] The *Gem Merchandising* decision also relied on the Supreme Court's decision in *Porter v. Warner Holding Co.*, 327 U.S. 395 (1946) for the proposition that a district court possesses limitless equitable powers to grant restitution and disgorgement "absent a clear [Congressional] intent to the contrary." *Gem Merchandising,* 87 F.3d at 469. Fifty years later, the Supreme Court, in *Grupo Mexicano*, reversed course and severely curtailed district courts' equitable powers and instructed that, in the absence of Congressional permission, courts should not infer their own authority. *Grupo Mexicano,* 527 U.S. at 321-22. This too shows that *Gem Merchandising* is too shaky a foundation to reliably rest any real weight.

empowered to issue a preliminary injunction preventing a party from transferring assets in which the party seeking the injunction does not maintain an equitable interest). Thus, in a recent case in the Southern District of Florida, the Honorable Judge Bloom recognized that *Grupo Mexicano* limits the authority of courts to issue injunctions to restrain assets for the benefit of a legal, monetary claim. *Piccolo v. Piccolo*, 2016 WL 4248208, at *1 (S.D.Fla. Aug. 11, 2016) (Bloom, B.) (denying plaintiff's request for entry of preliminary injunction due to lack of equitable claim in suit).

To be sure, other courts have concluded, even after *Grupo Mexicano*, that a district court may restrain assets for the benefit of an administrative agency's request for legal, monetary relief (including disgorgement and restitution), those cases unanimously relied on the false premise that disgorgement and restitution were forms of *equitable* relief. *See, e.g.*, *SEC v. ETS Payphones, Inc.*, 408 F.3d 727 (11th Cir. 2005) (granting SEC's request for a preliminary injunction to restrain assets for disgorgement, which, at the time, the court considered an equitable remedy); *SEC v. Lauer,* 445 F.Supp.2d 1362 (S.D.Fla. 2006) (same). Whatever validity those cases once had, they do not survive the Supreme Court's ruling in *Kokesh* that restitution is a punitive remedy and, hence, not an equitable one. *See Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017).[8] And they no longer have relevance in this federal circuit since *Graham*, a binding Eleventh Circuit precedent affirmed by the Supreme Court's decision in *Kokesh*, hold that disgorgement is a legal, rather than an equitable, remedy.

Thus, the FTC is not authorized to obtain an injunction to restrain Defendants' assets for the benefit of unlitigated disgorgement and restitution claims.

[8] Even if the Court was authorized to issue legal remedies such as disgorgement and restitution in an equitable proceeding — which it is not — the Court may do so only after a jury trial. The Seventh Amendment to the United States Constitution preserves the right to trial by jury in suits in which legal rights are to be determined in contrast to those in which equitable rights and remedies are involved. *Parsons v. Bedford*, 28 U.S. 433, 446-47 (1830). Therefore, even if the FTC was entitled to seek disgorgement and restitution in this case, it is *constitutionally* premature for the Court to determine that the FTC is entitled to those remedies.

IV. The TRO Has Expired by Operation of Law.

In addition to the lack of legal authority for the FTC to obtain restitution or disgorgement, there is a second, independently sufficient reason for this Court to strike the TRO. Under Rule 65(b), by operation of law, the TRO expired 14 days after it was issued. Fed. R. Civ. P. Rule 65(b)(2). The parties agreed to extend the original TRO from October 31, 2018, until December 6, 2018, and then to January 29, 2019. But when the Court granted the FTC's motion to indefinitely stay proceedings on December 31, 2018, Dorfman filed an emergency order to object, thereby withdrawing consent. *See Connell v. Dulien Steel Products, Inc.*, 240 F.2d 414, 417-418 (5th Cir. 1957) (finding that although the restrained party's counsel did not initially object to the TRO regarding excessive duration, there was no implied consent as counsel later objected to a later hearing date on the TRO). Either at that point or on January 29, 2019 — on the theory that Defendant had previously consented to that date — consent terminated. Thus, under either alternative, the TRO expired no later than February 12, 2019. *See* F.R.C.P. 65(b)(2). Even today, the preliminary injunction hearing is scheduled only for April, at which point the TRO will have been in place for nearly six months. Ever since the FTC sought an indefinite extension because of the three-week federal shutdown, Defendant has objected to these unwarranted postponements. And having waited until the TRO expired by operation of law under Rule 65(b)(2), Defendant now files this motion to strike the TRO and undo its effects.

Rule 65(b) could not be clearer. There are no exceptions for exigent circumstances or unexpected occurrences. Even to the extent there was an unforeseen government furlough, the hearing could still have been held on January 29. Now that the federal government has reopened, the original ground for the December extension has dissolved. Yet neither the FTC nor the Court have honored the purpose of a TRO, which is a brief freeze of the status quo, so that an adjudication can

quickly take place. We are now in the middle of February, clearly past the 14-day window by any plausible count of when that clock began.[9]

Temporary restraining orders cannot be extended indefinitely, and extensions of temporary restraining orders beyond the maximum length are invalid. *See S.E.C. v. Comcoa Ltd.,* 887 F.Supp. 1521, 1526 (S.D.Fla. 1995); *In re Golden Plan of California*, 36 B.R. 95 (9th Cir. BAP 1984) (finding that temporary restraining order that trial court extended beyond maximum length expired notwithstanding court's order improperly extending temporary restraining order). Thus, Defendant is entitled to a Court ruling that the TRO, in its entirety, including the asset freeze and temporary receivership, has expired and that Mr. Dorfman's and his co-Defendants' assets are no longer restrained and that the receiver no longer has authority over the parties or their assets.

CONCLUSION

Defendant does not claim the FTC is without power to seek injunctions under Section 13(b). Congress, however, has prescribed a specific procedure for obtaining legal, monetary remedies, and that procedure is plainly laid out in Sections 19b. To read monetary remedies into the language of Section 13(b), especially in light of the complementary Section 19b, would be to permit the FTC to expand its authority beyond the express command of Congress, enable the FTC to circumvent the FTC Act's requirements for obtaining monetary remedies, and render Section 19b a nullity. *See Bilski*, 130 S. Ct. at 3228-39. None of this can be justified, particularly in the face of unmistakably clear text confirmed by unambiguous legislative history. The Supreme Court's decision in *Kokesh* identified a

[9] While there are instances where modest extensions beyond 14 days have been countenanced, we have found no case where the TRO was permitted to operate over the objection of the subject of the TRO for nearly six months. *Cf. Sims v. Greene,* 160 F.2d 512, 516 (3d Cir. 1947) ("It is settled that no temporary restraining order may be continued beyond twenty days unless the party against whom the order is directed consents that it may be extended for a longer period."); *Isler v. New Mexico Activities Association,* 2010 WL 11623621, at *3 (D.N.M. Feb. 2, 2010) (holding that "the maximum period an *ex parte* temporary restraining order may be in place pursuant to Rule 65(b)(2), without consent of the opposing party, is 28 days . . .").

fundamental problem that has been gnawing at the validity of FTC actions for years. Now that the issue has been brought to the surface — by *Kokesh*, by Judge O'Scannlain in *AMG*, by the Eleventh Circuit's decision in *Graham*, and by this case — this Court should reconsider the erroneous assumption that prejudgment forfeiture, restitution, and disgorgement are available to the FTC.

Ultimately, this motion is the product of two lines of argument that converge on a single conclusion. First, it is clear that Section 13(b), by virtue of its plain text, broader context, and legislative history, provides solely for injunctive relief, not for broader equitable relief and certainly not for legal remedies like forfeitures and penalties. At the same time, it is equally clear, by virtue of several binding federal appellate decisions, that disgorgement and restitution are legal remedies — whether classified as a penalty under the logic of *Kokesh* or a forfeiture under the reasoning of *Graham* — that cannot be effectuated pursuant to a statute (Section 13(b)) or a rule (Rule 65) that exclusively contemplate equitable remedies.

Whatever the earlier justification that formed the basis of past practice, it cannot today be squared with the enabling statute, federal rule, and appellate precedent that govern this question. Accordingly, neither federal courts generally nor this Court in particular can unthinkingly fall back to stale precedent and practice. Therefore, the TRO, asset freeze, and receivership must be stricken and dissolved.

WHEREFORE, for the reasons set forth above, Defendant respectfully requests that this Court: (i) strike the TRO; (ii) unfreeze Defendants' assets; (iii) extinguish the receivership; (iv) require the FTC to proceed under Section 19b or on some alternate ground if the agency wishes to secure the substantial remedy of restitution and disgorgement before meaningful litigation on the merits of any kind; and (v) grant all further relief the Court deems just and proper.

Dated: February 19, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served this 19th day of February, 2019, by the Notice of Electronic Filing, and was electronically filed with the Clerk of the Court via the CM/ECF system, which transmits notice of the filing to attorneys of record.

/s/Ryan D. O'Quinn
Ryan D. O'Quinn