UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION, Plaintiff, vs. SIMPLE HEALTH PLANS LLC, a Florida limited liability company, et al., Defendants.	**Case No.: 18-cv-62593-DPG**

PLAINTIFF FEDERAL TRADE COMMISSION'S OPPOSITION TO DEFENDANT STEVEN DORFMAN'S MOTION TO STRIKE TEMPORARY RESTRAINING ORDER

I. Introduction

Decades-long Eleventh Circuit precedent, as well as a lineage of cases from every other circuit to have considered the issue, holds that the FTC may obtain equitable monetary relief pursuant to Section 13(b) of the FTC Act. In seeking to strike that relief, Defendant fails to cite a single case from any court in any circuit that supports the basic proposition advanced by his motion—that this Court should ignore decades of settled Eleventh Circuit law. The radical relief sought in Defendant's motion—striking the TRO, lifting the asset freeze, and dissolving the receivership,[1] all with only two days' notice to the FTC as a result of Defendant's manufactured "emergency"—is not even remotely supported by the cases cited in his motion. In fact, Defendant himself concedes throughout his motion to strike the TRO that it is not actually based on the existing law, but on what he believes may happen in the future.[2] The Court should not

[1] Defense counsel does not represent the Corporate Defendants, so it is not clear that Defendant even has standing to object to the Receivership.
[2] *See, e.g.*, Dkt. 79 at 6 ("federal courts have consistently approved" the FTC's authority, but "[i]t is only a matter of time before the proper scope of the FTC's authority is reviewed and

engage with Defendant's prognostications about what the state of the law might someday be. Instead, the Court should follow the long-settled law set forth by this Circuit and every other Circuit that has addressed this precise issue regarding the FTC's statutory authority.

Moreover, the Court should not tolerate Defendant's selective presentation of the facts and history of this litigation in a vain effort to argue that the TRO has expired. Defendant has requested on at least three occasions to extend the TRO and to delay the preliminary injunction hearing. Now, Defendant accuses the Court of improperly extending the TRO under Fed. R. Civ. P. 65(b)(2) and claims the TRO has expired. The facts establish the opposite. On numerous occasions over the course of months, Defendant consented to extensions of the TRO, including agreeing to the extension of the TRO's asset freeze and other prohibitions until the Court rules on the request for a preliminary injunction. Attempts by the FTC to expedite the preliminary injunction briefing and hearing dates were met with exaggerated accusations that the FTC was somehow trying to deprive Defendant of his due process right to defend himself. Defendant also engaged the Court multiple times on matters involving the TRO, including moving to modify the asset freeze by releasing attorneys' fees and living expenses, without expressing any concern about the TRO's duration.

Defendant's complaint about the TRO and request to dissolve it arose only after the FTC lawyers were furloughed due to the government shutdown and the Court temporarily stayed the case. After previously seeking to extend the time until the Court would consider the motion for preliminary injunction at least through February 26, 2019, Defendant suddenly declared that having the TRO in place during the stay violated his due process rights. But the shutdown ended

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revisited"); *Id.* at 11 (federal courts, including the Eleventh Circuit, "have upheld" the FTC's authority, "however, . . . the courts must now reconsider the foundation of the FTC's authority."); *Id.* (claiming court rulings signal "the prospect of an imminent correction of prior rulings.").

long before the date through which Defendant had proposed the TRO remain in place, and Defendant thereafter agreed to a briefing schedule and a preliminary injunction hearing date of April 16, 2019 based on dates proposed and agreed to by the parties. Defendant cannot argue both sides or have it both ways. The TRO was properly extended by the Court, and the Court properly entered a briefing schedule and hearing date on the FTC's request for a preliminary injunction. Defendant's baseless Motion to Strike the TRO should be denied.

II. Binding 11th Circuit law holds that equitable monetary relief, including restitution and disgorgement, is appropriate in actions under Section 13(b) of the FTC Act.

Binding Eleventh Circuit precedent is crystal clear and holds that the FTC may obtain equitable monetary relief pursuant to Section 13(b) of the FTC Act. *See FTC v. Gem Merch. Corp*., 87 F.3d 466 (11th Cir. 1996); *FTC v. Washington Data Res.*, 704 F.3d 1323 (11th Cir 2013). Nonetheless, Defendant asks the Court to depart from this longstanding precedent based on case law that does not overrule or undermine Eleventh Circuit jurisprudence. First, Defendant relies on *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), a Supreme Court case that deals with an entirely different statutory scheme and does not address the FTC's ability to seek equitable monetary relief. Second, he relies on a similarly inapposite Eleventh Circuit opinion, *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), that addresses the same question as *Kokesh*. Third, Defendant argues that a *concurrence* in a *Ninth* Circuit case that does not disturb Ninth Circuit precedent on this issue somehow dictates a result contrary to longstanding Eleventh Circuit precedent, even though the majority opinion in that case followed longstanding Ninth Circuit precedents. *FTC v. AMG Capital Management LLC*, 910 F.3d 417 (9th Cir. 2018). Defendant's arguments are unavailing -- this Court should follow the rule of law set forth by this Circuit regarding the FTC's authority to obtain equitable monetary relief.

In *Gem Merchandising*, the Eleventh Circuit specifically held that Section 13(b) of the FTC Act authorized the FTC to seek, and the Court to grant, equitable monetary relief, including consumer redress and disgorgement of ill-gotten profits. *Id* at 470. The Eleventh Circuit reiterated that point in *Washington Data*, 704 F.3d at 1325, and further held that the proper measure of monetary relief was net revenue (gross receipts minus refunds). *Id* at 1327. Eleventh Circuit law on this issue has not changed. In fact, as recently as March 2018 – nearly a full year after the Supreme Court issued its opinion in *Kokesh* – in a matter in which the FTC sought the same type of equitable relief it seeks in this case, the Eleventh Circuit affirmed the entry of a preliminary injunction that included an asset freeze. *FTC v. Vylah Tech LLC*, 727 Fed. Appx. 998 (11th Cir. 2018).

Defendant invites the Court to disregard binding precedent based on what he believes the Supreme Court "signaled" and offered as a "clue" or "hint" in *Kokesh*. (Dkt. 79 at 7, 12.) Of course, if the Supreme Court intended to overrule decades of clear precedent from every circuit to consider the issue, it would not speak in code or drop hints, it would do so plainly and clearly. The Supreme Court did not do so in *Kokesh*. In fact, it expressly declined to opine on the issue Defendant claims supports his position.

Contrary to Defendant's overly broad reading of *Kokesh*, the case involved a narrow, discrete issue—whether disgorgement to the Treasury sought by the SEC amounts to a penalty and thus is subject to the default federal five-year statute of limitations, 18 U.S.C. § 2462. The Court, however, did not address the point for which Defendant claims it stands – whether the SEC could seek equitable monetary relief. To the contrary, the Supreme Court specifically stated that it was not addressing the SEC's authority to seek or a court's authority to order disgorgement generally: "Nothing in this opinion should be interpreted as an opinion on whether

courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." *Kokesh*, 137 F.3d at 1342 n.3.

Kokesh also has no bearing here for several additional reasons. The case concerned application of the statute of limitations, an issue not presented here. It also involved disgorgement, with the disgorged funds dispersed to the Treasury, coupled with civil penalties. The Court determined that remedy serves deterrent, not compensatory, purposes. *Kokesh*, 137 S. Ct. at 1643-44. Here, by contrast, the FTC seeks redress of consumers' losses caused by Defendant's deceptive practices, not retribution or deterrence. The FTC fully intends to distribute to defrauded consumers the money it collects from Defendant, and the TRO's asset freeze is necessary to secure the assets available for such distribution. [3] As the Supreme Court has recognized, a "public remedy" granting equitable monetary relief is not "rendered punitive" when it is compensatory. *Mitchell v. Robert Demario Jewelry, Inc.*, 361 U.S. 288, 293 (1960).

At least one district court in the Eleventh Circuit already has flatly rejected the argument that *Kokesh* raises any doubt about the clear precedent authorizing the FTC to seek disgorgement. In *FTC v. J. William Enterprises, LLC*, 283 F. Supp. 3d 1259, 1262 (M.D. Fla. 2017), the court first reaffirmed its "inherent power to grant equitable relief" under controlling Eleventh Circuit precedent. Addressing *Kokesh*, the court noted the narrow scope of its holding and held that even if "a finding as to the unavailability of equitable remedies for violations of federal securities law would apply to section 13(b) violations, there was no such finding in

[3] Indeed, in recent years as much as 98% of the monetary remedies obtained in Section 13(b) cases were distributed to consumers (less the costs of distribution). *See* Federal Trade Commission, Office of Claims and Refunds, Annual Report 2018, https://www.ftc.gov/system/files/documents/reports/2018-annual-report-refunds-consumers/annual_redress_report_2018.pdf. In this case, Defendant's detailed customer database would allow for effective and efficient redress to their thousands of victims.

Kokesh: the Supreme Court specifically declined to address whether courts possessed authority to order disgorgement in SEC enforcement proceedings." 283 F. Supp. 3d at 1262 (internal citations omitted). Regarding footnote 3 of the *Kokesh* opinion, the *J. William* court found that "the Supreme Court's deliberate avoidance of this different, if potentially analogous, issue provides no basis for this Court to disregard decades of precedent." *Id*. Where Defendant finds innuendo and claims an ability to predict the future state of the law, the *J. William* court appropriately applied the law as it stands.

Two other district courts have similarly rejected the argument Defendant attempts to make here. In *FTC v. Credit Bureau Center, LLC*, 284 F.Supp.3d 907, 909 (N.D. Ill. 2018), the defendants first attempted to modify the preliminary injunction, arguing that *Kokesh* dictates that an asset freeze is an improper remedy under Section 13(b). The court rejected defendant's "considerable overstatement" that *Kokesh* called into question the availability of disgorgement as a remedy in securities enforcement actions. *Id*. Accordingly, the court held that *Kokesh* had no bearing on the court's authority to grant such relief in an FTC enforcement action. *Id*. Defendants renewed their *Kokesh* argument in their motion for summary judgment, and the court once again refused to depart from well-established Seventh Circuit precedent authorizing disgorgement and restitution in FTC matters. 325 F.Supp.3d 852, 868 (N.D. Ill. 2018). *See also FTC v. DIRECTV, Inc.*, No. 15-CV-01129-HSG, 2017 WL 3453376, at *5 (N.D. Cal. Aug. 12, 2017) (rejecting a *Kokesh*-based challenge to the FTC's authority to seek restitution). Each of the post-*Kokesh* decisions has taken the Supreme Court at its word, rather than, as Defendant urges, attempting to infer a meaning from *Kokesh* that is directly contrary to what the Court expressly stated.

Importantly, the Eleventh Circuit is not alone in holding that Section 13(b) grants district courts authority to order equitable monetary relief. Every other circuit that has addressed the issue has ruled the same way, and none has ruled otherwise.[4] These decisions rest on principles the Supreme Court set forth in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), and *Mitchell v. Robert Demario Jewelry, Inc.*, 361 U.S. 288 (1960). *Porter* was a government suit to enforce the Emergency Price Control Act of 1942, which provided that the Administrator of the Office of Price Administration could enforce the Act by bringing suit for "a permanent or temporary injunction, restraining order, or other order." 328 U.S. at 397. The Supreme Court upheld an order for equitable restitution of overcharges. In so doing, it held that "[u]nless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id*. at 398. *Kokesh* does not question the viability of that rationale.

In addition, legislative history that accompanied the Federal Trade Commission Act Amendments of 1994 – which Defendant's motion, in its lengthy discussion of legislative

[4] *See FTC v. Ross*, 743 F.3d 886, 890-92 (4th Cir. 2014) (Section 13(b) confers power to award "monetary consumer redress, which is a form of equitable relief"); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365 (2d Cir. 2011) ("Section 13(b) permits a court to order ancillary equitable relief, including monetary relief"); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-15 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (l0th Cir. 2005) ("[Section] 13(b)'s grant of authority to provide injunctive relief carries with it the full range of equitable remedies, including the power to grant consumer redress"); *FTC v. Pantron I Corp.*, 33 F.3d 1088, 1102 (9th Cir. 1994) (district courts authorized to grant monetary relief to correct "unjust enrichment"); *FTC v. Sec. Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-15 (8th Cir. 1991) (Section 13(b) empowers district courts to grant equitable monetary relief); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989) (Section 13(b) includes grant of power to order restitution). *See also FTC v. Sw. Sunsites, Inc.*, 665 F.2d 711, 717-18 (5th Cir. 1982) ("[A] grant of jurisdiction such as that contained in Section 13(b) carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it."). The concurring opinion in *FTC v. AMG Capital Mgmt. LLC*, 910 F.3d 417 (9th Cir. 2018), requests an *en banc* review of the controlling Ninth Circuit precedent holding that Section 13(b) authorizes the court to order monetary equitable relief. Absent an *en banc* opinion reversing existing Ninth Circuit precedent, the law in that circuit remains unchanged.

history, fails to cite – confirmed the courts' consistent reading of Section 13(b). Eleven years after the first appellate decision upholding equitable monetary relief under Section 13(b), Congress expanded the venue and service-of-process provisions of that section. The Senate Report accompanying that legislation explicitly recognized that Section 13(b) authorizes the FTC to "go into court . . . to obtain consumer redress." Congress endorsed this understanding once again when it enacted the U.S. Safe Web Act of 2006, Pub. L. 109-455, 120 Stat. 3372 (Dec. 22, 2006)). *See also* 15 U.S.C. § 45(a)(4)(B) (referring to "restitution to … victims" as one of the remedies available to the Commission). As the Supreme Court has repeatedly observed, where, as here, the interpretation of a statute "has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982) (internal quotation marks omitted) (citing cases).

Defendant also argues that *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016), somehow disturbed decades of well-settled Eleventh Circuit law that the FTC may seek disgorgement in its enforcement actions. Defendant is wrong. His reference to *Graham* as "binding law" in the Eleventh Circuit on the FTC's authority is a gross mischaracterization of the case. Like the Supreme Court in *Kokesh*, the Eleventh Circuit in *Graham* considered only whether certain relief sought by the SEC was time-barred by 18 U.S.C. § 2462. In *Graham*, the Eleventh Circuit ruled that disgorgement sought in an SEC enforcement action was synonymous with forfeiture; as such, the court held that claims seeking disgorgement in SEC matters are thus are subject to the default five-year limitations period, which expressly applies to forfeiture. The court did not address the SEC's authority to seek disgorgement within the five-year limitations period of

Section 2462, and its analysis of course did not touch on the FTC's authority to seek disgorgement under Section 13(b) of the FTC Act. Given its limited holding, and the fact that the very narrow holding in *Kokesh* supersedes it and is inapposite for the reasons previously discussed, *Graham* does not support Defendant's specious position that *Gem Merchandising* has been overruled.

Even after *Kokesh* and *SEC v. Graham*, this Court recognized the validity of Eleventh Circuit precedent authorizing the FTC to seek, and the courts to grant, equitable monetary relief. In entering the contested preliminary injunction including asset freeze in *FTC v. World Patent Mktg., Inc.*, this Court noted that "the Eleventh Circuit has repeatedly upheld the authority of district courts to order an asset freeze to preserve the possibility of consumer redress." Case No. 17-cv-20848-DPG, 2017 WL 3508639, at *16 (S.D. Fla. Aug 16, 2017) (internal citations omitted).

Lastly, Defendant urges the Court to ignore Eleventh Circuit precedent based on a concurring opinion in a Ninth Circuit case in which the majority opinion continued to apply longstanding Ninth Circuit precedent. In *AMG*, 910 F.3d 417 (9th Cir. 2018), the court applied existing Ninth Circuit precedent and affirmed the FTC's authority under Section 13(b) to seek disgorgement. In a concurring opinion, however, two judges from the panel recommended an *en banc* review of that precedent in light of the *Kokesh* decision.[5] Ninth Circuit law was not changed by *AMG*, and regardless of whether the Ninth Circuit ultimately reconsiders *en banc* its clear precedent authorizing the FTC to seek disgorgement, the majority's adherence to existing precedent provides the model this Court should follow here. Accordingly, the Court should reject Dorfman's arguments and deny his motion by following binding Eleventh Circuit law.

[5] According to the docket in the *AMG* matter, the Petition for Rehearing En Banc is not due until March 4, 2019.

III. With Defendant's Consent, the TRO Continues in Full Force and Effect

In addition to his legal claim that the Court should ignore binding Eleventh Circuit precedent, Defendant also makes the factually baseless argument that the TRO has "automatically expired" under Fed. R. Civ. P. 65(b)(2). In reality, Defendant already consented to the TRO's extension two times, and requested a third extension through February 26, 2019, which the Court had agreed to entertain. Defendant engaged the Court for months on issues related to the TRO, and ultimately consented to a new hearing date of April 16, 2019. Defendant's argument that he has somehow "withdrawn" his consent and that the TRO has expired is completely without merit and contrary to the facts. The extensions of the TRO by the Court have been wholly appropriate under Rule 65(b)(2).

On October 31, 2018, the Court entered the TRO and scheduled a preliminary injunction hearing for November 14, 2018. (Dkt. 15). Defendant later requested, and the FTC agreed to, two extensions of the TRO—the first until December 6, 2018 and the second until January 29, 2019—with all of the provisions of the TRO continuing in effect until the Court ruled on whether to enter a preliminary injunction. (Dkts. 18, 30). In communications with the FTC, Defendant repeatedly stressed in seeking extensions that without adequate time to prepare his defense, his due process rights would be violated. Defendant sought expedited discovery, which the FTC agreed to and the Court granted (Dkts. 26, 29), and also filed an emergency motion requesting that the Court modify the TRO's asset freeze to allow for payment of attorneys' fees and living expenses, which the Court granted in part. (Dkts. 41, 47). In his Motion to Compel filed on December 19, 2018, Defendant requested *an additional delay* in the preliminary injunction hearing then scheduled for January 29, 2019. Defendant asked in that motion that his opposition to the preliminary injunction be due 28 days after he received the disputed discovery from the

FTC. Defendant's proposed order accompanying the Motion to Compel proposed a preliminary injunction hearing on or after February 26, 2019, almost *four months* after the TRO was entered. (Dkts. 50 and 51). The FTC vigorously objected to delaying the hearing any longer (Dkt. 52), but the Court accepted Defendant's argument and found "good cause" to continue the preliminary injunction hearing "in light of the pending discovery motions and Defendant Steven Dorfman's request for a continuance." The Court then scheduled a status hearing on January 16, 2019 to enter a new briefing schedule and hearing date. (Dkt. 55).

Tellingly, only during the federal government shutdown when FTC attorneys were prohibited from working did Defendant suddenly complain that his due process rights were being violated because the case was temporarily stayed due to the shutdown. After the FTC's funding lapsed, the FTC sought a temporary stay of the case until the agency reopened, which the Court granted. (Dkts. 58, 59). Defendant then filed an emergency motion to dissolve the TRO, claiming it "could not be extended indefinitely without Mr. Dorfman's consent" and that this violated his due process rights. (Dkt. 60). In the alternative, Defendant requested that the Court order the FTC to produce certain discovery and set a preliminary injunction briefing schedule and hearing date. (Dkt. 60) To address Defendant's concerns, the Court promptly lifted the temporary stay to allow the parties to address the ongoing discovery dispute before Magistrate Judge Seltzer, and found good cause to continue the hearing and related deadlines commensurate with the government shutdown. (Dkt. 64) Notably, the Court's order was entered on January 18, 2019, which was still over five weeks before the February 26, 2019 hearing date that Defendant had proposed in connection with his Motion to Compel (Dkt. 50-1).

When the government shutdown ended, the Court immediately lifted the stay (Dkts. 67, 68) and asked the parties to submit a proposed briefing schedule and hearing date for the

preliminary injunction. Defendant proposed a briefing schedule that allowed himself *another 45 days* to prepare his opposition, [6] and he asked that the hearing be held on April 16, 2019 (Dkt. 75). The Court then approved the schedule Defendant had requested (Dkt.76).

Because Defendant has consented to multiple extensions of the TRO through April 16, 2019, the TRO clearly has not expired, as Defendant now claims. The argument that his consent was somehow withdrawn in January is nothing short of revisionist history. By that point, Defendant had already consented to an extension through February 26, 2019, and in late January, he then agreed to a further extension through April 16, 2019.[7] The Court had more than adequate bases to extend the TRO pursuant to Rule 65(b)(2).

Finally, Defendant improperly invoked Rule 65(b)(4) to require the Court to hold an expedited hearing and to force the FTC to respond *within less than 48 hours* to a motion that he no doubt has been preparing for months. Rule 65(b)(4) is intended to allow a party who has had an *ex parte* TRO entered against them to be heard promptly, even before the rules would require a hearing. In the four months since the *ex parte* TRO was entered, Defendant never sought such a prompt hearing. Instead, he sought expedited discovery and consented to multiple extensions of the TRO, all in the name of his due process right to defend himself. He only invoked Rule 65(b)(4) now in a show of pure gamesmanship to attempt to limit the FTC's ability to respond to his specious arguments. But Rule 65(b)(4) provides no authority for Defendant to belatedly

[6] Defendant informed the FTC that anything less than that would violate his due process rights, despite the fact that Defendant has had since the entry of the TRO on October 31, 2018 to prepare his defense.

[7] Defendant even goes so far as to argue, "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." (Dkt. 79 at 21 n.9). Of course, Defendant repeatedly consented to the extension of the TRO and even proposed February 26, 2019 as a preliminary injunction hearing date. His suggestion that the TRO was in place over his objection is blatantly false.

withdraw his express consent to multiple extensions of the TRO, to upend the preliminary injunction briefing and hearing schedule to which he agreed, and to demand an immediate ruling on legal arguments he has been preparing for months and that he has been making to the Court without filing a motion since a hearing on December 6, 2018.

Under Rule 65(b)(4) and the circumstances of this case, justice simply does not require the Court to take up Defendants' latest motion challenging the TRO before the preliminary injunction hearing already scheduled in this matter for April 16, 2019. *See, e.g.*, *SEC v. Path America, LLC*, No. C15-1350JLR, 2015 WL 5675811, at *1-4 (W.D. Wash. Sept. 25. 2015) (where defendants previously stipulated to extensions and modifications of TRO, court held justice did not require it to hear and decide Rule 65(b)(4) motion prior to already scheduled preliminary injunction hearing). If the Court is inclined to disregard binding Eleventh Circuit precedent, as Defendant so boldly requests, then the FTC requests the time allotted by the Local Rules to respond to Defendant's arguments, rather than the less than 48 hours it has been provided here.

IV. Conclusion

For the reasons discussed above, the FTC requests that the Court deny Defendant's Motion to Strike the TRO.

Dated: February 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this February 21, 2019, by the Notice of Electronic Filing, and was electronically filed with the Court via the CM/ECF system, which generates a notice of filing to all counsel of record.

/s/ Elizabeth C. Scott
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