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 EMERGENCY MOTION (I) SEEKING CONFIRMATION THAT THE SCHEDULING ORDER IS ABATED PENDING RESOLUTION OF THE APPEAL; (II) TO STAY THE PROCEEDING PENDING RESOLUTION OF THE APPEAL; OR (III) TO EXPEDITE STATUS CONFERENCE

Defendant Steve Dorfman ("**Dorfman**"), by and through undersigned counsel, pursuant to Rule 8(a)(1) of the Federal Rules of Appellate Procedure, files this emergency motion seeking (i) confirmation that the Scheduling Order (defined below) is abated pending resolution of the Appeal (defined below); (ii) staying the entire proceeding pending resolution of the Appeal; or, in the alternative (iii) to expedite the Status Conference (defined below). As discussed in more detail below, Mr. Dorfman submits that this matter requires the Court's timely attention as, if the Court determines that despite the Appeal the Court still retains jurisdiction to consider the Issues on Appeal (defined below) and hold the preliminary injunction hearing, Mr. Dorfman would be prejudiced and deprived of the opportunity to seek relief from the Eleventh Circuit Court of Appeals abating the Scheduling Order or staying the entire proceeding pending resolution of the Appeal. In further support of this motion, Mr. Dorfman states:

Background

On October 29, 2018, plaintiff, the Federal Trade Commission (the "**FTC**") filed the complaint initiating this matter against Mr. Dorfman and his corporate co-defendants. [D.E. 1].

The FTC alleges that the defendants violated the FTC Act by convincing consumers to purchase health insurance plans that were less comprehensive than advertised. *Id.*, ¶¶ 51-54. Based on these allegations, the FTC sought disgorgement and restitution from the defendants pursuant to Section 13(b) of the FTC Act. *Id.*, ¶ 67.

On October 31, 2018, the Court, upon the FTC's request, entered the *ex parte* temporary restraining order (the "**TRO**"). [D.E. 15]. Among other things, the TRO: (i) imposed an asset freeze over all of Mr. Dorfman's and his co-Defendants' assets (the "**Asset Freeze**") for the benefit of the FTC's sought disgorgement and restitution remedies; and (ii) scheduled a preliminary injunction hearing.

On February 8, 2019, the Court entered a scheduling order setting a preliminary injunction hearing in this matter for April 16, 2019 and associated briefing deadlines, including a deadline of March 21, 2016 for Mr. Dorfman to file a brief in opposition to entry of a preliminary injunction in this proceeding (the "**Scheduling Order**"). [D.E. 76].

On February 19, 2019, Mr. Dorfman filed his motion seeking to strike (the "**Motion to Strike**") [D.E. 79] the TRO, Asset Freeze, and injunctive relief entered in this proceeding and a determination that, among other things: (i) the FTC is not authorized to obtain disgorgement or restitution in this proceeding brought pursuant to Section 13(b) of the FTC Act; (ii) the FTC is not authorized to obtain injunctive relief, under Rule 65 of the Federal Rules of Civil Procedure or otherwise, including the Asset Freeze, for the benefit of its sought disgorgement or restitution remedies; and (iii) the TRO expired by its own terms due to the passage of time and because it had exceeded the bounds of Mr. Dorfman's limited consent (collectively, the "**Issues on Appeal**").

On February 22, 2019, the Court held a hearing on the Motion to Strike [D.E. 79] and, thereafter, entered an order (the "**Order**") denying it. [D.E. 83]. On March 4, 2019, Mr. Dorfman appealed the Court's Order to the Eleventh Circuit Court of Appeals (the "**Appeal**"). [D.E. 85].

On March 11, 2019, Mr. Dorfman requested that the Court hold a status conference regarding the effect of the Appeal on the Scheduling Order. [D.E. 91]. On March 12, 2019, the Court scheduled a status conference for March 20, 2019 (the "**Status Conference**"). [D.E. 92]

Relief Requested and Basis Therefor

The Appeal divested the Court of jurisdiction to determine the Issues on Appeal – fulcrum issues in this entire proceeding. Accordingly, the Court should confirm either that the Scheduling Order is abated pending resolution of the Appeal or stay the entire proceeding pending resolution of the Appeal. Either relief is necessary to avoid inconsistent rulings from this Court and the Eleventh Circuit Court of Appeals and to avoid causing Mr. Dorfman to incur unnecessary costs and fees, which may be mooted by the Eleventh Circuit Court of Appeals' ruling.

A. The Court Should Confirm that the Scheduling Order is Abated as the Court Has Been Divested of Jurisdiction on the Issues on Appeal.

The Appeal divested the Court of jurisdiction to determine the Issues on Appeal pending resolution of the Appeal. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal."); *see also, Blinco v. Green Tree Servicing LLC*, 366 F.3d 1249, 1250-51 (11th Cir. 2006) (court of appeals reversed district court's order denying stay of proceeding where court of appeals determined that issue on appeal was not frivolous and needed to be decided before the proceedings in the district court could proceed). Once an appeal is filed "[a] district judge retains the authority only to act in aid of the appeal, correct clerical errors." *Madura v. BAC Home*

Loans Servicing LP, 655 F. App'x 717, 723 (11th Cir. 2016). A district court cannot act to change the status quo pending an appeal. *See, e.g. Coastal Corp. v. Texas Eastern Corp.,* 869 F.2d 817, 820 (5th Cir. 1989). Accordingly, now that the Appeal has been filed, only the Eleventh Circuit Court of Appeals has jurisdiction to determine the Issues on Appeal. Therefore, the Court should not act to change the status quo by entering any additional orders regarding the FTC's right to disgorgement, restitution, or further injunctive relief in this proceeding pending resolution of the Appeal.

Mr. Dorfman anticipates that the FTC will argue that the Order is not appealable because a preliminary injunction has not been entered yet. However, it is a tautology that the Court of Appeals, not the District Court, rules on the appeal ability of District Court Order. *See, e.g. Mitsubishi Intern. v. Cardinal Textile Sales, Inc.*, 14 F.3d 1507 (11th Cir. 1997). Accordingly, the Court should disregard the FTC's assertion that the Court can usurp the Eleventh Circuit Court of Appeals' role in determining whether the Order is appealable. Regardless, the TRO is appealable as a preliminary injunction as it has exceeded its statutorily capped time limit. *See*, *Sampson v. Murray*, 415 U.S. 61, 87-88 (1974) (temporary restraining order which is continued beyond the time permissible under the Federal Rules of Civil Procedure must be treated as a preliminary injunction for appeal ability and appellate purposes); *Levine v. Comcoa, Ltd.,* 70 F.3d 1191, 1193 (11th Cir. 1995); *United Airlines v. U.S. Bank, N.A.*, 406 F.3d 918, 923 (7th Cir. 2005); *United States v. Crawford*, 329 F.3d 131, 136 (2d Cir. 2003); *see also*, 28 U.S.C. 1292(a)(1).

B. The Court Should Stay the Entire Proceeding Pending Resolution of the Appeal.

In the alternative, should the Court not view the Appeal as divesting the Court of jurisdiction of the Issues on Appeal, the Court should stay the entire proceeding.

Courts consider the following factors when determining whether to stay a proceeding pending appeal: (1) whether the movant is likely to prevail on the merits of the appeal; (2) whether the movant will suffer irreparable injury absent a stay; (3) whether the non-movant will suffer substantial injury from the issuance of the stay; and (4) whether issuance of the stay will serve the public interest. *Garcia-Mir v. Meese,* 781 F.2d 1450, 1453 (11th Cir. 1986). A movant who makes a showing on the latter three factors, however, need only show a "substantial case on the merits" rather than "a likelihood of success on the merits." *Id.*

1. **Mr. Dorfman Has a Substantial Case on the Merits.**

A party meets its burden of establishing a "substantial case on the merits" when the appeal involves "statutory interpretation questions" and "serious legal question[s]." *LabMD, Inc. v. FTC,* 678 Fed.Appx. 816, 821 (11th Cir. 2016) (staying FTC's action when court found that lower tribunal's interpretation of the law could be wrong); *Gonzalez ex rel. Gonzalez v. Reno,* 2000 WL 381901, at *2 (11th Cir. Apr. 19, 2000) (finding that a substantial case on the merits existed when the Court was required to engage in statutory interpretation and the limits of an Federal agency's powers). A movant also has a "substantial case on the merits" when the issue is "complex and novel question that has not yet been clearly addressed by the Eleventh Circuit." *In re EMI Resorts, Inc.,* 2010 WL 11506117, at *1 (S.D.Fla. Sept. 2, 2010) (Gold, A.) (Judge Gold stayed his own order and found that movant had a "substantial case on the merits," even where he determined that non-movants were "likely to succeed on the merits" when issue on appeal had not yet been addressed by the Eleventh Circuit (or any other circuit for that matter)); *Noriega v. Pastrana,* 2008 WL 331394, at *3 (S.D.Fla. Jan. 31, 2008) (Huck, J.) (staying proceeding where appeal involved credible arguments as to interpretations of the law); *Kowalski v. Jackson National Life Insurance Company*, 2014 WL 11531364, at *2 (S.D.Fla. Jan. 22, 2014) (Cohn, J.) (staying proceeding

pending appeal when there was a "paucity of case law" on the issue on appeal.); *In re Extradition of Hurtado-Hurtado,* 2009 WL 1444509, at *1 (S.D.Fla. May 21, 2009) (O'Sullivan, J.) (same).

Mr. Dorfman has a substantial case on the merits that: (i) the FTC is not authorized to obtain disgorgement or restitution in proceedings, such as this one, brought pursuant to Section 13(b) of the FTC Act; (ii) the FTC is not authorized to obtain injunctions to restrain assets for the benefit of disgorgement or restitution in this proceeding; and (iii) that the TRO expired. As more fully discussed in the Motion to Strike, a line of recent binding and persuasive precedent from the United States Supreme Court,[1] Eleventh Circuit Court of Appeals,[2] and Ninth Circuit Court of Appeals,[3] highlights that courts in this circuit and beyond have previously wrongly determined that FTC may obtain disgorgement and restitution remedies in actions brought pursuant to Section 13(b) of the FTC Act. Pursuant to that same precedent, Mr. Dorfman highlighted that the Court cannot issue injunctive relief to restrain the Defendants' assets for the benefit of those remedies, which the FTC is not authorized to obtain in this proceeding.

As Mr. Dorfman acknowledged in the Motion to Strike and observed by the Court at the hearing thereon, Mr. Dorfman's arguments relying on the legal authorities cited therein as to why the FTC is not entitled to the remedies or injunctive relief described above are novel, complex, and have not yet been considered by other courts (let alone courts in this Circuit) in the manner synthesized by Mr. Dorfman. Nonetheless, Mr. Dorfman's argument is credible and involves "serious legal questions." In other words, Mr. Dorfman has a "substantial case on the merits" that, applying recent binding and persuasive precedent, the FTC lacks the authority to obtain

[1] *Kokesh v. SEC,* 137 S.Ct. 1635 (2017); *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).
[2] *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016).
[3] *FTC v. AMG Capital Management,* 910 F.3d 417 (9th Cir. 2018).

disgorgement or restitution in Section 13(b) actions or an injunction to restrain assets for the benefit of those remedies.

2. **Mr. Dorfman Will Suffer Irreparable Damage Absent a Stay of this Proceeding**.

As to the second factor, a movant suffers "irreparable damage" "if it cannot be undone through monetary remedies." *Cunningham v. Adams*, 808 F.2d 815, 821 (11th Cir. 1987). "Even when a later money judgment might undo an alleged injury, the alleged injury is irreparable if damages would be 'difficult or impossible to calculate.'" *Scott v. Roberts,* 2010 WL 2977614, at *15 (11th Cir. July 30, 2010).

Absent a stay of this proceeding pending a final determination by the appellate court as to whether the FTC can obtain disgorgement or restitution in this proceeding and an injunction to restrain the Defendants' assets in furtherance of those remedies, the Court may enter an order authorizing the FTC to liquidate all of the Defendants' assets so that they can be distributed to the U.S. Treasury, the Defendants' customers, and other entities. A liquidation of and distribution of Mr. Dorfman's assets will be irreversible and constitute "irreparable harm." Additionally, absent a stay, Mr. Dorfman will incur substantial costs and expenses, including attorneys' fees, associated with defending the fallacious allegations in this action and wrongfully sought legal relief. These substantial costs and expenses will largely be unnecessary if the appellate court determines that the FTC is not entitled to disgorgement or restitution in this proceeding.

3. **The FTC Will Not Suffer a Substantial Injury if this Proceeding is Stayed.**

As to the third factor, the FTC will not be prejudiced if this proceeding is stayed as the status quo will be maintained. The lack of prejudice to the FTC of a stay of this proceeding is highlighted by the FTC's previous request to stay this case. [D.E. 58].

4. **Staying this Proceeding Will Serve the Public Interest**.

Staying this matter will preserve the status quo until the appellate court resolves whether the FTC is authorized to obtain disgorgement, restitution, and other injunctive relief in this proceeding. In the interim, consumers allegedly at risk will not be harmed. *See, LabMD*, 578 Fed.Appx. at 822 (finding that maintaining injunction pending appeal will protect allegedly harmed consumers). Additionally, staying this proceeding serves the public interest by allowing Mr. Dorfman to focus his limited resources on litigating the narrow legal issues that this and other similarly situated cases revolve around. *See, Noriega*, 2008 WL 331394, at *3 (finding that it is "in the public interest to establish the appropriate legal principles to be applied in the future if a similar case arises."). The public has a distinct interest in finding out whether or not the FTC has the authority to obtain disgorgement and restitution in Section 13(b) proceedings. That determination will impact this case and many others across this circuit and beyond. If this proceeding is not stayed, Mr. Dorfman's resources will be diverted to engaging in discovery and litigating other issues in this proceeding which would detract from his effort to litigate the purely legal issue of the FTC's ability to obtain disgorgement and restitution remedies.

Based on the foregoing, the Court is divested of jurisdiction on the Issues on Appeal pending the resolution of the Appeal by the Eleventh Circuit Court of Appeals and only the Eleventh Circuit Court of Appeals has the jurisdiction to determine otherwise. Accordingly, Mr. Dorfman requests that the Court abate the Scheduling Order pending resolution of the Appeal. In the alternative, Mr. Dorfman requests that the Court stay the entire proceeding pending resolution of the Appeal. In the absence of an Order abating or staying this proceeding pending resolution of the Appeal, the parties will be forced to incur substantial unnecessary costs and fees relating to preparing for a preliminary injunction hearing that ultimately may be mooted by the Eleventh Circuit Court of Appeals' ruling on the Appeal.

This matter is particularly time-sensitive as the Status Conference, during which the parties intended to discuss these matters, is currently scheduled to occur on the day before Mr. Dorfman's brief and supporting evidence in opposition to the preliminary injunction would be due had the Appeal not been filed. Mr. Dorfman's due process rights entitle him to clarity. To the extent that the Court determines that, despite the Appeal, the Court retains jurisdiction to consider the Issues on Appeal and to hold the preliminary injunction hearing, the Court should not deprive Mr. Dorfman of sufficient time to seek an emergency review by the Eleventh Circuit Court of Appeals in advance of his briefing deadline.

WHEREFORE, Defendant Steven Dorfman respectfully requests an Order of the Court (i) abating the Scheduling Order; or, in the alternative (ii) staying the entire proceeding; and (iv) for all further relief that the Court deems just and proper.

Local Rule 7.1(a)(3) Certificate

The undersigned certifies that he has conferred with all parties or non-parties who may be affected by the relief sought in the motion in a good faith effort to resolve the issues raised in the motion and has been unable to do so.

Local Rule 7.1(d)(1) Certificate

After reviewing the facts and researching applicable legal principles, I certify that this motion in fact presents a true emergency and requires an immediate ruling because the Court would not be able to provide meaningful relief to a critical, non-routine issue after the expiration of seven days. I understand that an unwarranted certification may lead to sanctions.

Dated: March 13, 2019

DLA Piper LLP (US)

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CERTIFICATE OF SERVICE

The undersigned certifies that he filed this pleading through the court's electronic filing system and that all parties requesting electronic notice of pleadings have been served with the pleading.

/s/Ryan D. O'Quinn
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