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 DISMISS
PLAINTIFF FEDERAL TRADE COMMISSION'S COMPLAINT

Defendant, Steve Dorfman ("**Dorfman**"), through undersigned counsel, pursuant to Rules 8, 9, and 12 of the Federal Rules of Civil Procedure (the "**Rules**"), moves to dismiss the complaint (the "**Complaint**") [DE 1] filed by Plaintiff, the Federal Trade Commission (the "**FTC**"), and/or to strike the FTC's prayer for non-injunctive relief, including, without limitation, disgorgement, restitution, rescission, reformation, and refund of monies paid to third parties, and states:

Introduction

On October 29, 2018, the FTC filed the Complaint initiating this matter against Mr. Dorfman and his corporate co-defendants (collectively, the "**Defendants**," each a "**Defendant**") pursuant to Section 13(b) of the FTC Act, 15 U.SC. § 53(b). [DE 1]. Therein, the FTC alleges that the Defendants violated Section 5 of the FTC Act, 15 U.S.C. § 45, by engaging in unfair and deceptive trade practices relating to the marketing, advertising, and sale of health insurance products.

Although the Complaint is packed with dramatic rhetoric and conclusions, clearly intended to excite the media and the public, its claims are skin-deep and fail to meet even basic pleading standards. This ill-conceived enforcement action is premised on the FTC's failure to (even attempt

to) understand the health insurance industry that Mr. Dorfman and his corporate co-Defendants operate in and the Defendants' limited roles in that industry. The FTC's simplistic view is evidenced by its: (i) lumping all Defendants together in each allegation in the Complaint without allocating any conduct to any individual Defendant; (ii) failure to acknowledge that the punitive relief the FTC seeks, such as joint and several monetary relief styled restitution, disgorgement, reformation, and rescission, are not authorized by Section 13(b) of the FTC Act; and (iii) failure to appreciate that the reverse preemption doctrine in the McCarran-Ferguson Act proscribes FTC intervention in health insurance-related matters such as this one that are regulated by state statutes and regulations.

The FTC's shortcomings have resulted in it filing a Complaint that fails to satisfy even basic pleading requirements of Rule 8(a) and heightened pleading standard of Rule 9(b) of the Federal Rule of Civil Procedures, seeking relief that it is not entitled to in this proceeding, and to seek to deputize this Court to oversee a proceeding for which the Court lacks subject matter jurisdiction. The FTC, as a federal regulatory agency, has been endowed by Congress with significant enforcement powers. Because of that, like the federal government's mandate in criminal actions, the FTC should maintain the highest standards of integrity in enforcement litigation in federal district courts. Unfortunately, as the Court observed during the preliminary injunction hearing, the FTC has fallen short of its expectations to meet the justified thoughtfulness and professionalism expected of Federal agencies. The FTC's shortcomings predate that hearing and originate in the Complaint.

The Court should not condone the FTC's misguided efforts and give the FTC a "pass." Rather, the Court should dismiss the FTC's Complaint due to its fatal defects. It would be reversible error for the Court to do otherwise.

Memorandum of Law

I. Legal Standard.

To survive a Rule 12(b)(6) motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[T]he court is not required to accept a plaintiff's legal conclusions." *Iqbal*, 556 U.S. at 678. To survive, a complaint requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. *Twombly*, 550 U.S. at 555.

Ordinarily, a court is limited to considering the four corners of a complaint and its exhibits in deciding a motion to dismiss. *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1368 (11th Cir. 1997). However, as this Court acknowledged, a court may consider extrinsic documents if the document is "(1) central to the plaintiff's claim, and (2) its authenticity is not challenged." *JAWHBS, LLC v. Arevalo,* 2016 WL 5142498, at *7 (S.D. Fla. Aug. 4, 2016) (Gayles, J.) (internal citations omitted). "In particular, a court may take judicial notice of and consider documents which are public records" and other courts' orders. *Id.* (internal citations omitted). Additionally, in deciding a motion to dismiss, the Court can consider a plaintiff's witnesses affidavits or declarations and exhibits thereto filed in connection with a plaintiff's motion for injunctive relief. *John Gil Const., Inc. v. Riverso,* 99 F. Supp. 2d 345, n.5 (S.D.N.Y. 2000).

II. The Complaint is an Impermissible "Shotgun Pleading."

Rule 8 requires a complaint to include "a short and plan statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). However, this Court has instructed that a complaint that "lumps" all defendants together in its allegations without allocating allegations to individual defendants is a "shotgun pleading" that violates Rule 8(a) and must be dismissed. *See Fischer v. Fed. Nat'l Mortg. Ass'n*, 302 F. Supp. 3d 1327, 1334 (S.D. Fla. 2018) (Gayles, J.)

(dismissing case without prejudice due to plaintiff lumping defendants together in complaint and requiring plaintiff to "identify the precise Defendant alleged to have carried out each respective action" if the plaintiff were to file an amended complaint); *see also Lane v. Capital Acquisitions and Mgmt. Co.*, 2006 WL 4590705, at *5 (S.D. Fla. Apr. 14, 2006) (Marra, J.) (dismissing complaint that alleged claims against collective "defendants," explaining that "[b]y lumping all the defendants together in each claim and providing no factual basis to distinguish their conduct, the [] Complaint fails to satisfy the minimum standard of Rule 8"); *Steen Grp. LLC v. Ltd.,* 2013 WL 12089956, at *3 (S.D. Fla. June 5, 2013) (Dimitrouleas, J.) (dismissing complaint that did "not clearly distinguish which [d]efendant is liable for which alleged breach or why . . .", reasoning that a complaint "must be specific, putting each [d]efendant on notice and informing each [d]efendant as to under which capacity they are allegedly being held liable."); *Diamond Resorts Int'l, Inc. v. US Consumer Attorneys, P.A,* 2018 WL 6621363, at *3 (S.D. Fla. Oct. 26, 2018) (dismissing claims as "insufficient under Rule 8" when complaint "fails to differentiate the defendants and delineate the conduct attributed to each.") (Reinhart, J.).

The FTC accuses all seven Defendants of violating the FTC Act by deceptively marketing and selling health insurance to customers that did not meet their expectations. Compl., ¶¶ 6-13. However, ***the FTC fails to (even attempt to) identify which Defendant carried out which respective act in any of the allegations in the Complaint***. Even a cursory reading of the Complaint highlights that the FTC fails to allege: (1) which Defendant(s) "claim[ed] to offer consumers comprehensive health insurance," Compl., ¶ 15; (2) which Defendant(s) "sold products to consumers," Compl., ¶ 16; (3) which Defendant(s)' "advertising and promotional materials, including websites" disseminated allegedly false information, Compl. ¶ 22-27; (4) which Defendant(s) own the "lead generation websites" at issue or purchase leads from "third-party lead

generation sites," Compl. ¶¶ 28-34; (5) which Defendant(s) "engage in [] telemarketing with potential customers," Compl, ¶ 36; and (6) which Defendant(s)' telemarketers' conduct are at issue, Compl. ¶¶ 38-47. Instead, the FTC's Complaint is a "shotgun pleading" that lumps all of the Defendants together in each allegation in the Complaint by simply referring to them as the "Defendants" and attributing all conduct to the collective "Defendants." *See, e.g.,* Compl., ¶¶ 15-16, 19-28, 30-59, 61, and 64-66.

The FTC's lazy pleading practice deprives the Court and each Defendant of the ability to understand "under which capacity they are allegedly being held liable." Accordingly, the FTC's Complaint fails to meet the minimum pleading threshold required by Rule 8 of the Federal Rules of Civil Procedure and must be dismissed.

III. The FTC Failed to Plead with Requisite Particularity in Rule 9(b).

Rule 9(b) requires a plaintiff to allege fraud with "particularity." FED. R. CIV. P. 9(b). Courts in this district and beyond hold that the heightened pleading standard applies to claims brought for violation of Section 5 of the FTC Act and other claims that "sound in fraud." *See, e.g.*, *FTC v. Am. Precious Metals, LLC,* 2012 WL 13114034, at *5 (S.D. Fla. Apr. 12, 2012) (Scola, J.) (agreeing that claims under Section 5 of the FTC Act are subject to the heightened pleading standard but finding that the Court need not decide the issue); *FTC v. Lights of Am., Inc.*, 760 F. Supp. 2d 848, 853-54 (C.D. Cal. 2010); *FTC v. ELH Consulting, LLC,* 2013 WL 7489267, at *1 (D. Ariz. Sept. 4, 2013); *FTC v. Ivy Capital, Inc.,* 2011 WL 2118626, at *3 (D. Nev. May 25, 2011); *see also FTC v. Am. Fin. Benefits Ctr.,* 324 F. Supp. 3d 1067, 1076 n.3 (N.D. Cal. 2018) (recognizing that the heightened pleading standard applies in Section 5 cases).

Rule 9(b)'s "particularity" standard requires a plaintiff to plead "facts as to time, place, and substance of the defendant's alleged fraud," specifically, the "details of the defendant's allegedly

fraudulent acts, when they occurred, and who engaged in them." *Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 567-68 (11th Cir. 1994). A complaint that lumps defendants together in allegations fails to satisfy the particularity requirements of Rule 9(b). *Cordova v. Lehman Brothers, Inc.,* 526 F.Supp.2d 1305, 1313 (S.D.Fla. 2007) (quoting *Bruhl v. Price Waterhousecoopers Intern.,* 2007 WL 997362, at *3 (S.D.Fla. Mar 27, 2007) ("Rule 9(b) does not allow a complaint to merely 'lump' multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud . . .") (Marra, J.); *see also, Kolmat Do Brasil, LDTA v. Evergreen United Investments, LLC*, 2015 WL 3606277, at *4 (S.D.Fla. June 8, 2015) (dismissing complaint for failure to meet Rule 9(b) because it "improperly lumps all Defendants together") (Marra, J.). As discussed above, the FTC lumped all of the Defendants together in each allegation in the Complaint and failed to identify which Defendant committed which alleged act that the FTC asserts they are all liable for. Therefore, the FTC failed to particularly allege the substance of *each* Defendant's alleged wrongful conduct. Accordingly, the Complaint violates Rule 9(b) and must be dismissed.

IV. The FTC's Requested Remedies are Unavailable and they Must be Stricken.[1]

The FTC requests that the Court award punitive damages to "redress injury to consumers resulting from Defendants' violations of the FTC Act and the TSR," including, but not limited to: disgorgement, restitution, rescission, or reformation of contracts (collectively, the "**Remedies**").

[1] Mr. Dorfman briefed these issues extensively in his *Motion to Strike Temporary Restraining Order* [DE 79] and opening brief in his appeal of the Court's order denying his motion to strike. For the Court's convenience, a copy of Mr. Dorfman's first appellate brief is attached hereto as **Exhibit "A."** For the sake of brevity, Mr. Dorfman respectfully refers the Court to those pleadings for additional discussion relating to why the FTC is not authorized to obtain the relief it seeks in this proceeding.

Compl., ¶ 69(b)-(c). As the Remedies are not available to the FTC in actions brought pursuant to Section 13(b) of the FTC Act, the Court should dismiss the FTC's claims seeking that relief or, alternatively, strike the FTC's prayer for those Remedies. *See* FED. R. CIV. P. 12(f) (allowing a court to strike from a pleading immaterial or impertinent matters); *Delta Consulting Grp., Inc. v. R. Randle Const., Inc.*, 554 F.3d 1133, 1142 (7th Cir. 2009) (instructing that a court should strike requested relief that is not available); *Tapley v. Lockwood Green Eng'rs*, 502 F.2d 559, 560 (8th Cir. 1974) (same).

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

The text of Section 13(b) of the FTC Act, its context, and its legislative history highlight that the FTC is not authorized to obtain monetary penalties in proceedings brought pursuant to Section 13(b) of the FTC Act.

1. 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 "after notice to the defendant,[2] 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). Section 13(b) does not grant or even suggest that the FTC has the power to seek consumer redress through disgorgement, restitution, or any other monetary or non-injunctive relief.[3] The clear language of Section 13(b) should end the Court's inquiry as to

[2] ***Despite the clear statutory prohibition of obtaining ex parte temporary restraining orders pursuant to Section 13(b) of the FTC Act, the FTC mislead the Court into violating the restriction*** as Mr. Dorfman had notice or ability to defend himself at that stage of this case. *See ex parte* TRO [DE 15].

[3] Even the subsection's heading — "temporary restraining orders; preliminary injunctions" — betrays the provision's limited purpose.

whether the FTC is authorized to obtain legal, monetary relief such as "disgorgement" or "restitution" or other relief such as rescission or reformation 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).

2. 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. Section 19b authorizes 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 . . ." *Id*. These non-injunctive remedies are available only after the FTC obtains an administrative adjudication, a "final cease and desist order," and subsequently proves to a 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 Congress enacted Section 13(b) it established Section 19b, expressly contemplating remedies of restitution, disgorgement, rescission, and reformation. The implications are clear: (i) Section 13(b) did not provide for these remedies; and (ii) if the FTC wishes to seek non-injunctive remedies it must clear a series of procedural safeguards, which Congress did not impose as a precondition to 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[4] make clear that injunctive relief to halt current misconduct is readily available under Section 13(b), while legal redress for consumers could only be obtained under Section 19b after an administrative adjudication culminating in a cease-and-desist order.[5] Thus, permitting the FTC to seek all remedial options pursuant only to the abbreviated process set forth in Section 13 would frustrate Congressional intent and 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"). 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 but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").[6]

[4] 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.*

[5] 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* 15 U.S.C. §§ 45, 57a.

[6] One further distinction is that while Section 13(b)is limited 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 and other penalties. 15 U.S.C. § 57b.

Just as courts should not artificially neuter agency authority, courts should also not give agencies authority where none exists. *Am. Bar Ass'n v. Fed. 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 . . .")(emphasis in original). Instead, read together, Sections 13(b) and 19b give the FTC two complementary tools: the former, forward-looking and prophylactic, and 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. § 57b; *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.").

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

The legislative history of Section 13(b) also shows that it was not intended to be used to impose monetary penalties. 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 consumers until an ultimate judgment in its case.[7] The legislative history does not contain any suggestion that Section 13(b) be used to obtain consumer redress.

[7] 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

B. Binding Precedent Proscribes the Remedies.

Admittedly, courts, including the Court of Appeals for the Eleventh Circuit, have upheld the FTC's right to obtain money judgments in Section 13(b) proceedings. *See FTC v. Gem Merch.*, 87 F.3d 466 (11th Cir. 1996). However, recent precedent ***requires*** courts to go beyond the labels that the FTC applies to its requested relief and analyze the climes to confirm the FTC's authority to seek them.

1. *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 (11th Cir. 2016). The issue before the Court was whether the SEC's requests for (i) an injunction, (ii) declaratory relief, and (iii) disgorgement were barred by the statute of limitations codified in 28 U.S.C. § 2462, which establishes a five year statute of limitations on "any civil fine, penalty, or forfeiture." *Id.* at 1360.

First, the court held that the statute of limitations did not apply to "injunctions requiring (or forbidding) future conduct" since they are equitable remedies. *Id.* at 1360, 1362. In other words, the Court held that "equitable remedies" are not "fines," "penalties," or "forfeitures." The court observed that a "penalty" "addresses a wrong done in the past" while an injunction "look[s] forward in time . . . to prevent future violations." *Id.* at 1361. Second, the court determined that

> 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).

"declaratory relief" is "backward-looking" and, thus, a "penalty" subject to § 2462's statute of limitations. *Id.* at 1362. The court observed that "[a] declaration of liability goes beyond compensation and is intended to punish because it serves neither a remedial nor a preventative purpose; it is designed to redress previous infractions rather than to sop any ongoing or future harm." *Id.* Third, the court held that "disgorgement . . . i.e., requiring defendants to relinquish money and property" is equivalent to a forfeiture and, thus, expressly covered by § 2462. *Id.* at 1363. Notably, the court also determined that disgorgement and forfeiture seek to redress *past* wrongdoing and, thus, are non-equitable remedies. *Id.* at 1364.

In sum, in *Graham*, the Eleventh Circuit instructed that *equitable remedies* are "forward-looking" remedies designed to prevent *future* violations of the law where as *non-equitable remedies, i.e., legal remedies*, such as penalties, forfeitures, and declarations, seek to punish wrongdoers for *past* misconduct.

2. *Kokesh v. SEC (S. Ct. 2017).*

One year later the Supreme Court in *Kokesh v. SEC,* 137 S.Ct. 1635 (2017) analyzed one of the same issues presented in *Graham*: whether disgorgement is a "penalty." The Supreme Court agreed with the Eleventh Circuit, affirmed *Graham*, and held that disgorgement is a "penalty." *Id.* Notably, the Supreme Court went a step beyond and extended *Graham* and held that ***disgorgement does not fall within the court's "inherent equity power to grant relief ancillary to an injunction."*** *Id.* at 1642 (emphasis supplied).[8]

[8] 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

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

The year after *Kokesh* was decided, 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 Mgmt.*, 910 F.3d 417 (9th Cir. 2018). In *AMG*, like in this case, the FTC sought "equitable monetary relief," including restitution and disgorgement, under Section 13(b) of the FTC Act. *Id.* at 422. In his opinion for the panel, Judge O'Scannlain ruled that, according to the court's precedent in *FTC. v. Commerce Planet, Inc.,* 815 F.3d 593 (9th Cir. 2016), restitution and disgorgement were equitable relief, and thus fell within the scope of Section 13(b). *Id.* at 426.

Judge O'Scannlain then took the uncommon step of issuing a second opinion, joined by Judge Carlos Bea, concurring with the panel decision he composed. In this "concurrence," Judge O'Scannlain admitted 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 found that decision's analysis untenable. Absent contrary Ninth Circuit precedent, Judge O'Scannlain stated he would have ruled that 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.[9]

D. **The Legal Edifice for the FTC's Request for Disgorgement, Restitution, Rescission, and Reformation are Now Invalid.**

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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.

[9] 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"; 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).

Over 20 years ago, in *FTC v. Gem Merchandising*, the Eleventh Circuit determined that Section 13(b) authorizes the FTC to seek disgorgement and restitution. 87 F.3d at 466. When it was decided, *Gem Merchandising* did not answer or even attempt to analyze how restitution, disgorgement, rescission, or reformation under Section 13(b) is incompatible with the enactment of Section 19b. But more fundamentally *Gem Merchandising* predates binding, contradictory precedent in the Supreme Court's decisions in *Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund, Inc.,* 527 U.S. 308 (1999)*, Great-West Life & Annuity Ins. Co. v. Knudson,* 534 U.S. 204 (2002), and *Kokesh* and the Eleventh Circuit's decision in *Graham.* In the course of those cases, the Supreme Court and Eleventh Circuit 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,* 534 U.S. 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 v. Bd. of Trs. Of Nat'l Elevator Indus. Health Benefit Plan*, 136 S. Ct. 651, 657 (2016), the Court cannot impose such a 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 and forfeiture are non-equitable remedies. In sum, binding precedent establishes that the FTC's request for disgorgement and restitution is in reality a legal claim for a money judgment that is unavailable under Section 13(b).

Based on the foregoing, the FTC is not authorized to obtain any remedies in this proceeding, brought pursuant to Section 13(b) of the FTC Act, other than an injunction. Accordingly, the Court should strike the FTC's prayer for disgorgement, restitution, rescission, or reformation.

V. The FTC's Prayers for Rescission and Reformation of Contracts Must be Stricken as the Defendants are not in Privity with the Alleged Victims and the FTC failed to allege a "Mutual Mistake."

As discussed above, in addition to disgorgement and restitution, the FTC seeks to have the Court rescind or reform the health insurance policies that the "Defendants" brokered to the alleged victim-customers. As detailed in Section IV, none of those remedies are available in proceedings brought pursuant to Section 13(b) of the FTC Act and, accordingly, they must be stricken. The FTC's request that the insurance policies be rescinded or reformed should be stricken for the additional reason that the "Defendants" are not in privity of contract with the alleged victim-customers.

A necessary element for any rescission or reformation claim is that defendant be in privity of contract with the alleged victims of its wrongful conduct. *See Thompkins v. Lil' Joe Records, Inc.*, 476 F.3d 1294, 1315 (11th Cir. 2007). A plaintiff cannot bring a rescission or reformation claim against a party that is not a party to the contract. *Id.* The FTC alleges that the "Defendants" advertised, marketed, distributed or sold limited benefit plans." *See* Compl. ¶¶ 6-12. However,

(critically fatal to the FTC's rescission and reformation claims) the FTC *does not* allege that the "Defendants" were insurers or parties to those limited benefit plans. The reason for this critical omission is obvious and indisputable: the Defendants did not issue and were not parties to the health insurance plans they brokered. Rather, Health Insurance Innovations ("**HII**") was the insurer and counter-party to the health insurance policies that the "Defendants" brokered to customers. The FTC's own submissions to the Court highlight that HII was the insurer and counterparty to each insurance agreement at issue. Indeed, every single document that the FTC submitted in this proceeding evidences that HII, not any of the "Defendants," was the insurer and underwriter for the insurance plans that victims bought. *See, e.g.*, *Memorandum in Support of Plaintiffs' Ex Parte Motion in Support of the Temporary Restraining Order* [DE 12] (the "**TRO Memo**") , PX 1 (FTC's investigator's declaration), p. 442-456, 493-521, 525-540; PX 2 (FTC's investigator's declaration) ¶ 11, p. 35-41, 50-55, 102-105; PX 3 (FTC's investigator's declaration), p. 29-35, 56, 74-82; PX 6-22 (customer-witness declarations); PX 23 (FTC's expert's declaration), p. 139, 172, 179-194; PX 24 (FTC declaration from Pennsylvania special investigator) ¶ 3; PX 26 (FTC declaration from Georgia special investigator) ¶ 3; PX 30 (former Simple Health Plans employee's declaration for FTC) ¶ 17; PX 31 (former Simple Health Plans employee's declaration for FTC) ¶¶ 27 and 33. Accordingly, as the FTC failed to allege that any of the "Defendants" were a party to the health insurance policies at issue and since HII is not a party to this proceeding, the FTC failed to state a claim that it is entitled to rescission or reformation of the insurance policies. Therefore, the FTC's prayer for rescission or reformation of the insurance policies should be stricken.

The FTC's claim for rescission or reformation of the insurance policies should be stricken for the additional reason that the FTC failed to allege that "there was a mutual mistake." *Winn-*

Dixie Stores, Inc. v. Big Lots Stores, Inc., 2016 WL 2918152, at *9 (S.D. Fla. May 18, 2016) (providing that "mutual mistake" is a necessary element to any rescission or reformation claim) (Middlebrooks, J.). The Complaint lacks *any* allegation that any of the "Defendants" were mistaken about the terms of the insurance policies at issue. For this additional reason the FTC's prayer for rescission or reformation must be stricken.

VI. The McCarran-Ferguson Act Proscribes this Action.

The Court must also dismiss this action because it lacks subject matter jurisdiction over it. FED. R. CIV. P. 12(b)(1). The Court is not limited to reviewing the allegations in the Complaint when determining whether it has subject matter jurisdiction over this proceeding. Instead, the Court "is free to independently weigh facts, and 'may proceed as it never could under Rule 12(b)(6) or FED.R.CIV.P. 56.'" *Morrison v. Amway Corp.*, 323 F.3d 920, 925, (11th Cir. 2003) (quoting *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990)). That is, when a Rule 12(b)(1) motion constitutes a factual attack on subject matter jurisdiction, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional issue." *Lawrence*, 919 F.2d at 1529.

The reverse-preemption provision of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, deprives the Court of subject-matter jurisdiction over this proceeding. The McCarran-Ferguson Act provides that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ." 15 U.S.C. § 1012(b). In other words, insurance-related conduct is exempt from Federal oversight if (i) the conduct involves the "business of insurance" and (ii) is regulated by the States. As observed by the Supreme Court, the ***McCarran-Ferguson Act withdrew from the FTC the authority to***

regulate the marketing and advertising of insurance products in those states which regulate those practices under their own laws. *FTC v. Nat'l Cas. Co.*, 357 U.S. 560, 562-63 (1958).

The first element of the McCarran-Ferguson exemption requires the conduct at issue to constitute the "business of insurance." The Supreme Court has instructed that activities relating to selling, advertising, or marketing insurance constitutes the "business of insurance." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 460 (1969) (holding that the acts of selling, marketing, and advertising insurance policies are part of the "business of insurance" under the McCarran-Ferguson Act.); *Ocean State Phys. Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1108 (1st Cir. 1989) ("The exemption offered to state-regulated insurance activities by the McCarran-Ferguson Act would be thin indeed if it were deemed to cover the content of policies, but not the marketing and pricing activities which necessarily accompany these policies."). The FTC acknowledges that the Defendants were in the business of selling, marketing, and advertising insurance. Compl., ¶¶ 6-11 (alleging that Defendants Simple Health Plans, Health Benefits One, Health Center Management, Innovative Customer Care LLC, Simple Insurance Leads LLC, and Senior Benefits One LLC, "advertised, marketed, distributed, or sold limited benefit plans."); and Compl. ¶ 16 (acknowledging that "Defendants" sold indemnity insurance); *see also* TRO Memo [DE 12]; PX 23 (declaration from FTC's expert), p. 5-6, 17-20 (explaining that the plans at issue are "indemnity plans" that "provide[] a defined financial benefit paid to consumers after medical expenses are incurred," increasing an insurer's financial risk and costs each time an insured makes a claim). Accordingly, the first McCarran-Ferguson exemption element is satisfied.

The second element of the McCarran-Ferguson exemption requires that a state regulate the conduct at issue. The threshold for satisfying this element is low. Indeed, as the Supreme Court instructed in *National Casualty,* state "legislation which proscribes unfair insurance advertising

and authorizes enforcement through a scheme of administrative supervision" is sufficient to satisfy the second prong of the exemption. *Nat'l Cas.*, 358 U.S. at 564 (noting that the majority of states' enactment of the "Model Unfair Trade Practices Bill for Insurance" or a similar statute regulating the insurance industry evidences satisfaction of the second McCarran-Ferguson prong). The FTC highlights, as evidenced by numerous state regulatory inquiries and actions into the Defendants' business practices, that the Defendants' alleged sales, marketing, and advertising practices are regulated by state regulatory agencies. *See* TRO Memo [D.E. 12], p. 25-29 (identifying alleged state law enforcement investigations of and actions against various "Defendants" for alleged violations of state laws and regulations in Indiana, Florida, Pennsylvania, Nebraska, and Montana relating to the "Defendants" insurance-related sales, advertising, and marketing activities); *Id.*, PX 1 (FTC investigator's declaration), ¶¶ 74-80 and Exhibits UU-BBB (various state regulatory agencies' pleadings against and formal correspondence with various "Defendants" relating to the agencies' investigation and prosecution of various "Defendants'" insurance-related sales, advertising, and marketing practices). It is indisputable that the "Defendants'" insurance-related sales, advertising, and marketing practices are regulated by the states. Therefore, the second McCarran-Ferguson exemption element is also satisfied.

Based on the foregoing, the McCarran-Ferguson exemption deprives the Court of subject matter jurisdiction over this proceeding. Accordingly, the Court should dismiss it.

WHEREFORE, Mr. Dorfman respectfully requests an Order of the Court (i) dismissing the Complaint; or, in the alternative, (ii) striking the FTC's prayer for disgorgement, restitution, rescission, and reformation; and (iii) for all further relief that the Court deems just and appropriate.

Dated: April 29, 2019

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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.

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Ryan D. O'Quinn

EXHIBIT A

Docket No. 19-10840

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

STEVEN DORFMAN,
Appellant

v.

FEDERAL TRADE COMMISSION,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 18-CV-62593-DPG

BRIEF OF APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a)(2) and Eleventh Circuit Rule 28-1(c), Appellant respectfully submits that oral argument will assist the Court in resolving this appeal. This appeal presents important questions concerning whether the Federal Trade Commission (FTC) has statutory authority to order disgorgement and restitution, as it seeks in this case, under Section 13(b) of the FTC Act, which provides only for injunctive relief. Oral argument would permit the parties to address any questions the Court may have.

JURISDICTIONAL STATEMENT

The District Court had jurisdiction of the case that is docketed as 0:18-cv-62593-DPG pursuant to 28 U.S.C. § 1331. The District Court's federal question jurisdiction was based on an alleged violation of Section 13 of the Federal Trade Commission Act. 15 U.S.C. § 53(b).

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1292. Appellant appeals the temporary restraining order granted on October 31, 2018 and the order denying Appellant's Motion to Strike the temporary restraining order filed February 22, 2019.[1]

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[1] For a more comprehensive discussion of jurisdiction, please refer to Appellant's Response to Jurisdictional Question filed in this Court on March 22, 2019.

STATEMENT OF THE ISSUES

The Federal Trade Commission (FTC) has sought restitution and disgorgement of Appellant's assets under Section 13(b) of the FTC Act, issuing a temporary restraining order (TRO) that remains to be litigated. Appellant contends that, in view of recent Supreme Court and federal appellate court precedent, the FTC lacks statutory authority to obtain such remedies in the first place. The District Court denied Appellant's motion to strike the TRO, and the instant appeal followed.

STATEMENT OF THE CASE

The facts underlying this appeal are rooted in entrepreneur Steven Dorfman's good faith endeavor to provide a limited form of health insurance to people who cannot afford comprehensive health insurance. The Patient Protection and Affordable Care Act, signed in 2010, imposed an "individual mandate" that required individuals to pay a penalty if they were not covered by a health plan that provided "minimum essential coverage" by 2014. 26 U.S.C. § 500A. As a consequence of the costs of comprehensive plans, there was a market of people who wished to purchase limited plans, even with a penalty, to avoid unaffordable monthly premiums.

Mr. Dorfman's business was entitled to conduct business alongside other market operators seeking to navigate an unfamiliar and heavily regulated industry. For a federal agency to intercede and bring an action to cripple a company in such

an industry, the agency should have to make certain basic showings and respect constitutional guarantees, not act unilaterally without minimum safeguards.

The FTC, in this case, seeks to penalize a man who sought simply to provide services to a group of underserved Americans. The FTC's power to freeze Mr. Dorfman's assets prior to any substantive adjudication, enter his companies into receivership, and effectively upend his entire life is predicated on an unstable legal foundation. The FTC has acted here based upon a font of authority that it has long assumed empowered the agency to crack down on what it perceived as wrongdoing with none of the protections accorded to the agency's targets by the very same statutes the FTC uses to justify its longstanding practice.

In this appeal, Mr. Dorfman asks this Court to reconsider the FTC's authority under Section 13(b) of the FTC Act and reverse the District Court's ruling.

SUMMARY OF THE ARGUMENT

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 April 16, 2019. The District Court issued a TRO against Appellant under the putative authority of Section 13(b) of the Federal Trade Commission Act ("FTC Act").

On February 19, 2019, Appellant filed a Motion to Strike the TRO. The District Court denied this motion on February 22. On March 4, Appellant filed his notice of appeal with this Court.

Appellant Steven Dorfman asks this Court to strike the TRO on the ground that Section 13(b) of the FTC Act does not authorize the remedy issued by the Court.

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, often seeking relief *ex parte*, 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 approved the use of Section 13(b) to obtain disgorgement and restitution, which in this case are legal and punitive remedies, even though the enabling statute is expressly limited to "injunctive" relief. That longstanding assumption has been substantially undermined by the Supreme Court's unanimous decision in *Kokesh v. SEC* (S. Ct. 2017), as well as by this Court's decision in *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 in light of *Kokesh.* This case presents an appropriate occasion to do so.

The FTC lacks authority to seek disgorgement or restitution under Section 13(b) of the FTC Act. Accordingly, Appellant Dorfman asks this Court to reverse the lower court's refusal to strike the TRO. Appellant's contentions do not require

clever lawyering, judicial imagination, or innovative, untested legal theories; quite the contrary, Appellant's argument merely requires the straightforward application of ordinary rules of statutory construction, as confirmed by recent federal precedent. Ultimately, Appellant asks this Court to reverse the District Court's decision 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 other equitable and legal 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 seek a judge's order 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 federal courts previously 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 this Court's ruling in *SEC v. Graham*. Today, that earlier assumption is simply no longer valid. Collectively, these decisions make clear that disgorgement or restitution, in the form sought by the FTC, is a form of forfeiture or penalty, which removes this remedy 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.

BACKGROUND

I. Procedural history

On October 29, 2018, Appellee (the FTC) filed the complaint ([D.E. 1], "Complaint") initiating this matter against Appellant Steven Dorfman and his corporate co-defendants. Compl. ¶ 6-12. The FTC alleges that Mr. Dorfman and 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.

Once the Complaint was filed, the District Court issued a TRO and froze all of Appellant's assets; a preliminary injunction hearing was scheduled and then rescheduled for April 2019; and the District Court granted the FTC's motion to stay the hearing based on the federal government shutdown in late 2018 and early 2019.

On February 19, Appellant filed a Motion to Strike the TRO based on the FTC's lack of authority to seek penalties that are not available under 13(b) and because of the legal expiration of the TRO. [D.E. 79]. His motion was denied on February 22. [D.E. 83]. He responded by filing notice of this appeal on March 4 alongside a related Emergency Motion on March 13 to confirm that the District

Court was divested of jurisdiction, or in the alternative, that the District Court should grant a stay pending this appeal. [D.E. 94]. The District Court denied Appellant's Emergency Motion on March 20. In the interim, this Court issued a Jurisdictional Question to Appellant to assess the appealability of the case on March 20, to which Appellant replied on March 22. Appellant's answer to the jurisdictional question explained that the TRO expired because he withdrew his consent at the latest on February 13, 2019, and accordingly that his notice of appeal was timely.

The result of the procedural rigmarole is Appellant's assets have been frozen, in anticipation of an eventual disgorgement and restitution judgment, for months without Appellant 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 Appellant'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 was likely never defensible and is certainly now at odds with governing precedent.

II. Equitable v. Legal Relief

Resolution of this appeal 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 sometimes said that disgorgement and restitution are equitable, but recently courts have recognized that in some cases they should be classified as "legal" remedies, which courts may not issue pursuant to their equitable powers.[2] 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 in about a dozen cases over the last two decades, 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

[2] The Complaint seeks "disgorgement" and "restitution" as separate remedies. Each is an umbrella term that can be used for a variety of more specific restitutionary remedies, some of which are legal and some equitable. *See Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002) ("[N]ot all relief falling under the rubric of restitution is available in equity."); Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 O.J.L.S. 71, 87-88 & nn. 114-15 (2018); Stephen M. Bainbridge, *Kokesh Footnote Three Notwithstanding: The Future of the Disgorgement Penalty in SEC Cases*, 56 Wash. U. J. L. & Pol'y 17, 29-30 (2018).

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); *see generally* Samuel L. Bray, *The Supreme Court and the New Equity*, 68 Vand. L. Rev. 997 (2015). 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 labeling 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." *Id.* at 213. In other words, disgorgement or restitution of specifically identified property or money traced to the wrongdoing is an equitable remedy (such as "accounting for profits," "constructive trust," or "equitable lien"). Conversely, disgorgement or restitution of non-traceable assets is "'a merely personal liability upon the defendant to pay a sum of money,'" and is a legal remedy. *Id.* (quoting the Restatement of Restitution § 160, Comment *a*, 641-42 (1936); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 4, Comment *d* (2011) ("The standard legal

remedy for a liability based on unjust enrichment is a judgment for money, to be satisfied from the assets of the defendant by the ordinary procedures of execution."). 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 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. Any penalty is necessarily a legal remedy. *See Tull v. United States*, 481 U.S. 412, 424 (1987) (noting that "a court in equity . . . may not enforce civil penalties"). One of equity's basic principles is that equity does not punish. *See* Samuel L. Bray, *Fiduciary Remedies*, in Oxford Handbook of Fiduciary Law 449, 466 (Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff eds., 2019) ("It is black letter law that equitable remedies are not supposed to punish."). Equity abhors forfeitures and penalties; it does not impose them. *See* J.D. Heydon, M.J. Leeming, & P.G. Turner, *Meagher, Gummow & Lehane's Equity: Doctrines And Remedies* § 23-595, at 865 (5th ed. 2015) ("Punishment through monetary awards or otherwise is contrary to the basis and purpose of equity.").

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, Appellant asks this Court to reexamine the edifice of FTC action. For purposes of background, this Court should be aware that this appeal comes at the invitation of a series of federal appellate rulings, including a decision by the United States Supreme Court undermining the logic 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 this Court (in a decision from over two decades ago), have agreed with the FTC's 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 the requested disgorgement was a forfeiture.[3] This Court 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

[3] Appellant is not attempting to draw a distinction between penalties and forfeitures in this brief. He only means to create a logical analogy between two forms of remedies, both of which equity abhors.

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.[4]

Strictly speaking, the Supreme Court's decision was concerned with 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

[4] 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 ("The 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.

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. Albeit in a footnote, this suggestion confirmed that the Court 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. *Accord* Bainbridge, 56 Wash. U. J. L. & Pol'y at 30 ("If disgorgement is a penalty, however, courts lack that power and the SEC lacks that authority. This conclusion follows necessarily from the basic premise that there are no penalties in equity and the complete absence of any statutory authority to impose disgorgement as a legal sanction . . . [T]he future of the disgorgement penalty therefore looks bleak . . . .").

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 *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 notable, 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.[5]

[5] In reaching this conclusion Judge O'Scannlain applied the *Kokesh* factors to find that the restitutionary remedy sought was legal, not equitable. *AMG*, 910 F.3d, at 433. Specifically, he concluded that: (i) restitution seeks to redress public wrongs; (ii) restitution is "punitive" rather than "remedial"; and (iii) that restitution is not necessarily compensatory. *Id.* Thus the Ninth Circuit concluded that restitution "bears all the hallmarks of a penalty." *Id. citing Kokesh*, 137 S.Ct. at 1644.

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 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." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *see also Pub. Emp. Retirement Sys. v. Betts*, 492 U.S. 158, 171 (1989) ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself. Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."). Based

upon a plain reading of the law alone, this Court should reverse the District Court's denial of Appellant's motion to strike the TRO insofar as that order effectuates legal and monetary remedies beyond the FTC's statutory authority under Section 13(b).

B. The FTC Act's structure reinforces Section 13(b)'s plain language.

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, apparently 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).

During the enactment of Section 19, the House and Senate disagreed on multiple aspects of the bill, including whether it should be limited to redress of violations of FTC trade regulation rules, rather than also including Section 5 "unfair or deceptive acts or practices;" the length of the statute of limitations; and whether it might lead to the possibility of a redress suit against someone who was unaware of a violation. Peter C. Ward, *Restitution for Consumers Under the Federal Trade Commission Act: Good Intentions or Congressional Intentions*, 41 Am. U. L. Rev. 1139, 1181-82 (1992). Section 19 was ultimately a result of extensive compromise to ensure that the FTC would not be able to sue potential violators without proper safeguards, with the specific knowledge that 13(b), albeit saddled with more onerous constraints on government overreach, was available for injunctive relief so that consumers would not be harmed during the pendency of a Section 19 action.

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[6] make clear that equitable, non-monetary relief to thwart

[6] 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

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.[7] 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

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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.*

[7] 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).

of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").[8]

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 or punitive. 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. *See* 15 U.S.C.

[8] 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.

§ 57(b); *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 confirms Appellant's interpretation of Rule 13(b).

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 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 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."[9] 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."[10] Whatever 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

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[9] *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.
[10] *Id.*

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.").

D. The FTC's litigation strategy shows that the agency strategically expanded its authority without congressional or judicial approval.

After Congress created Section 19 in 1975, the FTC was unsatisfied that it still did not have authority to order restitution.[11] Instead, for the agency to redress consumer harm, Section 19 required the FTC to seek and obtain (1) a 13(b) preliminary injunction to obtain a preliminary asset freeze; (2) an administrative proceeding for a cease and desist order; and then (3) a district court action under Section 19. *Id.* at 11-12. The FTC viewed this process, created by Congress, as overly cumbersome. It needed a "shortcut." *Id.* at 12. *Porter v. Warner Holding Co.*, a case that was even then already three decades old and had never been used to support the FTC's proposed position, supplied the solution. *Porter* contained language the FTC could invoke to press for an expansive new framing of its authority. *Id.* at 15-16. Meanwhile, people even inside the FTC believed these suits would be unsuccessful because "Section 13(b) authorized only injunctive relief." *Id.*

[11] David Fitzgerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act,* https://www.ftc.gov/sites/default/files/documents/public_events/FTC%2090th%20Anniversary%20Symposium/fitzgeraldremedies.pdf at 6.

at 22. Put in other words, people working at the FTC at the time *knew* that these court cases were a stretch, but the litigators decided to try their luck anyways.

The FTC began its mission to expand the meaning of 13(b) in a suit against Australian Land Title, Ltd. (ALT) in 1977. *Id.* at 10. At the time, 13(b) was only being used to seek preliminary injunctions after the completion of the FTC's administrative process. *Id.* This was the first time the FTC used 13(b) to seek an injunction directly from a federal district court, arguing that if it waited until the administrative proceeding had ended, ALT might have dissipated its funds leaving nothing for consumer redress. *Id.* The parties reached a settlement, agreeing to put ALT's assets in escrow. *Id.*

In 1979, the FTC pursued a similar case against Southwest Sunsites, Inc. In 1982, the Fifth Circuit reversed the District Court's holding, finding that 13(b) did authorize the FTC to "order temporary ancillary relief preventing the dissipation of assets or funds that may constitute part of the relief eventually ordered in the case." *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 717-18 (5th Cir. 1982), *cert denied*, 479 U.S. 828 (1982). It did not, however, find that Section 13(b) fully covered consumer redress, noting that a Section 19 case would still be necessary after an administrative proceeding. *Id.* at 722.

Also, in 1979, the FTC filed its first permanent injunction suit under 13(b) in *FTC v. Virginia Homes Manufacturing Corp.* 509 F. Supp. 51 (D.Md. 1979), *aff'd*

mem., 661 F.2d 920 (4th Cir. 1981). In *Virginia Homes*, the court granted the FTC's motion for summary judgment, finding that bringing a case for a permanent injunction requiring defendant to notify its customers of their true warranty rights (where they had been previously misrepresented) was "a legitimate exercise of prosecutorial discretion" and that the court could order notification even though it was not expressly listed in 13(b) because of the "expansive" equity powers of the court. 509 F. Supp at 55.

Later in 1979, the FTC filed *FTC v. Kazdin*, a fraud case where they sought, not only a permanent injunction, but also ancillary relief including restitution. Fitzgerald, at 13. The FTC won the requested relief in a default judgment *Id.*

Shortly thereafter, in 1980, the FTC brought the case that would become the foundation for its entire 13(b) program. In *FTC v. H.N. Singer, Inc.*, the Ninth Circuit affirmed the district court's authority to order preliminary relief under 13(b) and held that when Congress gave district courts the authority to grant a permanent injunction under 13(b), it also gave the district court authority "to grant any ancillary relief necessary to accomplish complete justice because it did not limit the traditional equitable power…." – including freezing assets, rescission of contracts, and restitution. 668 F.2d 1107, 1111-13 (9th Cir. 1982). The Ninth Circuit came to this conclusion, despite the limited remedies listed on the face of 13(b) and the "little authority on the question," based on *Porter v. Warner Holding Co. Id.* at 1112-13.

Porter v. Warner Holding Co. is a case from 1946 where the Supreme Court held that restitution of illegally high rent was an available remedy under Section 205(a) of the Emergency Price Control Act of 1942, which permitted "a permanent or temporary injunction, restraining order, *or other order*." 328 U.S. 395, 397 (1946) (emphasis added). In arriving at this holding, the Court stated that, where a statute gives the court equitable powers, "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction." *Id.* at 398. This quote is, of course, used in *Singer* and becomes the cornerstone on which the FTC builds its 13(b) foundation.

The Ninth Circuit in *Singer* does not take notice of the fact that 13(b) does in fact contain a "clear and valid legislative command" that "restricts the court's jurisdiction in equity" in that it only permits preliminary and permanent injunctions and TROs. *Porter* at 138; 15 U.S.C. § 53(b). Section 205(a), on the other hand, includes the term "or other order" which the Court notes "contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion." *Id.* at 399.

Beyond the fact that *Porter* is clearly distinguishable from *Singer*, its reasoning has fallen out of favor with the courts. In *Meghrig v. KFC Western, Inc.*, where the Government suggested in an amicus brief that plaintiff could seek equitable restitution (a remedy not listed in the relevant statute) by relying on *Porter*

and other similar cases, the Supreme Court disagreed because "where Congress has provided 'elaborate enforcement provisions…it cannot be assumed that Congress intended to authorize by implication additional judicial remedies…'" and because "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." 516 U.S. 479, 487-88 (1996).

After *Meghrig*, other courts noticed the stark difference in reasoning between *Meghrig* and *Porter*, using *Meghrig* as a signal that *Porter* is, in effect, "dead." *See U.S. v. Apex Oil Co., Inc.*, 579 F.3d 734, 737 (7th Cir. 2009) (finding that cases that allowed a broader reading of a court's powers "on the basis of general equitable principles set forth in such cases as … *Porter v. Warner Holding Co.*, are dead after *Meghrig*").

Since *Singer*, the FTC has continued to bring similar cases, broadening and building upon each subsequent court holding. This is done even though *Porter* can hardly still be considered good law. Relying on *Porter*, *Singer* and its successors reads remedies into the statute which appear nowhere on its face. *See* Fitzgerald at 22 (admitting that neither the text nor legislative history of 13(b) "disclosed a basis to argue for broad equitable relief").

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, in the form sought in this case, 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 reverse the District Court's decision denying Appellant's Motion to Strike the TRO on the ground that it was improper for the FTC to have sought and obtained it in the first place.

II. Clear Guidance 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 not bound by the Ninth Circuit — which presents an additional and independent reason why this Court must overturn the District Court's denial to strike the TRO.

In *SEC v. Graham*, this Court 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"); *United States v. Banks*, 115 F.3d 916, 919 (11th Cir. 1997) ("[S]ection 2462 does not apply to equitable remedies.").

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

This Court'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 asset-freezing injunctions when the

ultimate remedy the plaintiff seeks is legal. *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 is as straightforward as it is inescapable: *Graham* holds that disgorgement, because it is within the scope of § 2462, is not an equitable remedy, and *Grupo Mexicano* holds that preliminary injunctions are outside the authority of federal courts when the ultimate remedy the plaintiff seeks is legal. Therefore, a TRO or preliminary injunction in the form of a receivership and asset freeze to further the eventual remedies of disgorgement or restitution is invalid.

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

Appellant is aware that the FTC's practice is longstanding and has been repeatedly affirmed by federal courts, including this one. *See, e.g.*, *FTC v. Gem Merch.*, 87 F.3d 466 (11th Cir. 1996). Appellant 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 this Court's decision in *Graham*.

A. *Gem Merchandising* was wrongly decided and is no longer valid.

FTC v. Gem Merchandising is this Court'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. It, like similar decisions of many appellate courts, rested its analysis on *Porter v. Warner Holding Co.* — just as the FTC hoped it would — rather than engaging in a thorough statutory analysis.

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 with little 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 recently came to a similar conclusion 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.

The FTC will be quick to note that *Gem Merchandising* is still binding circuit precedent and that *Kokesh* and *Graham* resolve a statute of limitations question involving a different statute and a different agency. What the FTC will likely fail to note is that the *reasoning* in *Kokesh* has implications beyond the immediate statute at issue, reasoning that extends to a Section 13(b) case and requires the overturning

of *Gem Merchandising*. *See Saad v. SEC*, 873 F.3d 297, 305 (D.C. Cir. 2017) ("The Supreme Court's reasoning [on whether certain remedies are punitive] was not limited to the specific statute at issue [in *Kokesh*].") (Kavanaugh, concurring).

In sum, precedent from the Supreme Court and this Court 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 decision and reasoning rather than reflexively abide by a doomed analysis that is formally ripe for reversal.[12]

B. Injunctions cannot be used to restrain assets to assist 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

[12] 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 upon which to reliably rest any real weight.

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 318-19. ("[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 a prejudgment 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 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. *See Piccolo v. Piccolo*, 2016 WL 4248208, at *1 (S.D. Fla. Aug. 11, 2016) (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), but 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 can be a punitive remedy and, hence, not an equitable one. *See Kokesh* at 1642. And they no longer have relevance in this federal circuit since *Graham*, a decision from this Court affirmed by the Supreme Court's decision in *Kokesh*, holds that disgorgement is a legal, rather than an equitable, remedy.

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

C. Legal Remedies May Only Be Issued After a Jury Trial.

Even if the Court were authorized to issue punitive, legal remedies such as disgorgement and restitution in a 13(b) equitable proceeding — which it is not — doing so in the manner sought by the FTC would abridge the Appellant's right to a jury trial. Following the analysis *required by Kokesh*, the relief the FTC seeks "contains all the hallmarks of a penalty." For instance, "the wrong sought to be redressed is a wrong to the public" and it is for punishment and deterrence (rather than compensatory) purposes. *Kokesh* at 1642; *see also Saad*, at 304 (stating that, under *Kokesh*, "expulsion and suspension are punitive" and not remedial because they "do not provide a remedy to the victim") (Kavanaugh concurring).

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, as opposed to those in which solely equitable rights and remedies are involved. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 708 (1999) (citing *Parsons v. Bedford*, 28 U.S. 433, 447 (1830)). Because FTC's claims seek legal relief, it would be *constitutionally* premature for the Court to enforce those claims at a preliminary injunction hearing. *See generally Grupo Mexicano* at 329-33 (holding where plaintiffs sought a legal remedy that a federal court "had no authority to issue a

preliminary injunction preventing petitioners from disposing of their assets," and grounding that holding in part on the U.S. Constitution). Instead, Appellant is entitled to a jury trial before any lien on assets would arise to support enforcement of the FTC's right to recovery. *See id.* at 330 (denying a preliminary injunction that would have frozen the defendant's assets in part because it was inconsistent with the defendant's "right to a jury trial on the legal claim"); *see also SCL Basilisk AG v. Agribusiness United Savannah Logistics LLC*, 875 F.3d 609, 622 (11th Cir. 2017) (Jordan concurring) (recognizing *Grupo Mexicano* as authority for the proposition that "the Supreme Court has not allowed federal courts to order the pre-judgment restraint of assets under their traditional equity powers"); *cf. Luis v. United States*, 136 S. Ct. 1083, 1092 (2016) (plurality) (distinguishing in both criminal and civil law between assets the government may freeze and assets in which it has, at best, the claim of an unsecured creditor, and citing *Grupo Mexicano*).

CONCLUSION

Appellant 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 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 this Court'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 appeal 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 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 contemplates 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 District Court's decision to deny appellant's Motion to Strike the TRO must be reversed.

WHEREFORE, for the reasons set forth above, Appellant respectfully requests that this Court reverse the District Court's denial of Appellant's motion to: (i) strike the TRO; (ii) unfreeze Appellant's 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: April 15, 2019

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served this 15th day of April, 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

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Attorney for Appellant Steven Dorfman

Dated: April 15, 2019