

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

SIMPLE HEALTH PLANS LLC, et al.,

Defendants.

Case No.: 18-cv-62593-DPG

**DEFENDANT STEVEN DORFMAN'S MOTION TO STRIKE THE FTC'S
REPLY MEMORANDUM IN SUPPORT OF A PRELIMINARY INJUNCTION**

Defendant, Steve Dorfman (“**Dorfman**”), through undersigned counsel, pursuant to Local Rule 7.1(c) and this Court’s order [DE 113], requests that the Court strike the FTC’s Reply Memorandum in Support of a Preliminary Injunction (collectively, with the accompanying declarations and exhibits thereto, the “**Reply**”) [DE 116]. The Reply must be stricken as it exceeds the limited permissible scope of a reply: to rebut matters raised in Mr. Dorfman’s response in opposition (the “**Response**”) [DE 104] to the FTC’s motion for a preliminary injunction (the “**Motion**”) [DE 3] and memorandum in support thereof (the “**Memorandum**”) [DE 12]. In reality, the Reply is merely the FTC’s thinly-veiled, misguided effort to introduce additional evidence in support of its Motion that the FTC has possessed for months. In further support of this motion, Mr. Dorfman states:

Background

On October 29, 2018, the FTC filed the complaint initiating this matter against Mr. Dorfman and his corporate co-defendants. [DE 1]. Therein, the FTC alleges that the Defendants violated the FTC Act by engaging in unfair and deceptive trade practices relating to the marketing and sale of health insurance products.

On the same day that the FTC filed its complaint, the FTC filed an *ex parte* Motion and Memorandum seeking entry of an *ex parte* temporary restraining order and preliminary injunction against Mr. Dorfman and his co-defendants. The primary evidentiary support for that request are 31 declarations (collectively, the “**Declarations**”) from, among others, 17 of the Defendants’ alleged former customers (the “**Original Customer Witnesses**”).¹ The Declarations consist of hundreds of pages of the Declarations and exhibits thereto, including the application, enrollment, and verification documents reflecting the terms and conditions of the health insurance plans and products the Original Customer Witnesses purchased from Defendant Simple Health. Taken together, through the Declarations and their exhibits, the FTC asserts that the Defendants sold health insurance plans and products that did not meet the Defendants’ customers’ expectations.

On March 25, 2019, Mr. Dorfman filed his Response to the Motion for entry of a preliminary injunction and a supporting declaration, i.e. the Response. In the Response, Mr. Dorfman highlights, among other things: (i) the FTC’s misguided efforts to have all of the Defendants treated as a “common enterprise,” Response, 9-10; (ii) the FTC’s failure to meet its burden of establishing that (a) the Defendants made any misrepresentations to consumers, Response 11-16, or that, even if they did, (b) any of the alleged misrepresentations were material, Response 16-18; (iii) the FTC’s failure to establish that Mr. Dorfman can be held individually liable for his co-Defendants’ alleged conduct, Response 19-21; (iv) the impropriety of the blanket asset freeze, Response 21-24; and (v) why the receivership should be dissolved or replaced with a monitorship, Response 24-27.

On April 8, 2019, the FTC filed its Reply to Mr. Dorfman’s Response. In its Reply the FTC largely fails to rebut, let alone address, Mr. Dorfman’s arguments and impeaching evidence

¹ Exhibits 6-22 of the FTC’s memorandum in support of its motion for a preliminary injunction.

in his Response. Instead, the FTC merely (i) rehashes arguments raised in its Motion, (ii) supplements those arguments by producing some of the transcripts of conversations between the Original Customer Witnesses and Defendant Simple Health, and (iii) piles-on over a thousand pages of previously undisclosed evidence in support of the Motion that the FTC has had access to for months, including declarations (and exhibits thereto) of five alleged customers (the “**Supplemental Customer Witnesses**”) that the FTC had not previously disclosed to the Court or Mr. Dorfman. Suspiciously absent from some of the Supplemental Customer Witnesses’ declarations are documents that the FTC produced for the Original Customer Witnesses: (i) application, enrollment, or verification forms reflecting the terms and conditions of the health insurance plans and products the Supplemental Customer Witnesses purchased from Defendant Simple Health; and/or (ii) transcripts of the conversations between the Supplemental Customer Witnesses and Defendant Simple Health.

Relief Requested and Basis Therefor

The Reply must be stricken as through it the FTC does not rebut Mr. Dorfman’s arguments and evidence in his Response. Rather, through the Reply the FTC seeks to pile-on additional evidence that it has long had access to and recycle and supplement arguments that it should have raised almost half a year ago in the Motion or, at the very least, weeks before Mr. Dorfman’s deadline to file a his Response.

The Reply must be stricken as it exceeds the permissible limitations for which a reply may be filed. Local Rule 7.1(c) “strictly limit[s]” the scope of a reply “to rebuttal of matters raised in the memorandum in opposition without reargument of matters covered in the movant’s initial memorandum of law.” L.R. 7.1(c). In other words, a reply is not an opportunity to revisit arguments in an initial memorandum or introduce new evidence and witnesses that were not

previously disclosed. *See also, TCC Air Services, Inc. v. Schlesinger*, 2009 WL 565516, No. 05-80543-CIV, at *7 (S.D. Fla. Mar. 5, 2009) (warning litigants that reply memorandums may not raise new arguments or evidence, particularly where the evidence was available when the underlying motion was filed).

The FTC attempts to circumvent the Local Rules by rearguing matters raised in its Motion and Memorandum and by piling-on over a thousand pages of declarations and exhibits from numerous (previously undisclosed) witnesses that the FTC has known of for over a year and could have submitted with its Motion or before Mr. Dorfman filed his Response. Additionally, apart from exceeding the limited scope of a reply, the FTC failed to meet the very purpose for which the Local Rules afford it an opportunity to file a reply: to rebut matters covered in Mr. Dorfman's Response.

The FTC's introduction of new evidence, particularly the declarations from the Supplemental Customer Witnesses, is particularly prejudicial and offensive as the FTC was aware of their existence for over a year, failed to previously disclose them to Mr. Dorfman, and attempts to sandbag Mr. Dorfman by introducing their testimony at the last moment, depriving Mr. Dorfman of the ability to search for corporate records relating to them. *See Schlesinger*, 2009 WL 565516 at *7 (this Court refused to consider the plaintiff's new evidence to support its claims for costs, which was attached to the reply memorandum rather than the initial motion, and found that the defendants would be prejudiced by not having an opportunity to determine the reasonableness of the plaintiff's costs in light of the plaintiff's new evidence). Additionally, tellingly, for many of the Supplemental Customer Witnesses, the FTC failed to produce complete sets of substantiating documents relating to the products that the Customer Witnesses purchased from Defendant Simple Health or transcripts of their calls – virtually all of which were available to the FTC months ago

or even before it initiated this proceeding. This omission is particularly troublesome as it deprives Mr. Dorfman and the Court from weighing the credibility of the Supplemental Customer Witnesses' declarations by contrasting them with (i) the actual disclosed terms and conditions of the plans that they purchased and (ii) the representations that Defendant Simple Health's representatives made to the Supplemental Customer Witnesses.

Based on the FTC's violation of the Local Rules, its Reply should be stricken. *See Andreu v. Hewlett-Packard Company*, 2016 WL 1697088, No. 15-23270-CIV, at *4 (S.D. Fla. Apr. 20, 2016) ("Neither the Federal Rules of Civil Procedure nor the Local Rules are aspirational . . . [p]arties who fail to abide by the rules should suffer the consequences of consciously disregarding them.").

WHEREFORE, Defendant, Steven Dorfman, respectfully requests an Order of the Court, substantially in the form attached hereto, striking the FTC's Reply.

Local Rule 7.1(a)(3) Certificate

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

Dated: April 12, 2019

DLA Piper LLP (US)

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CERTIFICATE OF SERVICE

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

/s/ Ryan O'Quinn

Ryan D. O'Quinn