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 REPLY IN SUPPORT OF HIS MOTION TO DISMISS PLAINTIFF FEDERAL TRADE COMMISSION'S COMPLAINT

Defendant, Steve Dorfman ("**Dorfman**"), through undersigned counsel, files this reply in support of his *Motion to Dismiss* (the "**Motion to Dismiss**") [DE 134] the complaint (the "**Complaint**") [DE 1] filed by Plaintiff, the Federal Trade Commission (the "**FTC**"), and states:

Introduction

As established in the Motion to Dismiss, the Court must dismiss the FTC's Complaint for at least two independent reasons: (i) the FTC impermissibly lumped all seven defendants together in each substantive allegation without allocating any specific conduct to any of them; and (ii) the McCarran-Ferguson Act reverse-preemption doctrine divests the Court of subject matter jurisdiction over this insurance-related dispute. Additionally, as an alternative, Mr. Dorfman established that the Court should strike the FTC's requested remedies as (i) they are unavailable to the FTC under Section 13(b) of the FTC Act; and (ii) as to the FTC's request that the Court rescind or reform the insurance contracts at issue (a) the Defendants are not parties to the insurance contracts and (b) the FTC failed to allege that parties were mutually mistaken as to the terms of those contracts.

In its response (the "**Response**") [DE 138] in opposition to the Motion to Dismiss, the FTC largely failed to address the disqualifying legal infirmities in its Complaint. Instead, as has been its practice throughout this proceeding, the FTC attempts to distract the Court from the shortcomings in its Complaint by, yet again, intentionally misrepresenting[1] the law, procedural history, and facts of this case to the Court.

The Court should see through the FTC's blatant efforts to mislead the Court. Through this reply, Mr. Dorfman seeks to rectify the FTC's maneuvers by correcting the record. The Court should dismiss the Complaint.

I. The FTC's "Lump" Pleading Style Requires Dismissal of the Complaint.

The FTC does not dispute that it failed to allocate alleged substantive conduct to any specific Defendant. As discussed in the Motion to Dismiss, the FTC's overly-simplistic shotgun pleading style requires dismissal of the Complaint under both Rules 8(a) and 9(b) of the Federal Rules of Civil Procedure.[2] *See* Motion to Dismiss, p. 3-6. Indeed, this Court and others have described complaints, such as the FTC's in this action, as "improper 'shotgun pleadings'" which "obligates" the Court to dismiss the Complaint. *Fischer v. Fed. Nat'l Mortg. Ass'n*, 302 F. Supp.

[1] *See, e.g.*, Transcript of Preliminary Injunction Hearing [DE 137] at p. 118 (describing the FTC's submission of a consumer-witnesses' affidavit in support of the FTC's request for a Temporary Restraining Order despite the fact that ***the witness told the FTC's attorney that he could "no longer recall exactly what was said to me since it has been several months, so at this point I don't think I would be a credible witness.***)"

[2] Mr. Dorfman acknowledges that a split of authority as to whether Rule 9(b) applies to Section 13(b) cases. However, as cited in the Motion to Dismiss, a majority of jurisdictions that have analyzed the issue, including courts from this district, have determined that Rule 9(b)'s heightened pleading standard applies to enforcement actions under the FTC Act. *See* Motion to Dismiss, p. 5-6. Regardless, the FTC's practice of lump pleading violates *both* Rule 9(b)'s heightened pleading standard and Rule 8(a)'s basic pleading standard. Accordingly, the Court has sufficient grounds to dismiss the Complaint under even the lower pleading threshold.

3d 1327, 1334 (S.D.Fla. 2018) (Gayles, J.) (dismissing complaint and holding that "Plaintiff may not proceed with the 'shotgun pleading' style of lumping all Defendants together . . . ***If Plaintiff chooses to file an amended complaint, he must identify the precise Defendant alleged to have carried out each respective action***.") (emphasis supplied).

After devoting a few pages of its Response to an irrelevant attempt to highlight specific substantive allegations in the Complaint against *all* of the "Defendants," but none against a *specific* Defendant, the FTC concedes that "lumped" all of the Defendants together in every substantive allegation in the Complaint. *See* Response, p. 5-6. However, the FTC makes the unsupported claim that its failure to allocate conduct to the Defendants, individually, is not disqualifying because the Defendants are jointly liable for each other's conduct. *Id.* at 6. Mr. Dorfman does not dispute that the doctrines of "common enterprise" and "individual liability" can, in appropriate circumstances, impose joint and derivative liability on co-defendants. However, the FTC failed to identify any authority that supports its proposition that a plaintiff is excused from allocating conduct to defendants in a complaint merely because the complaint also includes "common enterprise" or "individual liability" allegations. To the contrary, Judge Marra has instructed that even when a complaint contains common enterprise and joint liability allegations, the complaint must be dismissed if the plaintiff lumps defendants together and fails to allocate conduct amongst them. *U.S. Bank Nat. Ass'n v. Capparelli,* 2014 WL 2807648, at *2-3 (S.D.Fla. June 20, 2014) (Marra, J.) (dismissing complaint that alleged that defendants were a "common enterprise" because the complaint lumped defendants together "creat[ing] confusion and mak[ing] the analysis of the Complaint unnecessarily burdensome, and results in [Plaintiff] making accusations that are just not accurate." "By commingling the factual allegations against all defendants . . . Capparelli has effectively placed the onus on Movants to discern which, if any, of the allegations are brought

against them. This is wholly improper. Accordingly, on these grounds alone, the Court will dismiss the [Complaint]."); *see also, Eruchalu v. U.S. Bank, N.A.*, 2013 WL 2460404, at *7 (D.Nev. June 6, 2013) (dismissing complaint because it lumped defendants together despite plaintiff's claim for joint liability). In other words, merely claiming that the Defendants were a "common enterprise" or are otherwise liable for each other's conduct does not absolve the FTC of its duty to comply with this Court's directive that the FTC "identify the precise Defendant alleged to have carried out each respective action."

The FTC apparently misinterprets Mr. Dorfman's attack on the FTC's lump pleading as an attack on the sufficiency of the FTC's allegations that the Defendants violated Section 5 of the FTC Act. Those issues are distinct. The FTC's failure to appreciate that its Complaint is an improper lump pleading is highlighted by the list of "detailed allegations" that the FTC claims provide sufficient specificity to avoid dismissal. *See* Response, p. 5. However, ironically, each of the allegations that the FTC listed is made against the "*Defendants*," collectively – underscoring the fatal defect in the FTC's pleading. The FTC further highlights its failure to appreciate the requirement that it allocate conduct to specific defendants when it claimed that the Complaint "identifies ***who*** perpetrated the scam – Dorfman and his six corporate co-defendants," but, failed to identify which of the seven Defendants made which representations or omissions in support of the alleged "scam." *See* Response, p. 9.

In sum, the FTC's lump pleading require that the Court dismiss the Complaint under both Rules 8(a) or 9(b) of the Federal Rules of Civil Procedure.

II. The Court is Authorized to Strike the FTC's Unavailable Requested Relief from the Complaint.

The FTC argues that a strict interpretation of Rule 12(f) does not authorize the Court to strike the FTC's unavailable requests for disgorgement, restitution, and other relief. Response, p.

10-11. To support this conclusion, the FTC cites to *Williams v. Delray Auto Mall, Inc.*, 289 F.R.D. 697, 700 (S.D.Fla. 2013). Response, p. 11. In doing so, the FTC represents to the Court that *Williams* stands for the proposition that a motion to strike is an inappropriate vehicle to strike unavailable remedies from a complaint. That is not what *Williams* holds. Rather, in *Williams* the court determined that "motions to strike are not an appropriate form of ***dismissal*** of a complaint." *Id.* (emphasis supplied). Mr. Dorfman never suggested that Rule 12(f) vests the Court with that authority, which is provided by Rule 12(b) and which Mr. Dorfman also sought relief under in the Motion to Dismiss. Rather, by Rule 12(f), Mr. Dorfman merely seeks to strike the unavailable remedies from the FTC's Complaint.

It is true that Rule 12(f) does not explicitly address striking unavailable remedies from a complaint.[3] However, as this Court has recognized, Rule 12(f) authorizes the Court to strike any prayer for relief that is unavailable. *Horn v. Jones,* 2015 WL 3607012, n. 11 (S.D.Fla. May 8, 2015) (collecting cases). This is consistent with the vast majority of holdings from other jurisdictions that have similarly held that Rule 12(f) authorizes the Court to strike requested remedies from the Complaint. *See, e.g., Delta Consulting Grp., Inc. v. R Randle Const., Inc.,* 554 F. 3d 1133, 1142 (7th Cir. 2009); *Tapley v. Lockwood Green Eng'rs*, 502 F,3d 559, 560 (8th Cir. 1974); *Wrench LLC v. Taco Bell Corp.,* 36 F.Supp. 3d 787, 789 (W.D.Mich. 1998); *Johnson v. Metropolitan Sewer Dist.,* 926 F.Supp. 874, 875 (E.D.Mo. 1996); *Erhard v. Local Union Co. No. 604*, 914 F.Supp. 954, 956 (W.D.N.Y. 1996); *Helwig v. Kelsey-Hayes Co.,* 907 F.Supp. 253, 255-

[3] Mr. Dorfman notes that it is overwhelmingly ironic that the FTC asserts that the Court should conduct a "strict interpretation" of Rule 12(f) to conclude that it does not authorize the Court to strike the FTC's remedies while the FTC simultaneously argues that Section 13(b) of the FTC Act authorizes the FTC to obtain equitable relief, disgorgement, and restitution when the statute's text only authorizes the FTC to obtain an "injunction."

56 (E.D.Mich. 1995); *Chambers v. Weinberger*, 591 F. Supp. 1554, 1557-58 (N.D.Ga. 1984); *Jackson v. Marsh*, 551 F. Supp. 1091, 1094 (D.Colo. 1982); *Holland v. Sebelius*, 2015 WL 13691436, at *4 (N.D. Ga. May 12, 2015); *Scmidt v. C.R. Bard, Inc.*, 2014 WL 5149175, at *7 (S.D.Ga. Oct. 14, 2014); *Brown v. Michaels Stores, Inc.*, 2014 WL 4961089, at *9 (C.D.Ca. Oct. 2, 2014); *Hodge v. Orlando Utilities Commission*, 2009 WL 404293, at *4 (M.D.Fla. Nov. 23, 2009); *Baldwin v. Peake*, 2009 WL 1911040, at *1 (W.D.Pa. July 1, 2009); and *Rokoski v. City of Chi., Dept. of Police*, 1999 WL 966098, at *2-3 (N.D.Ill. Oct. 13, 1999).[4]

The FTC also makes the curious assertion that Mr. Dorfman failed to argue that the FTC's requested remedies are "immaterial" or "impertinent," as required by Rule 12(f). Mr. Dorfman would direct the FTC to sections IV and V of the Motion to Dismiss that detail why the FTC is not authorized to obtain the remedies it seeks. *See* Motion to Dismiss, p. 6-17. It is axiomatic, that unavailable remedies are "immaterial" or "impertinent" to the claims by which those remedies are sought.[5] *See, e.g. Williams v. Bank of America*, 2010 WL 3034197, at *2 (E.D.Cal. July 30, 2010) ("A court may strike prayers for relief which seek remedies that are unavailable as a matter of law, on the grounds that such remedies are immaterial.").

III. The FTC's Request to Rescind and Reform of the Insurance Contracts Requires a "Mutual Mistake."

The FTC asserts that it is not required to allege a "mutual mistake" to state a claim for violation of Section 5 of the FTC Act. Response, p. 11-12. Mr. Dorfman never argued that a

[4] The FTC relies on a single case from the Ninth Circuit, and a district court case citing that case, for the proposition that Rule 12(f) does not authorize the Court to strike unavailable requests for relief from a complaint. *See* Response, p. 11.

[5] The FTC's argument that Rule 12(f) does not authorize the requested relief may ultimately be an academic point as Mr. Dorfman also sought to dismiss the FTC's claims. *See* Motion to Dismiss, p. 6-7.

"mutual mistake" is required for a Section 5 claim. Rather, a "mutual mistake" is required for the FTC's requested remedies of rescission or reformation. *See* Motion to Dismiss, p. 15-17. The Court need not go "beyond the pleadings" to recognize that the FTC has not alleged a "mutual mistake." Indeed, the four corners of the Complaint only identify the Defendants' customers – not the Defendants or HII – as parties that were allegedly mistaken about the coverage afforded to them by the insurance policies they purchased. For this additional reason, the FTC's request for rescission or reformation should be stricken or dismissed.

IV. The McCarran-Ferguson Reverse-preemption Doctrine Deprives the Court of Subject Matter Jurisdiction Over this Proceeding.

As discussed in the Motion to Dismiss, the McCarran-Ferguson Act deprives the Court of subject matter jurisdiction over conduct that: (i) involves the "business of insurance" and (ii) is regulated by the States. Motion to Dismiss, p. 17. The FTC contests that the Defendants were in the "business of insurance" but does not dispute that their conduct was regulated by the States. *See* Response, p. 12 – 15.

It is undisputed that the Defendants were in the business of marketing and selling limited benefit indemnity insurance and short-term limited duration insurance ("STLDI") plans. *See e.g.,* Motion to Dismiss, p. 18 *citing* to FTC's Complaint and exhibits in support of the FTC's request for a temporary restraining order. Numerous courts, including the Supreme Court and courts in this District, have found that the Defendants' conduct of selling and advertising insurance plans qualifies as the "business of insurance." *Id. citing Ocean State Phys. Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.,* 883 F.2d 1101, 1108 (1st Cir. 1989) (holding that marketing and selling insurance plans qualifies as the "business of insurance" for McCarran-Ferguson reverse-preemption purposes) and *SEC v. National Securities, Inc.,* 393 U.S. 453, 460 (1969) ("The selling and advertising of policies" are part of the "business of insurance" under the McCarran-Ferguson

Act.); *see also, FTC v. National Casualty Co.*, 357 U.S. 560, 562-563 (1958) ("[T]he [McCarran-Ferguson Act] withdrew from the Federal Trade Commission the authority to regulate respondents' [insurance] advertising practices . . ."); *Weinstein v. Zurich Kemper Life*, 2002 WL 32828648, at *1 (S.D.Fla. Mar. 15, 2002) (recognizing that "selling and advertising" insurance constitutes the "business of insurance.") (Dimitrouleas, J.); *C. Burstein v. First Penn-Pacific Life Insurance Company*, 2002 WL 34186960, at *2 (S.D.Fla. Feb. 11, 2002) (same) (Graham, J.). The FTC does not (and the undersigned cannot) identify any legal authority that stands for the FTC's apparent proposition that, when health insurance is involved, only comprehensive health insurance implicates the McCarran-Ferguson Act's reverse-preemption doctrine. In other words, the business of selling and advertising limited benefit indemnity or STLDI plans is also covered by the McCarran-Ferguson Act reverse-preemption doctrine.

In an overzealous attempt at playing "gotchya," the FTC accuses Mr. Dorfman of strategically omitting an analysis of the Eleventh Circuit's decision in *IAB Marketing* from his Motion to Dismiss. Response, p. 12-13. The FTC's efforts are misguided. Rather, Mr. Dorfman did not rely on *IAB Marketing* in his Motion to Dismiss because, despite the FTC's representation to the Court, it is distinguishable from this case and does not have "virtually" identical facts. In *IAB Marketing*, the Eleventh Circuit determined that the McCarran-Ferguson doctrine did not deprive the FTC of jurisdiction to regulate the activities of a defendant that ***only*** "sold trade-association memberships offering limited medical discounts" but not "insurance." *FTC v. IAB Marketing Associates, LP*, 746 F.3d 1228, 1235 (11th Cir. 2014). In other words, the Eleventh Circuit determined that McCarran-Ferguson reverse-preemption did not apply in *IAB Marketing* because the defendant did not sell insurance. That is the exact opposite of this circumstance. Here, as even the FTC and its expert and other witnesses admit, the Defendants were in the business of

advertising and selling insurance. *See* Motion to Dismiss, p. 18. Accordingly, the FTC's overly-enthusiastic reliance on *IAB Marketing* is misplaced and should be disregarded.

The Court should reject the FTC's transparent efforts to distract the Court from fundamental undisputed facts that are critically fatal to the FTC's case against Mr. Dorfman and his co-Defendants: the Defendants advertised and sold limited indemnity and STLDI insurance plans which were regulated by the States. Accordingly, the McCarran-Ferguson Act reverse-preemption doctrine deprives the Court of jurisdiction over this proceeding.

WHEREFORE, Mr. Dorfman respectfully requests an Order of the Court, substantially in the form annexed hereto: (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: May 20, 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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