

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 EXPEDITED MOTION TO
STAY PROCEEDING PENDING FINAL RESOLUTION OF APPEAL**

Defendant, Steve Dorfman (“**Dorfman**”), through undersigned counsel, pursuant to Rule 8(a)(1) of the Federal Rules of Appellate Procedure, files this expedited¹ motion seeking to stay this entire proceeding pending final resolution of his appeal [DE 140] of the Court’s preliminary injunction (the “**Preliminary Injunction**”) [DE 139]. In support of this motion, Mr. Dorfman states:

Background

On October 29, 2018, Plaintiff, the Federal Trade Commission (the “**FTC**”), sued Mr. Dorfman and his corporate co-defendants pursuant to Section 13(b) of the FTC Act, 15 U.S.C. § 53(b). [DE 1]. Therein, the FTC alleges that the Defendants violated Section 5 of the FTC Act,

¹ Mr. Dorfman seeks the relief requested herein on an expedited basis as the FTC, through its *Expedited Motion Authorizing Notification of Existing Customers About Deceptively Sold Plans and Opportunity to Obtain Comprehensive Health Insurance* (the “**Notification Motion**”) [DE 144] seeks to expeditiously obtain authority to issue notices to Defendant Simple Health’s customers notifying them that they were “deceptively sold” health insurance plans and requiring them to “opt in” to keep their health insurance plans or have them automatically cancelled. This relief would substantially prejudice the Defendants by causing many long-time, satisfied customers to assume they have been deceived and causing them to fail to “opt in” to keep their health insurance plans, causing astronomical, irreversible damage to the Defendants.

15 U.S.C. § 45, by engaging in unfair and deceptive trade practices relating to the marketing, advertising, and sale of health insurance products.

On October 31, 2018, the Court, upon the FTC's request, entered the *ex parte* restraining order (the "**TRO**"). [DE 15]. Among other things, the TRO: (i) imposed an asset freeze over all of Mr. Dorfman's and his co-Defendants' assets (the "**Asset Freeze**") for the benefit of FTC's sought disgorgement and restitution remedies; and (ii) established a receivership over the corporate Defendants to facilitate preserving, liquidating, and distributing assets for the FTC's sought remedies.

On February 19, 2019, Mr. Dorfman filed his motion seeking to strike (the "**Motion to Strike**") [DE 79] the TRO, Asset Freeze, receivership, and injunctive relief entered in this proceeding and a determination that, among other things: (i) the FTC is not authorized to obtain disgorgement or restitution in this proceeding brought pursuant to Section 13(b) of the FTC Act; and (ii) the FTC is not authorized to obtain injunctive relief, including the Asset Freeze and receivership, for the benefit of its sought disgorgement or restitution remedies (collectively, the "**Issues on Appeal**").

On May 14, 2019, the Court entered the Preliminary Injunction. The Court based its authority to enter the Preliminary Injunction pursuant to Section 13(b) of the FTC Act. The Preliminary Injunction converted the temporary receivership into a permanent receivership and extended the Asset Freeze.

On May 14, 2019, Mr. Dorfman appealed the Preliminary Injunction to the Eleventh Circuit Court of Appeals (the "**Appeal**"). [DE 140].

Relief Requested and Basis Therefor

The Appeal divested the Court of jurisdiction to determine the Issues on Appeal – fulcrum issues in this entire proceeding. Specifically, through the Appeal, Mr. Dorfman challenges the FTC’s ability to obtain disgorgement or restitution in this proceeding and the Asset Freeze and Receivership to restrain assets for the benefit of the FTC’s sought remedies of disgorgement and restitution. The Court should stay this proceeding to avoid: (i) inconsistent rulings from the Court and the Eleventh Circuit Court of Appeals; (ii) allowing the FTC and Receiver to liquidate the Defendants’ assets or consent to a judgment, permanently prejudicing Mr. Dorfman and his corporate co-Defendants when the Eleventh Circuit may ultimately determine that the Asset Freeze and Receivership should be dissolved; (iii) substantially increasing the damages to the Defendants associated with the relief requested in the Notification Motion; and (iv) causing Mr. Dorfman to incur unnecessary costs and fees, which may be mooted by the Eleventh Circuit’s ruling.

I. The Case Should be Stayed Because the Court is Divested of Jurisdiction Over the Issues on Appeal Which Dominate the Case.

The Court was divested of jurisdiction to determine the Issues on Appeal when Mr. Dorfman filed his Appeal with this Court. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982) (“The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”); *see also Blinco v. Green Tree Servicing LLC*, 366 F.3d 1249, 1250-51 (11th Cir. 2006) (court of appeals reversed district court’s order denying stay of proceeding where court of appeals determined that issue on appeal was not frivolous and needed to be decided before the proceedings in the district court could proceed). Once an appeal is filed “[a] district judge retains the authority only to act in aid of the appeal [and] correct clerical errors . . .” *Madura v. BAC Home Loans Servicing LP*, 655 F. App’x 717, 723 (11th Cir. 2016). The

Court cannot act to change the status quo pending an appeal. *See, e.g. Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 820 (5th Cir. 1989). Accordingly, now that the Appeal has been filed, only the Eleventh Circuit Court of Appeals has jurisdiction to determine the Issues on Appeal. Therefore, the Court should stay this proceeding and halt the FTC's and Receiver's ability to change the status quo by, among other things, liquidating the Defendants' assets, when the fundamental basis for the Receivership and Asset Freeze is being validly challenged.

II. A Stay is Appropriate Under Binding Case Law.

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

A. Mr. Dorfman Has a Substantial Case on the Merits.

A party meets its burden of establishing a "substantial case on the merits" when the appeal involves "statutory interpretation questions" and "serious legal question[s]." *LabMD, Inc. v. FTC*, 678 Fed.Appx. 816, 821 (11th Cir. 2016) (staying FTC's action when court found that lower tribunal's interpretation of the law could be wrong); *Gonzalez ex rel. Gonzalez v. Reno*, 2000 WL 381901, at *2 (11th Cir. Apr. 19, 2000) (finding that a substantial case on the merits existed when the Court was required to engage in statutory interpretation and the limits of an Federal agency's powers). A movant also has a "substantial case on the merits" when the issue is "complex and

novel question that has not yet been clearly addressed by the Eleventh Circuit.” *In re EMI Resorts, Inc.*, 2010 WL 11506117, at *1 (S.D.Fla. Sept. 2, 2010) (Gold, A.) (Judge Gold stayed his own order and found that movant had a “substantial case on the merits,” even where he determined that non-movants were “likely to succeed on the merits” when issue on appeal had not yet been addressed by the Eleventh Circuit (or any other circuit for that matter)); *Noriega v. Pastrana*, 2008 WL 331394, at *3 (S.D.Fla. Jan. 31, 2008) (Huck, J.) (staying proceeding where appeal involved credible arguments as to interpretations of the law); *Kowalski v. Jackson National Life Insurance Company*, 2014 WL 11531364, at *2 (S.D.Fla. Jan. 22, 2014) (Cohn, J.) (staying proceeding pending appeal when there was a “paucity of case law” on the issue on appeal); *In re Extradition of Hurtado-Hurtado*, 2009 WL 1444509, at *1 (S.D.Fla. May 21, 2009) (O’Sullivan, J.) (same).

Mr. Dorfman has a substantial case on the merits that: (i) the FTC is not authorized to obtain the disgorgement or restitution in proceedings, such as this one, brought pursuant to Section 13(b) of the FTC Act; and (ii) the FTC is not authorized to obtain injunctions and related relief, such as the Asset Freeze and Receivership, to restrain assets for the benefit of disgorgement or restitution in this proceeding. As more fully discussed in Mr. Dorfman’s opposition to entry of a preliminary injunction (the “**Opposition**”) [DE 104] and *Motion to Dismiss* (the “**Motion to Dismiss**”) [DE 134], a line of recent binding and persuasive precedent from the United States Supreme Court,² Eleventh Circuit Court of Appeals,³ and Ninth Circuit Court of Appeals,⁴ highlights that courts in this circuit and beyond have previously wrongly determined that FTC may obtain disgorgement and restitution remedies in actions brought pursuant to Section 13(b) of

² *Kokesh v. SEC*, 137 S.Ct. 1635 (2017); *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002); and *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

³ *SEC v. Graham*, 823 F.3d 1357 (11th Cir. 2016).

⁴ *FTC v. AMG Capital Management*, 910 F.3d 417 (9th Cir. 2018).

the FTC Act. Pursuant to that same and related precedent, Mr. Dorfman highlighted that the Court cannot issue injunctive relief to restrain the Defendants' assets for the benefit of those remedies which the FTC is not authorized to obtain in this proceeding.

As Mr. Dorfman acknowledged in the Motion to Strike and Motion to Dismiss, Mr. Dorfman's arguments relying on the legal authorities cited therein as to why the FTC is not entitled to disgorgement or restitution, or an asset freeze or receivership in furtherance of those remedies, are novel, complex, and have not yet been considered by other courts (let alone courts in this Circuit) in the manner synthesized by Mr. Dorfman. Nonetheless, Mr. Dorfman's argument is credible and involves "serious legal questions." In other words, Mr. Dorfman has a "substantial case on the merits" that, applying recent binding and persuasive precedent, the FTC lacks the authority to obtain disgorgement or restitution in Section 13(b) actions or an asset freeze or receivership to restrain the Defendants' assets for the benefit of those remedies.

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

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

Absent a stay of this proceeding pending a final determination by the appellate court as to whether the FTC can obtain disgorgement or restitution in this proceeding and an injunction or receivership to restrain the Defendants' assets in furtherance of those remedies, the FTC or Receiver may attempt to liquidate all of the Defendants' assets so that they can be distributed to the U.S. Treasury, the Defendants' customers, and other entities. A liquidation of and distribution

of any of Mr. Dorfman's assets will be irreversible and constitute "irreparable harm." Additionally, absent a stay, Mr. Dorfman will incur substantial costs and expenses, including attorneys' fees, associated with defending the fallacious allegations in this action and wrongfully sought legal relief. These substantial costs and expenses will largely be unnecessary if the appellate court determines that the FTC is not entitled to disgorgement or restitution in this proceeding.

The substantial prejudice to Mr. Dorfman in the absence of a stay is also highlighted by the FTC's recent Notification Motion, through which it seeks to create an absurd default that requires Defendant Simple Health's customers to "opt in" to keep their insurance policies or, otherwise, have them automatically cancelled. To make matters worse, the FTC in its notice and motion calls the health insurance policies at issue "fraudulent" and "deceptive." If that relief is granted, it will almost certainly cause many customers, including long-time customers who are satisfied with their health insurance plans and fully cognizant of the benefits afforded to them, to cancel or fail to renew those plans due to the FTC's notices. This will cause substantial damages to the Defendants in the form of lost revenue and increased damage figures that the FTC, Receiver, and other entities will try to pin to the Defendants. The FTC's requested relief is clearly a ruse to cause increased cancellations of the health insurance plans at issue in this case and then use those cancellations as "evidence" that the Defendants acted deceptively. The Court should reject the FTC's dilatory efforts.

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

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

D. Staying this Proceeding Will Serve the Public Interest.

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

WHEREFORE, Defendant, Steven Dorfman, respectfully requests an Order of the Court, substantially in the form annexed hereto, staying this proceeding in its entirety pending final resolution of the appeal and for all further relief that the Court deems just and proper.

Local Rule 7.1(a)(3) Certificate

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

Dated: May 23, 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.

/s/ Ryan D. O'Quinn

Ryan D. O'Quinn

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Case No.: 18-cv-62593-DPG

**ORDER GRANTING DEFENDANT STEVEN DORFMAN'S MOTION
TO STAY PROCEEDING PENDING FINAL RESOLUTION OF APPEAL**

THIS MATTER came before the Court upon the *Motion to Stay Proceeding Pending Final Resolution of Appeal* (the "**Motion**") [DE __] filed by Defendant Steven Dorfman. The Court, having considered the Motion and record before it and finding good cause **ORDERS:**

1. The Motion is **GRANTED**.
2. This proceeding is stayed in its entirety pending final resolution of Mr. Dorfman's appeal [DE 140] of the Preliminary Injunction [DE 139].

DONE AND ORDERED in Chambers at Miami, Florida, this ___ day of May, 2019

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE