

**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 DISSOLVE PRELIMINARY INJUNCTION**

Defendant, Steve Dorfman (“**Dorfman**”), through undersigned counsel, pursuant to 15 U.S.C. 53(b), i.e., Section 13(b) of the FTC Act, moves to dissolve the preliminary injunction (the “**Preliminary Injunction**”) [DE 139] and states:

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, 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 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 also continued a receivership against the corporate Defendants and asset freeze of all of the Defendants’ assets.

As of even date, the FTC has not initiated an administrative proceeding against Mr. Dorfman or any of his co-Defendants.

Section 13(b) of the FTC Act authorizes the FTC to seek a preliminary injunction in United States District Court to enjoin conduct that it believes violates the FTC Act. *See* 15 U.S.C. § 53(b). As detailed in Mr. Dorfman’s *Motion to Dismiss* [DE 134] and *Motion to Strike TRO* [DE 123], Section 13(b) proceedings are intended to merely be “stop gap” proceedings to immediately enjoin potentially unfair or deceptive trade practices while the FTC initiates an administrative proceeding pursuant to Section 19b of the FTC Act, where, with the benefit of substantial procedural safeguards, it is authorized to seek more robust remedies such as disgorgement, restitution, rescission, and reformation.

Highlighting the “stop gap” nature of a Section 13(b) injunction, Section 13(b) of the FTC Act explicitly requires a preliminary injunction must be immediately dissolved if the FTC fails to file an administrative proceeding pursuant to Section 19b of the FTC Act against the enjoined defendants within 20 days of entry of the preliminary injunction:

[T]he Commission . . . may bring suit in a district court of the United States to enjoin such act or practice. Upon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant¹, a temporary restraining order or a preliminary injunction may be granted without bond. [The First Provision:] *Provided, however, [t]hat if a complaint is not filed within [20 days] after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: [the “First Provision”]* *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction [(the “Second Provision”)].

15 U.S.C. 53(b) (emphasis in original and supplied). To be sure, the “complaint” that the FTC must file within 20 days of entry of a preliminary injunction in order to avoid dissolution of the

¹ *The FTC improperly sought the temporary restraining order [DE 15] against Mr. Dorfman and his co-Defendants ex parte, without notice to any of the defendants, in violation of the explicit notice requirement in the FTC Act.*

preliminary injunction is an administrative complaint pursuant to Section 19 of the FTC Act. *See also FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, n. 2 (11th Cir. 1984) (FTC authorized to obtain preliminary injunction pursuant to Section 13(b) pending issuance of administrative complaint); *U.S. v. National Dynamics Corp.*, 525 F.Supp. 380, 381 (S.D.N.Y. 1981) (“Section 13(b) conditions the continuance of a temporary restraining order or a preliminary injunction upon the prompt issuance by the Commission of an administrative complaint . . .”); *U.S. v. JS & A Group, Inc.*, 716 F.2d 451, 456 (7th Cir. 1983) (Section 13(b) of the FTC Act requires the FTC to timely initiate an administrative cease and desist proceeding following entry of a preliminary injunction); *FTC v. Shire ViroPharma Inc.*, 2018 WL 1401329, at *3 (D.De. March 20, 2018) (*citing FTC v. Commonwealth Marketing Group, Inc.*, 72 F.Supp. 2d 530, 525 (W.D.Pa. 1999) (FTC is authorized to seek preliminary injunctive relief *in aid of* administrative proceeding and preliminary injunctions are authorized pending issuance of administrative complaint) (collecting cases)).

As of 20 days from entry of the Preliminary Injunction, i.e. June 3, 2019, and through today, the FTC failed to issue an administrative complaint against the wrongful conduct alleged in this proceeding. Accordingly, pursuant to the express requirements of Section 13(b) of the FTC Act, the Court must dissolve the Preliminary Injunction.

The FTC may argue that, pursuant to *U.S. Oil & Gas Corp.*, it is absolved of its statutory obligation to initiate a Section 19b administrative proceeding within 20 days of entry of the Preliminary Injunction. *See U.S. Oil & Gas Corp.*, 748 F.2d at 1433-34 (holding that, in some cases, the court has authority to issue an asset freeze and appoint receiver incident to its statutory authority to issue a permanent injunction under Section 13(b)). Yet, the Eleventh Circuit’s *U.S. Oil & Gas* decision relied on the Supreme Court’s 1946 decision in *Porter v. Warner Holdings*, a decision in which the Supreme Court provided that, absent statutory limitations, district courts have virtually unlimited equitable powers. *Id.* at 1434 *citing Porter v. Warner Holding Co.*, 328

U.S. 395, 397-98 (1946). Fifty years after it issued *Porter*, the Supreme Court issued its decision in *Meghrig v. KFC Western, Inc.*, reversing *Porter* and severely curtailing District Court's broad equitable powers. See *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 487-88 (1996) ("where Congress has provided 'elaborate enforcement provisions . . . it cannot be assumed that Congress intended to authorize by implication additional judicial remedies . . .'" and "it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be wary of reading others into it."); see also, *U.S. v. Apex Oil Co*, 579 F.3d 734, 737 (7th Cir. 2009) (finding that courts' broad interpretation of their equitable powers "are dead after *Meghrig*").

The Court should not rely on *U.S. Oil & Gas*, as doing so render the First Provision of Section 13(b) a 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). The law presumes that Congress acts more purposefully 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."). Indeed, if the Court interprets the Second Provision of Section 13(b), authorizing the FTC to seek a *permanent* injunction, to also authorize the FTC to seek and obtain a preliminary injunction, asset freeze, and receivership, it renders the First Provision of Section 13(b), which explicitly authorizes the FTC to seek a *preliminary* injunction and requires that the FTC initiate an Section 19b administrative cease and desist proceeding within 20 days of obtaining that preliminary injunction, and Section 19b of the FTC Act meaningless. Under the FTC's interpretation, it would never have to initiate a Section 19b administrative proceeding when seeking an injunction because it could

assert in every one of its proceedings that it is seeking a permanent injunction (in addition to a preliminary injunction) and, hence, need not comply with the explicit, simple requirements of the First Provision of Section 13(b). This interpretation is patently absurd and would allow the FTC to bypass the due process requirements that Congress intentionally embedded into the FTC Act. The FTC should not be allowed to elevate itself over a co-equal branch of government.

Lastly, the Court cannot now adopt a new basis for the relief issued, as the Preliminary Injunction in this case was expressly issued upon the FTC's motion for *preliminary* relief not *permanent* relief. See FTC's motion for a preliminary injunction [DE 3].

WHEREFORE, Mr. Dorfman respectfully requests an Order of the Court, substantially in the form annexed hereto, dissolving the Preliminary Injunction and for all further relief that the Court deems just and appropriate.

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: June 4, 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