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**

STEVEN DORFMAN'S RESPONSE IN OPPOSITION TO THE FEDERAL TRADE COMMISSION'S MOTION TO STRIKE AFFIRMATIVE DEFENSES AND JURY DEMAND

Defendant, Steven Dorfman ("**Dorfman**"), through undersigned counsel, files this response in opposition to the *Motion to Strike Defendant Steven Dorfman's Affirmative Defenses and Jury Demand* (the "**Motion to Strike**") [D.E. 198] filed by Plaintiff (the "**FTC**"), the Federal Trade Commission.

Through the Motion to Strike, the FTC asks the Court to strike Dorfman's affirmative defenses (collectively, the "**Affirmative Defenses**") and jury demand. The Motion to Strike must be denied because: (i) (a) the Affirmative Defenses are related to the FTC's claims, (b) the FTC has not shown how it is being prejudiced by inclusion of the Affirmative Defenses, and (c) the Affirmative Defenses are legally sufficient; and (ii) Dorfman is entitled to a jury trial because the monetary relief that the FTC seeks in this proceeding, restitution and disgorgement, are "legal" remedies, for which Dorfman is entitled to a jury trial. In further support of this response, Dorfman states:

I. Dorfman's Affirmative Defenses should not be stricken.

The FTC's efforts to strike Dorfman's Affirmative Defenses must be denied for each of a number of independent reasons, including: (i) Dorfman's Affirmative Defenses are not frivolous; (ii) the FTC has not shown how it would be prejudiced if the Affirmative Defenses are not stricken; and (iii) through the Motion to Strike, the FTC merely disputes the law supporting the Affirmative Defenses, which should be decided at a *later* stage in this litigation.

Striking affirmative remedies is a *drastic remedy* that is disfavored and motions to strike should be denied unless it is clear that the defenses could not succeed under *any* circumstances. *Augustus v. Bd. of Public Instruction of Escambia Cty., Fla.*, 306 F.2d 862, 868 (5th Cir. 1962). For a movant to prevail on a motion to strike, it must show that challenged defenses "are [1] so unrelated to plaintiff's claims as to be unworthy of any consideration as a defense and [2] that their presence in the pleading throughout the proceeding will be prejudicial to the moving party." *Fla. Strawberry Festival, Inc. v. ACE Am. Ins. Co.*, 2014 WL 11762612, at *1 (S.D.Fla. Feb. 14, 2014) (quoting 5C Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil § 1380 (3d ed. 2008)); *see also, Equal Employment Opportunity Comm'n v. First Nat'l Bank,* 614 F.2d 1004, 1008 (5th Cir. 1980) (an affirmative defense will be held insufficient as a matter of law only if it appears that the defendant cannot succeed under any set of facts which it could prove.). Moreover, disputed questions of fact or law should generally not be decided on a motion to strike. *Augustus*, 306 F.2d at 868. Rather, those issues should be tested at a later stage of litigation. *Merrill Lynch Bus. Fin'l Svcs. v. Performance Machine System U.S.A., Inc.*, 2005 WL 975773 , at 11 (S.D.Fla. March 4, 2005).

The Motion to Strike must be denied because the Affirmative Defenses are all related to the FTC's claim that Dorfman deceived consumers. The FTC's case focuses on Dorfman's and

his co-Defendants' alleged misrepresentations to consumers that: (i) the products the Defendants sold were comprehensive health insurance and are qualified health plans under the Affordable Care Act; (ii) the Defendants were experts on government-sponsored health insurance plans; and (iii) the Defendants were affiliated with AARP and the Blue Cross Blue Shield Association. *See* Motion to Strike, p. 6-7. Dorfman's Affirmative Defenses are all directed at those allegations and fall into the following categories: (i) the defendants' statements were not "deceptive," *see* Affirmative Defenses 1 (puffery), 2 (disclaimers), 4 (First Amendment), 5 (vagueness), and 8 (statements in the FTC complaint were made by third parties); and (ii) the FTC's claims/sought relief are not actionable, *see* Affirmative Defenses 6 (lack of authority to obtain monetary relief), 7 (failure to state a claim), and 9 (reverse preemption). In sum, Dorfman's Affirmative Defenses are not "so unrelated to [the FTC's] claims as to be unworthy of any consideration as a defense." To the contrary, Dorfman's Affirmative Defenses are directly related to the FTC's claims. Accordingly, the Motion to Strike must be denied on this ground.

The Motion to Strike the Affirmative Defenses must also be denied because the FTC failed to identify how it will be prejudiced if the Affirmative Defenses are not stricken. *See Fla. Strawberry Festival, Inc.*, 2014 WL 11762612, *1 (requiring a plaintiff to show prejudice to it as a condition for striking affirmative defenses); *FTC v. Rawalins & Rivera, Inc.*, 2007 WL 1730091, *2 (M.D.Fla. June 14, 2017) (declining to strike affirmative defenses that arguably duplicate denials made in the answer because there was no prejudice to the FTC); *FTC v. Affiliate Strategies, Inc.*, 2010 WL 11470103, *3 n. 33 (D.Kan. June 8, 2010) (declining to strike affirmative defenses where FTC failed to show that refusal to do so would prejudice it)(collecting cases). Indeed, even if the Court determines that any of the Affirmative Defenses "are more in the nature of a general denial than an affirmative defense, the proper course is to treat them as such, rather than to strike

them, unless it would prejudice the plaintiff." *Achievement & Rehabilitation Centers, Inc. v. City of Lauderhill*, 2012 WL 6061762, *1 (S.D.Fla. Dec. 6, 2012). The only "prejudice" that the FTC claims it will suffer if the Affirmative Defenses are not stricken is that it will have "to expend time and resources to litigate" the Affirmative Defenses. Motion to Strike, p. 5. This unsupported conclusion fails to identify any unique prejudice. Instead, tellingly, the FTC makes the same unsubstantiated claim of "prejudice" that every other plaintiff seeking to strike affirmative defense makes. However, that is not enough to deprive Dorfman of his defenses. Put simply: the FTC failed to identify what additional resources it would need to expend to litigate the Affirmative Defenses. This deficiency alone requires denial of the Motion to Strike.

Finally, it would be inappropriate to strike Dorfman's Affirmative Defenses on the basis that the FTC disputes their underlying basis as trial courts should not determine "questions of law upon a motion to strike." *Augustus*, 306 F.2d at 868. Indeed, many courts have recognized that Dorfman's Affirmative Defenses are viable defenses to the FTC's claims:

- **Affirmative Defense 1 (Puffery):** *See FTC v. National Urological Group, Inc.*, 2013 WL 12328294, *10 (N.D.Ga. Aug. 8, 2013) (recognizing puffery as a defense).
- **Affirmative Defense 2 (Disclaimers):** *See FTC v. World Patent Marketing*, 2017 WL 3508639, *13 (S.D.Fla. Aug. 16, 2017) (recognizing that "disclaimers" as a defense).
- **Affirmative Defense 3 (Good Faith)**: *See FTC v. USA Financial, LLC*, 2009 WL 10671254, *2 (denying FTC's motion to strike good faith defense).
- **Affirmative Defense 6 (FTC Lacks Authority to Obtain Disgorgement or Restitution)**: Although the FTC has argued throughout this proceeding that it has the unfettered right to obtain disgorgement, restitution, and other monetary relief in Section 13(b) cases, such as this one, the parties are litigating that exact issue before the Eleventh Circuit Court of

Appeals. *See FTC v. Steven Dorfman*, Case No. 19-11932, 11th Circ. Further, only days ago the Seventh Circuit Court of Appeals held that the FTC is not authorized to obtain monetary relief, including disgorgement and restitution, in proceedings brought by the FTC pursuant to Section 13(b) of the FTC Act, such as this one. *See FTC v. Credit Bureau Center*, --- F.3d ----, 2019 WL 3940917, *18 (7th Cir. Aug. 21, 2019) (holding that Section 13(b) of the FTC Act "***does not authorize monetary relief***.") (emphasis supplied), a copy of which is attached hereto as **Exhibit "A."**

- **Affirmative Defense 7 (Failure to State a Claim)**: *See FTC v. Mazzoni & Son, Inc.*, 2007 WL 2413086, *2 (E.D.Mich. Aug. 14, 2007) (refusing to strike affirmative defense of failure to state a claim because there was no prejudice to the FTC); *FTC v. Rawlins & Rivera, Inc.*, 2007 WL 1730091, *3 (M.D.Fla. June 13, 2007) (refusing to strike affirmative defense of failure to state a claim because issue was better reserved for consideration later in the proceedings).

II. Dorfman's jury demand should not be stricken.

The FTC objects to Dorfman's jury demand because it claims that it is only seeking "equitable" remedies in this proceeding. *See* Motion to Strike, p. 13-15. The FTC is wrong: the FTC's sought disgorgement and restitution remedies are *legal* remedies, which Dorfman is entitled to have a jury determine whether he is liable for.

Despite a historical practice of labeling disgorgement and restitution as "equitable" remedies, a growing choir of courts has held that they are actually "legal" remedies. 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 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 Supreme Court 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, disgorgement or restitution are only considered "equitable relief" where they return "money or property" that can be specifically identified and traced to the defendant's wrongdoing to its rightful owner. *Id.* at 213. 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.* (internal citations omitted); *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.

Further, more recently, in *Kokesh*, the Supreme Court added that a judicial action is a penalty, and thus a "legal" remedy, if: (1) "the wrong sought to be redressed is a wrong to the public," not to an individual; and (2) 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. Using that rubric, as to the first factor, the Supreme Court found that disgorgement seeks to redress public wrongs because it "is imposed by courts as a consequence for violating . . . public laws." *Id.* 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."). As to the second factor, the Court ruled that 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 Supreme Court also emphasized that disgorgement is not compensatory since the government does not have a statutory obligation to return disgorged funds to victims and a substantial portion of the funds tend instead to be paid to the United States Treasury. *Id.* at 1644.

In sum, the Supreme Court established a clear framework 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, or correct a public wrong, it qualifies as a penalty, which is also necessarily a *legal* remedy. Here, the FTC has not, cannot, and claims it need not specifically trace alleged consumer-victims' assets in the hands of the Defendants. Accordingly, the FTC's sought disgorgement and restitution are indisputably *legal* remedies under Supreme Court precedent.

Reinforcing the non-equitable nature of FTC disgorgement and restitution, the year after *Kokesh* was decided, the Ninth Circuit Court of Appeals analyzed whether disgorgement or restitution under Section 13(b) of the FTC Act is a "legal" or "equitable" form of relief. *See FTC v. AMG Capital Management*, 910 F.3d 417 (9th Cir. 2018). In his concurrence to the majority decision that he drafted, Judge O'Scannlain stated that absent contrary Ninth Circuit precedent, which he was bound to follow and could only be overturned by the Ninth Circuit sitting *en banc,* Judge O'Scannlain drafted a detailed analysis of why FTC disgorgement and restitution are penalties, a form of legal relief, that do not fall within Section 13(b)'s injunctive powers. *Id.* at 435-437.[1]

Based on the foregoing, as the monetary relief that the FTC seeks in this proceeding has increasingly been recognized as "legal," not "equitable," relief, Dorfman is entitled to a jury trial in this proceeding.

Finally, even if the Court believes, despite the rapidly-evolving jurisprudence that holds to the contrary, that the monetary relief that the FTC seeks in this proceeding is "equitable," the Court should not strike the jury demand because that issue is currently pending before and fully briefed in the Eleventh Circuit Court of Appeals. *See Dorfman v. FTC*, 19-11932, 11th Cir.. That appeal divests this Court of the jurisdiction to determine whether the FTC's sought monetary relief is "equitable" and, regardless, a stay of a decision on this issue is necessary to avoid inconsistent rulings between this Court and its appellate court.

[1] 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, Judge O'Scannlain 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.* Hence, the Ninth Circuit concluded that restitution "bears all the hallmarks of a penalty." *Id.* (*citing Kokesh*, 137 S.Ct. at 1644).

WHEREFORE, Defendant, Steven Dorfman, respectfully requests an Order of the Court, substantially in the form annexed hereto, denying the Motion to Strike and for all further relief the Court deems just and proper.

Dated: September 4, 2019

DLA Piper LLP (US)

/s/ Ryan D. O'Quinn

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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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