UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

FEDERAL TRADE COMMISSION, Plaintiff, v. SIMPLE HEALTH PLANS LLC, a Florida limited liability company, et al., Defendants.	**Case No.: 18-cv-62593-DPG**

PLAINTIFF FEDERAL TRADE COMMISSION'S OPPOSITION TO DEFENDANT DORFMAN'S MOTION TO DISSOLVE PRELIMINARY INJUNCTION

Defendant Dorfman's shallow analysis of the Supreme Court's recent decision in *AMG Capital Management v. FTC* in his motion to dissolve the preliminary injunction ignores that (1) Section 13(b) of the FTC Act continues to authorize preliminary and permanent injunctions, and (2) Section 19 explicitly and independently supplies a basis for the FTC to seek monetary relief for rule violations. Together, these two provisions fully support the preliminary injunction with asset freeze that has been in effect in this case since April, 2019.

The question presented to the Supreme Court in *AMG* was whether the "statutory language [of Section 13(b) of the FTC Act]" authorizing a "permanent injunction" also "authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement." 593 U.S. __, Case No. 19-508, slip op at 1, 2021 WL 1566607, *2 (Apr. 22, 2021). The Court concluded that it does not. *Id*. But far from "abrogat[ing] the entire legal basis" for the preliminary relief entered in this case, the Supreme Court's decision did not disturb the FTC's ability to obtain preliminary and

permanent injunctive relief pursuant to Section 13(b). 15 U.S.C. § 53(b). That decision also did not impact the availability of monetary relief to "redress injury to consumers" for FTC rule violations pursuant to Section 19 of the FTC Act. 15 U.S.C. § 57b. Thus, *AMG* does not support Dorfman's misguided attempt to dissolve the Court's preliminary injunction under the facts here.

I. BACKGROUND AND PROCEDURAL HISTORY

The FTC alleges in this action that Dorfman and his companies engaged in a deceptive telemarketing scheme that violated both Section 5 of the FTC Act, 15 U.S.C. § 45(a), and the Telemarketing Sales Rule ("TSR"), 16 C.F.R. Part 310, as amended. Pursuant to Sections 13(b) and 19 of the FTC Act, the FTC seeks monetary relief for Dorfman's victims and a permanent injunction barring Dorfman and his companies from engaging in certain practices. ECF No. 289. To preserve the status quo during litigation, the FTC sought a preliminary injunction to do three things: (1) enjoin the alleged misconduct, (2) freeze Defendants' assets, which are dwarfed by the hundreds of millions of dollars in consumer injury they caused with their unlawful telemarketing scheme, for eventual redress to consumers, and (3) appoint a receiver over the companies to ensure compliance with the preliminary injunction. After a daylong evidentiary hearing and considering volumes of evidence in support of the FTC's claims against Defendants, the Court granted the FTC's motion. ECF No. 139.

In so doing, the Court found that Dorfman was the "mastermind" of a "classic bait and switch scheme" that defrauded thousands of consumers out of millions of dollars and left them uninsured. ECF No. 139 at 21. The Court expressly found that Dorfman and his companies collected millions of dollars in ill-gotten gains by deceiving these

consumers. *Id*. at 21-23. The Court-appointed receiver's report concluded that the companies could not operate lawfully and profitably, and the Court found "a continued need for the Receiver in this action to preserve assets and maintain the status quo." *Id*. at 24. Both the "vast disparity" between Defendants' "substantial ill-gotten gains" and the frozen assets, as well as the Court's "concern that Defendants will dissipate the assets if not enjoined," resulting in less money for consumer redress, strongly supported the asset freeze and receivership. *Id*. at 23. As to likelihood of success on the merits, the Court found that Defendants engaged in deception in violation of both the FTC Act and the TSR. *Id*. at 19-20. Dorfman's motion to dissolve the preliminary injunction does not and could not challenge any of those findings.

II. ARGUMENT

Dorfman's challenge to the preliminary injunction rests on the false premise that the FTC, after *AMG*, can no longer obtain monetary relief in this case. ECF No. 418 at 1. What Dorfman fails to recognize is that the Supreme Court in *AMG* held only that the word "injunction" in Section *13(b)* does not also authorize the FTC to obtain monetary relief under *that* subsection—not that the wholly separate basis the FTC invokes in its complaint to obtain monetary relief under Section *19* of the FTC Act is void. *See* Sec. Am. Compl., ECF No. 289 at ¶¶ 1, 5, 72, and 73. Section 19(a)(1) of the FTC Act authorizes the FTC to bring suits in district court for violations of rules, like the Telemarketing Sales Rule violations alleged in this case. 15 U.S.C. § 57b(a)(1). Section 19(b) empowers the Court to remedy those rule violations by entering "such relief as the court finds necessary to redress injury to consumers," including "the refund of money." 15 U.S.C. § 57b(b).

Where, as here, monetary relief is available, the court's authority to enter a preliminary injunction includes the authority to enter an order freezing assets. The Ninth Circuit confirmed as much in *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1112 (9th Cir. 1982), explaining as follows:

> Because the authority to issue a preliminary injunction rests upon the authority to give final relief, the authority to freeze assets by a preliminary injunction must rest upon the authority to give a form of final relief to which the asset freeze is an appropriate provisional remedy. The Commission says that the preliminary injunction is necessary to preserve the possibility of rescission of contracts and restitution of money obtained by fraud. Rescission is a possible remedy for violation of the Franchise Rule under § 19. Hence, there is a basis for the order freezing assets.

The Eleventh Circuit in *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005), similarly held that an "asset freeze is justified as a means of preserving funds for the equitable remedy of disgorgement." The plain language of Section 19 offers further support, authorizing "such relief as the court finds necessary to redress injury." 15 U.S.C. § 57b(b). For all the reasons set out in the FTC's memoranda in support of a preliminary injunction, an asset freeze and receivership are necessary here to ensure the Court can redress consumer injury at the conclusion of this case.[1] ECF No. 116.

Dorfman's motion ignores all of this, and instead argues that *AMG* somehow deprives this Court of its authority to continue a freeze on his assets as part of the preliminary injunction against him. Dorfman is plainly wrong. Nothing in *AMG* undermines this Court's authority to maintain the preliminary injunction with asset freeze and receivership in this case. Dorfman does not contest, and the Supreme Court did not

[1] Dorfman also assumes that the sole basis for the preliminary injunction against him is to preserve assets for redress to consumers. While that is critical, so is preventing Dorfman from lying to consumers about the sham health insurance plans Defendants sold. ECF No. 139 at 24-25 ("Prohibited Misrepresentations").

consider, the FTC's authority to seek preliminary injunctive relief under Section 13(b), an authority the Eleventh Circuit has repeatedly confirmed.[2] And Dorfman does not dispute, and the Court did not deny, the FTC's authority to obtain monetary relief under Section 19. To the contrary, the Supreme Court in *AMG* explicitly acknowledged that the statutory scheme set out in Section 19 of the FTC Act authorizes monetary relief: "Nothing we say today, however, prohibits the Commission from using its authority under §5 and §19 to obtain restitution on behalf of consumers."[3] 593 U.S. ___, slip op. at 17, 2021 WL 1566607, *8. Dorfman's recently filed notices of supplemental authority in support of his motion to dissolve (ECF Nos. 421, 422) do him no better; in those cases, the availability of relief independent of Section 13(b), including pursuant to Section 19, was not at issue before the courts.

Dorfman fleetingly suggests that the preliminary injunction cannot stand because it was entered before the FTC amended its complaint to add Section 19 as a basis for relief. That is both wrong and completely beside the point at this juncture, because the Second Amended Complaint is the operative complaint. Having already found that the FTC is likely to succeed on the merits of its TSR claim (ECF No. 139 at 20), the preliminary injunction is plainly appropriate as entered. But the Court could also easily

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[2] *See, e.g.*, *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) ("A district court may order preliminary relief, including an asset freeze, that may be needed to make permanent relief possible."); *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431, 1434 (11th Cir. 1984) ("Court's inherent equitable powers may be employed to issue a preliminary injunction, including a freeze of assets, during the pendency of an action for permanent injunctive relief."); *see also Levi Strauss & Co. v. Sunrise Int'l Trading Inc.*, 51 F.3d 982, 987 (11th Cir. 1995) ("A request for equitable relief invokes the district court's inherent equitable powers to order preliminary relief, including an asset freeze, in order to assure the availability of permanent relief.").

[3] The Supreme Court's opinion in *AMG* focuses on Section 19(a)(2) of the FTC Act, which differs from Section 19(a)(1), the applicable subsection here. Unlike Section 19(a)(2), Section 19(a)(1) authorizes the FTC to bring suit directly in district court for a defendant's rule violation and does not require that the FTC proceed administratively before obtaining monetary relief under Section 19(b). 15 U.S.C. § 57b.

modify the preliminary injunction to include Section 19 as a basis for the preliminary relief. *See Brown v. Plata*, 563 U.S. 493, 542 (2011) (court of equity's power to modify injunctive relief is "long-established, broad, and flexible"); *Sea-Land Serv., Inc. v. Int'l Longshoremen's Ass'n of New York*, 625 F.2d 38, 40 (5th Cir. 1980) (district court retains "continuing jurisdiction" to modify preliminary injunctions). The Court's preliminary injunction against settling Defendant Candida Girouard already references Section 19. ECF No. 280 at 3.

The purpose of a preliminary injunction is to maintain the status quo pending a trial on the merits. *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). Maintaining the freeze on Defendants' assets and the receivership over the corporate defendants to preserve the status quo is just as necessary today as it was two years ago. The Court should not permit Defendants to resume misrepresenting to consumers that their "practically worthless" medical discount and limited benefit plans are comprehensive health insurance. Assets should be preserved for ultimate relief to consumers, which Section 19 plainly authorizes the FTC to obtain and this Court to provide. The Receiver's appointment remains necessary to ensure that the substantial corporate assets are not depleted, and to ensure that the conduct prohibitions in the preliminary injunction are followed. Dorfman's effort to stretch *AMG* to dissolve the preliminary injunction so that he can make off with what remains of the millions of dollars he bilked from consumers is no more persuasive now than it was before.[4]

[4] *See FTC v. Simple Health Plans LLC*, 801 F. App'x 685 (11th Cir. Feb. 5, 2020) (affirming injunction); *FTC v. Simple Health Plans LLC*, 792 F. App'x 761 (11th Cir. Feb. 5, 2020) (summarily affirming denial of motion to dissolve).

III. CONCLUSION

Because Dorfman does not challenge the facts supporting preliminary relief and the law regarding injunctions is unchanged, the Court's preliminary injunction was authorized and appropriate when the Court entered it, and it remains so. Dorfman's motion is baseless and should therefore be denied.

Dated: April 30, 2021

Respectfully submitted,

/s/ Joannie Wei

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on April 30, 2021, by the Notice of Electronic Filing, and was electronically filed with the Court via the CM/ECF system, which generates a notice of filing to all counsel of record.

/s/ Joannie Wei
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