UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-CV-62593-GAYLES

FEDERAL TRADE COMMISSION,

Plaintiff,

vs.

SIMPLE HEALTH PLANS LLC, et al.,

Defendants.
_____/

RECEIVER'S RESPONSE TO DEFENDANT STEVEN DORFMAN'S "EMERGENCY" MOTION TO DISSOLVE PRELIMINARY INJUNCTION

Michael I. Goldberg, as court-appointed receiver (the "Receiver") over defendants Simple Health Plans LLC, Health Benefits One LLC, Health Center Management LLC, Innovative Customer Care LLC, Simple Insurance Leads LLC, Senior Benefits One LLC, and their subsidiaries, affiliates, successors, and assigns (collectively, the "Receivership Entities") responds to *Defendant Steven Dorfman's Emergency Motion to Dissolve Preliminary Injunction* ("Motion"; ECF No. 418). Yet again, there is no "emergency" and, yet again, Defendant Steven Dorfman's ("Dorfman") attempt to escape the restraints the Court properly imposed at the outset of this case must be rejected.

PRELIMINARY STATEMENT

"Nothing we say today, however, prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers." *AMG Capital Mgmt., LLC v. F.T.C.*, ___ S.Ct. ___, 2021 WL 1566607 (Apr. 22, 2021). That definitive statement at the conclusion the Supreme Court's decision last week disposes of the Motion – which is entirely based on *AMG Capital* – because not only has no restitution been ordered as of yet, the operative *Second Amended Complaint for Permanent Injunction and Other Equitable Relief* (ECF No. 289) expressly seeks relief under Section 5 and Section

19 of the FTC Act, *see id.* at ¶ 72, and such an amended pleading supersedes and relates back to the filing of the original pleading as a matter of law, *see* Rule 15(c), FED. R. CIV. P. Moreover, in *Lowery v. Alabama Power Co.*, 483 F.3d 1184 (11th Cir. 2007), the Eleventh Circuit expressly rejected the argument that a plaintiff may be held to the prayer for relief in its original pleading, because the "amended prayer for relief supersedes the one contained in the initial complaint." *Id*. at 1219.

Thus, the injunction Dorfman challenges for the umpteenth time remains on a solid legal foundation – and, notably, when Dorfman tried his luck in the Eleventh Circuit in challenging the injunction, that court noted, "Dorfman raises no challenge to the district court's factual findings or to the district court's determination that the FTC satisfied its burden of showing that a preliminary injunction was warranted in this case." *F.T.C. v. Simple Health Plans LLC*, 801 F. App'x 685, 687 (11th Cir. Feb. 5, 2020). Furthermore, this Court functionally rejected Dorfman's exact argument last year, when he and co-defendant Candida Giourard moved for a stay pending the Supreme Court's decision in *AMG Capital*. *See* ECF No. 302. The Court then wrote, "[T]he Supreme Court's decision … will have no bearing on Defendants' liability for violations of the FTC Act and the Telemarketing Sales Rule ('TSR') or whether injunctive relief is warranted. Rather, [it] only relate[s] to whether the FTC may obtain certain forms of penal monetary relief. Moreover, both the FTC and the public would suffer harm if a stay is issued." ECF No. 314 (entered Aug. 2, 2020). Nothing has changed since last August, and the Court's forecast of the consequences of the *AMG Capital* decision was prescient.

Accordingly, on the law and the facts, the existing injunction is proper, and Dorfman's latest challenge must be rejected.

Finally, and in any event, Dorfman's complaint is not even ripe. Dorfman is not *presently* subject to any restitution or disgorgement order under Section 13(b), and – should the Court rule in the Commission's favor – any restitution or disgorgement order will not be pursuant to Section 13(b), but pursuant to the authority of Section 19 and/or the TSR. Until that disgorgement eventuality arises,

Dorfman does not even have a colorable basis to try to use the Supreme Court's decision in *AMG Capital* to dissolve the existing asset freeze so as to enable him spirit away the ill-gotten proceeds from Defendants' established misdeeds.

BACKGROUND

A. The Receivership

On October 29, 2018, the Federal Trade Commission (the "FTC") filed a *Complaint for Permanent Injunction and Other Equitable Relief* ("*Complaint*"; ECF No. 1) against the Receivership Entities and Dorfman (Dorfman and the Receivership Entities are collectively referred to as "Defendants"), under Section 13(b) of the Federal Trade Commission Act (the "FTC Act"), 15 U.S.C. § 53(b), and the Telemarketing and Consumer Fraud and Abuse Act (the "Telemarketing Act"), 15 U.S.C. §§ 6101-6108, alleging the Defendants violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), and the FTC's Telemarketing Sales Rule ("TSR"), 16 C.FR Part 310, as amended. *See generally Complaint*.

On October 31, 2018, this Court entered an *Ex Parte Temporary Restraining Order with Asset Freeze, Appointment of a Temporary Receiver, and Other Equitable Relief, and Order to Show Cause Why a Preliminary Injunction Should Not Issue* (the "TRO"; ECF No. 15), which, among other things, froze Defendants' assets and appointed the Receiver as the temporary receiver over the Receivership Entities, with full powers of an equity receiver. *See id*. The Court entered orders continuing the TRO on multiple occasions. *See* ECF Nos. 18, 30 & 55.

B. The Preliminary Injunction and Dorfman's Appeals

On May 14, 2019, after an evidentiary hearing on the FTC's request for preliminary injunctive relief, the Court entered the *Preliminary Injunction* (ECF No. 139) extending the asset freeze and appointing the Receiver as permanent receiver over the Receivership Entities. *See generally F.T.C. v. Simple Health Plans, LLC*, 379 F. Supp. 3d 1346 (S.D. Fla. 2019).

The *Preliminary Injunction* recognizes that the FTC brought this action for violations of both Section 5(a) and the TSR. *See* 379 F. Supp. 3d at 1352. The *Preliminary Injunction* contains a detailed factual recitation of Defendants' misdeeds and misrepresentations to consumers, based on the evidentiary presentation by the FTC and Dorfman, and also the Receiver's report to the Court. *See* 379 F. Supp. 3d at 1352-1358. The Court found that "Defendants made a series of material misrepresentations that were likely to influence consumers' decisions to purchase Defendant's services. … These implied claims, combined with the express misrepresentations in the scripted sales calls, clearly induced consumers to purchase the plans offered by Defendants." *Id*. at 1360-61. The Court noted that the FTC provided proof that "consumers relied on Defendants' representations that they would be receiving comprehensive health insurance and/or ACA-qualified plans when they paid their premiums." *Id*. at 1361. In summary, the Court found that the FTC established that Defendants had committed fraud and, "the record supports the conclusion that the FTC is likely to succeed on the merits of its FTC Act claim." *Id*. at 1362. Moreover, the Court also found that "the record also supports the conclusion that the FTC is likely to succeed on the merits of its TSR claim. Defendants falsely led consumers to believe that they would receive comprehensive health insurance and/or ACA-qualified plans." *Id.* (emphasis added).

After determining that Defendants were engaged in a common enterprise – *i.e.*, "the same health insurance scam" – and that Dorfman was individually liable, because he was "the mastermind behind the Simple Health bait and switch scheme," which meant that "the FTC is likely to succeed in proving that Dorfman is individually liable," the Court found that "the FTC has met its burden of proving that the equities favor a preliminary injunction against Defendants." *Id*. at 1363. Furthermore, the Court recognized that "[t]he public interest in this case—enjoining conduct that violates the FTC Act and preserving assets that may be used for restitution to victims who have suffered financial losses—is compelling and entitled to great weight." *Id*. (emphasis added).

As part of the relief awarded, the Court ordered an asset freeze. *See id*. at 1364-65. Notably, the Court does not cite Section 13(b) of the Act as the authority. *See id*. Instead, the Court noted that "[t]he Eleventh Circuit has repeatedly upheld the authority of district courts to order an asset freeze to preserve the possibility of consumer redress," and quotes *F.T.C. v. IAB Marketing Associates, LP*, 746 F.3d 1228 (11th Cir. 2014), for the proposition that "'[a]n asset freeze is within the district court's equitable powers.'" *Id*. at 1364 (quoting *IAB Mktg.*, 746 F.3d at 1234). Furthermore, the Court correctly recognized that "'[t]he FTC's burden of proof in the asset-freeze context is relatively light.'" *Id.* (quoting *IAB Mktg.*, 746 F.3d at 1234) (alteration in original). Significantly, *IAB Marketing* does not base its analysis on Section 13(b), which is not even mentioned in the decision. *See generally id*.

Thus, through the *Preliminary Injunction*, the Court concluded that Defendants had violated both Section 5(a) of the Act and the TSR, and imposed an asset freeze pursuant to the Court's general equitable powers.

Dorfman appealed the *Preliminary Injunction* and the Court's denial of his motion to dissolve the *Preliminary Injunction*, and lost both appeals in decisions issued on February 5, 2020. *See F.T.C. v. Simple Health Plans LLC*, 801 F. App'x 685 (11th Cir. Feb. 5, 2020) (affirming injunction); *F.T.C. v. Simple Health Plans LLC*, 792 F. App'x 761 (11th Cir. Feb. 5, 2020) (mem. op.) (summarily affirming denial of motion to dissolve). Dorfman centered both appeals on Section 13(b) of the Act, arguing that Section 13(b) did not authorize restitution, *see* 801 F. App'x at 687, and arguing that the FTC's not filing an administrative proceeding timely after the *Preliminary Injunction* issued required dissolution of the *Preliminary Injunction*, *see* 792 F. App'x at 762.

In both appeals, the Eleventh Circuit rejected Dorfman's arguments, based on the then-established principle that Section 13(b) of the Act authorized a wide range of equitable remedies, including both restitution and disgorgement, as reflected in multiple prior Eleventh Circuit decisions. *See Simple Health*, 801 F. App'x at 687-88; *Simple Health*, 792 F. App'x at 762. Significantly, however,

Dorfman did not challenge any other basis for the *Preliminary Injunction* and, most important, did not challenge any of the Court's factual findings regarding his and the other Defendants' misdeeds. Indeed, the Eleventh Circuit highlighted Dorfman's choice: "As an initial matter, Dorfman raises no challenge to the district court's factual findings or to the district court's determination that the FTC satisfied its burden of showing that a preliminary injunction was warranted in this case." *Simple Health*, 801 F. App'x at 687. Thus, Dorfman centered his appeals on Section 13(b) as his only issue, thereby forgoing and waiving any other challenges he may have had to the *Preliminary Injunction*.

C. The Second Amended Complaint and Dorfman's First Attempt to Rely on *AMG Capital*

On June 23, 2020, the FTC filed the *Second Amended Complaint for Permanent Injunction and Other Equitable Relief* ("*Second Amended Complaint*"; ECF No. 289). The factual allegations remained essentially the same as in the original *Complaint* and the *Second Amended Complaint* similarly relies on Section 19, the Telemarketing Act, and the TSR, in addition to Section 13(b). *See id*. at ¶ 1.

Paragraphs 71 and 72 are under the heading, "THE COURT'S POWER TO GRANT RELIEF." *See id.* at 29. Paragraph 72 expressly seeks relief under Section 19: "Section 19 of the FTC Act, 15 U.S.C. § 57b, and Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), authorize this Court to grant such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the TSR, including the rescission or reformation of contracts, and the refund of money." *See id*. at ¶ 72 (emphasis added). Paragraph 71 seeks relief under Section 13(b). *See id*. at ¶ 71. Consistent with both bases for seeking relief, the "PRAYER FOR RELIEF" seeks relief "pursuant to Sections 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 53(b) and 57b, Section 6(b) of the Telemarketing Act, 15 U.S.C. § 6105(b), and the Court's own equitable powers[.]" *See id.* at ¶ 73.

Thus, the *Second Amended Complaint* is not based solely on Section 13(b) and the relief sought – including, but not limited to "rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies," *id*. at ¶ 73(C) – is not circumscribed by Section 13(b).

On July 10, 2020, Dorfman and co-defendant Giourard moved to stay this action pending the Supreme Court's decision in *AMG Capital*, basing the motion on the grant of certiorari and claiming that the anticipated decision "is certain to be highly relevant—if not entirely dispositive—of the legal issues currently confronting this Court." *See* ECF No. 302 at 5. The Court was not impressed, swiftly denying the motion through a paperless order issued three weeks later, stating:

> The Court, having considered the factors set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009), finds that is stay is not warranted. Defendants have not made a strong showing that they are likely to succeed on the merits or that they will be irreparably injured absent a stay. Indeed, the Supreme Court's decision in the consolidated appeals, *Federal Trade Commission v. Credit Bureau Center, LLC*, and *FTC v. AMG Capital Management, LLC*, will have no bearing on Defendants' liability for violations of the FTC Act and the Telemarking Sales Rule ("TSR") or whether injunctive relief is warranted. Rather, the consolidated appeals only relate to whether the FTC may obtain certain forms of penal monetary relief. Moreover, both the FTC and the public would suffer harm if a stay is issued.

ECF No. 314 (emphasis added). Thus, Dorfman's latest *AMG Capital*-based Motion makes essentially the same argument the Court rejected over eight months ago.[1]

On November 11, 2020, Dorfman answered the *Second Amended Complaint*. *See Defendant Steven Dorfman's Answer and Affirmative Defenses to Second Amended Complaint* (ECF No. 346). Dorfman's vanilla pleading does not challenge either Paragraph 71 or Paragraph 72, contending only that they "contain[] a legal conclusion to which no response is required." *See id*. at ¶¶ 71 & 72. Dorfman does not challenge the applicability of Section 13(b) in specific in any way, *see generally id*., but he does expressly recognize that the FTC seeks relief under both Section 13 and Section 19 of the FTC Act

[1] Perhaps the best way to characterize the Motion is properly as one seeking reconsideration, in which case it falls woefully short of the standard. The Court rejected Dorfman's functionally-identical argument over eight months ago, and Dorfman is trying again. But, "'[a] motion for reconsideration is not an appeal, and thus it is improper on a motion for reconsideration to ask the Court to rethink what the Court has already thought through—rightly or wrongly.'" *Siegmund v. Xuelian*, No. 12-cv-62539, 2016 WL 3186004, *1 (S.D. Fla. June 8, 2016) (Gayles, J.) (quoting *Armbuster v. Rosenbloom*, No. 15-0114, 2016 WL 1441467, at *1 (S.D. Ga. Apr. 11, 2016) (alteration in original). The Court previously "thought through" these issues after full briefing and rejected Dorfman's argument. Thus, to the extent the Motion is deemed a request for reconsideration, it should be denied.

in his (improper) jury demand: "Dorfman is entitled to a trial by jury due to the non-equitable relief that the FTC seeks under either Section 13 or 19b of the FTC Act." *Id*. at 8.

D. The Supreme Court's *AMG Capital* Decision and Dorfman's "Emergency" Motion to Dissolve Preliminary Injunction

On April 22, 2021, the Supreme Court issued its decision in *AMG Capital*, upending some four decades of reliance by the FTC on Section 13(b) as one of its bases to seek restitution or disgorgement. As the Court framed the issue, "The question presented is whether this statutory language [in Section 13(b) authorizing a 'permanent injunction'] authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement." *Id*. at *2 (emphasis added). In short, "[w]e conclude that it does not." *Id*.

Significantly, *AMG Capital* arose in the context where summary judgment had been granted, a permanent injunction entered, and restitution and disgorgement had been ordered. *See id*. The defendant – Tucker – appealed the final orders, arguing "that §13(b) does not authorize the monetary relief the District Court had granted." *Id*. at *3 (emphasis added). The Supreme Court agreed with Tucker, but only up to a point, determining that courts must "read § 13(b) to mean what it says, as authorizing injunctive but not monetary relief" but also noting that "the [FTC] may use § 13(b) to obtain injunctive relief while administrative proceedings are foreseen or in progress, or when it seeks only injunctive relief." *Id.* at *6. Furthermore, in its conclusion, the Court was crystal clear as to the narrowness of its ruling: "Nothing we say today, however, prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers." *Id*. at *8 (emphasis added).

Almost before the ink was dry on *AMG Capital*, Dorfman ran into Court and filed the *Motion*, styling it as an "Emergency" and providing a Local Rule 7.1(d) statement to that effect. *See id*. at 1.[2]

[2] Dorfman's counsel reading of Local Rule 7.1(d) leaves much to be desired, but that is an issue for the Court to address.

Although Dorfman asserts that "[t]he Court relied solely on Section 13(b) of the FTC Act to enter the Preliminary Injunction," *see id.* at 2, that statement is obviously false. *See supra* § B; *see generally Preliminary Injunction*. Operating from this false premise, Dorfman centers the Motion on *AMG Capital*, contending that "[i]n *AMG* the Supreme Court completely abrogated the entire legal basis for the Preliminary Injunction, asset freeze, and receivership. *See Mot.* at 3.

As shown below, Dorfman could hardly be more wrong, and the Motion should be denied.

ARGUMENT

As much as Dorfman wishes the *AMG Capital* decision to be a panacea for his claimed financial ills – *i.e.*, his desire to make personal use of Defendants' ill-gotten gains from consumers in violation of the FTC Act and the TSR – it is not.

I. THE *SECOND AMENDED COMPLAINT* IS THE OPERATIVE PLEADING AND IT DOES NOT BASE ITS DEMAND FOR RESTITUTION ONLY ON SECTION 13(b)

Dorfman ignores the truth that the *Second Amended Complaint* is the operative pleading, and an amendment supersedes and replaces the prior pleading in full. "An amended pleading supersedes the former pleading; 'the original pleading is abandoned by the amendment, and is no longer a part of the pleader's averments against his adversary.'" *Dresdner Bank AG v. M/V Olympia Voyager*, 463 F.3d 1210, 1215 (11th Cir. 2006) (quoting *Proctor & Gamble Defense Corp. v. Bean*, 146 F.2d 598, 601 n. 7 (5th Cir. 1945)); *see also id.* ("Even if Zernavi's original complaint could be construed to affirm the proposed contract, that pleading was wholly superceded by the amended complaint which proceeded under a different theory."). The Eleventh Circuit has reiterated the principle that an amended pleading replaces a prior pleading in its entirety on multiple occasions in a variety of different contexts. *See*, *e.g.*, *Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) ("So when [plaintiff] filed the second amended complaint, the first amended complaint (and its attached exhibits) became a legal nullity."); *Pintando v. Miami-Dade Housing Agency*, 501 F.3d 1241, 1243 (11th Cir. 2007) ("In this case, once the amended complaint was accepted by the district court, the original complaint was superceded and there

was no longer a federal claim on which the district court could exercise supplemental jurisdiction for the remaining state law claims."); *Fritz v. Standard Sec. Life Ins. Co. of New York*, 676 F.2d 1356, 1358 (11th Cir. 1982) ("Plaintiff … amended his complaint shortly before trial to include a claim for additional insurance payments. … Since the original complaint had been superseded, the district court correctly awarded plaintiff the insurance payments that had accrued through the date of the amended complaint.").

Accordingly, the Motion must be evaluated in the context of the *Second Amended Complaint*, which seeks relief under Section 19 of the FTC Act and Section 6(b) of the Telemarketing Act, in addition to seeking relief under Section 13(b). *See SAC* at ¶¶ 72 & 73; *see also id.* at ¶ 71. Section 19, codified at 15 U.S.C. § 57b, entitles the FTC to a wide range of relief to redress the type of behavior the Court has determined Defendants engaged in:

> The court in an action under subsection (a) shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages."

15 U.S.C. § 57b (emphasis added). Accordingly, irrespective of Section 13(b)'s non-viability of a basis to seek eventual restitution or disgorgement, the same relief is available under Section 19.

On its face, the operative *Second Amended Complaint* is not based solely on Section 13(b) and the relief sought – including, but not limited to "rescission or reformation of contracts, restitution, the refund of monies paid, and the disgorgement of ill-gotten monies," *id*. at ¶ 73(C) – is not circumscribed by Section 13(b).[3] The Eleventh Circuit's decision in *Lowery v. Ala. Power Co.*, 483 F.3d 1184 (11th

[3] For this reason alone, neither of Dorfman's notices of supplemental authority (ECF Nos. 421 & 422) changes the analysis one whit. Dorfman's first "supplemental authority" (ECF No. 421) is an exchange of Rule 28(j), FED. R. APP. P., letters in an appeal. *See* ECF No. 421 at Ex. A. Even if the

Cir. 2007), is instructive, if not dispositive. In arguing that removal on diversity grounds was proper, the defendant argued it could rely on the amount stated in the original complaint, even though the amended pleading stated a lower amount. *See id.* at 1220. The Eleventh Circuit categorically rejected the argument, in language directly applicable here. "[I]t would be improper to bind plaintiffs by the prayer for relief in the initial pleading. Plaintiffs have since amended the prayer for relief, and this amended prayer for relief supersedes the one contained in the initial complaint. Under … federal law, an amended complaint supersedes the initial complaint and becomes the operative pleading in the case." *Id*. at 1219-20 (emphasis added) (citing *Fritz v. Standard Sec. Life Ins. Co. of New York*, 676 F.2d 1356, 1358 (11th Cir.1982)). Similarly here, the *Second Amended Complaint* invokes both Section 13(b) and Section 19 in its Prayer for Relief, *see id*. at ¶ 73, which "prayer for relief supersedes the one contained in" the original *Complaint*. *See Lowery*, 483 F.3d at 1219.

In sum, because the FTC's basis for restitution and disgorgement is not solely Section 13(b), Dorfman's reliance on *AMG Capital* is seriously misplaced, even if the decision had the import Dorfman claims – and it does not as shown below. Accordingly, the Motion should be denied.

II. THE *PRELIMINARY INJUNCTION* ASSET FREEZE IS NOT FOUNDED ON SECTION 13(b) AND *AMG CAPITAL* PROVIDES NO BASIS TO SEEK DISSOLUTION OF THE PRELIMINARY INJUNCTION – OR THE ASSET FREEZE

The Motion is entirely premised on Section 13(b) and *AMG Capital*, but the asset freeze in the *Preliminary Injunction* is not premised on Section 13(b). Furthermore, *AMG Capital* has no bearing on

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Court could properly consider such letters to be "supplemental authority" – which the Receiver doubts – neither letter mentions Section 19. Dorfman's second supplemental authority is a recent Ninth Circuit decision, *FTC v. VPL Medical, Inc.*, ___ F. App'x ___, 2021 WL 166404 (9th Cir. Apr. 28, 2021). *See* ECF No. 422 at Ex. A. The decision does not discuss Section 19 either; it solely discusses Section 13(b). *See generally id.* Similarly, the underlying district court opinion – *F.T.C. v. Cardiff*, No. ED CV18-2104-DMB (PLAx), 2020 WL 3867293 (C.D. Cal. July 7, 2020), *vacated and remanded sub nom. FTC v. VPL Medical, Inc.*, ___ F. App'x ___, 2021 WL 1664404 (9th Cir. Apr. 28, 2021) – only addresses Section 13(b). *See generally id.* Moreover, it does not appear that defendant had any of the problems Dorfman has in this case as detailed in this response, each of which independently bars the relief Dorfman seeks in the Motion.

a *preliminary* injunction, as it arose in the context of a post-summary-judgment *permanent* injunction and award requiring disgorgement and restitution.

First, Section V of the *Preliminary Injunction*, entitled, "An Asset Freeze is Appropriate," does not mention Section 13(b). *See* 379 F. Supp. 3d at 1364-65. Instead, as the Court properly recognized, "'An asset freeze is within the district court's equitable powers.' *IAB Mktg.*, 746 F.3d at 1234. The Eleventh Circuit has repeatedly upheld the authority of district courts to order an asset freeze to preserve the possibility of consumer redress. *See*, *e.g.*, *Id*." 379 F. Supp. 3d at 1364 (other citations omitted). Notably, the Court's primary authority – *IAB Marketing* – is likewise not based on Section 13(b). Like the original *Complaint* here, the complaint in *IAB Marketing* was brought under § 45(a) of the FTC Act and the § 6102 of the Telemarketing Act. *See* 746 F.3d at 1230-31; *see also* ECF No. 1 at ¶ 1. However, *IAB Marketing* does not mention Section 13(b). *See generally id*. Moreover, the FTC's Ex Parte *Motion for a Temporary Restraining Order with Asset Freeze (*etc.*)* (ECF No. 3), was not brought solely under Section 13(b). *See generally id.* Consequently, because the *Preliminary Injunction* is not solely – if at all – based on Section 13(b), Dorfman's Section-13(b)-centered Motion must fail.

Second, all *AMG Capital* does is establish that Section 13(b) may not be used as the basis for an order of disgorgement or restitution, neither of which has occurred in this case. The Supreme Court was clear – and narrow – in its decision: "The question presented is whether this statutory language [of Section 13(b)] authorizes the Commission to seek, and a court to award, equitable monetary relief such as restitution or disgorgement." 2021 WL 1566607 at *2 (emphasis added). The decision does not speak to any other basis for awarding restitution or disgorgement and says nothing about the FTC's power to obtain an asset freeze on a preliminary basis prior to summary judgment or a trial. Indeed, not only does the Court not circumscribe the FTC's ability to obtain preliminary injunctive relief or asset freeze on another basis, the Court's focus was whether "§ 13(b)'s 'permanent injunction' language … authorize[d] the Commission directly to obtain court-ordered monetary relief[,]" and the Court concluded that it

"does not[.]" *See id*. at *4. Moreover, the Court was quite explicit in the limits of its decision, "Nothing we say today, however, prohibits the Commission from using its authority under § 5 and § 19 to obtain restitution on behalf of consumers. … We must conclude, however, that § 13(b) as currently written does not grant the Commission authority to obtain equitable monetary relief." *Id*. at *8. But, here, the FTC has not obtained restitution or equitable monetary relief, it has only obtained a preliminary asset freeze – an issue to which *AMG Capital* does not speak.

* * *

Thus, Dorfman cannot use the *AMG Capital* decision to unlock the vault to his ill-gotten gains, because the *AMG Capital* key does not fit the asset-freeze lock. For this reason also, the Motion should be denied.

III. IT IS LAW OF THE CASE THAT THE *PRELIMINARY INJUNCTION* STANDS

As the Court is aware, Dorfman challenged the *Preliminary Injunction* in the Eleventh Circuit in two separate proceedings, losing twice. *See Simple Health*, 801 F. App'x at 687-88; *Simple Health*, 792 F. App'x at 762. Thus, that the *Preliminary Injunction* was correctly entered is law of the case, at least in the context of Dorfman's Motion.

"Under the law-of-the-case doctrine, [the resolution of] an issue decided at one stage of a case is binding at later stages of the same case." *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307, 1313 (11th Cir. 2000). "Furthermore, the law-of-the-case doctrine bars relitigation of issues that were decided either explicitly or by necessary implication." *This That and the Other Gift and Tobacco, Inc. v. Cobb Cty., Ga.*, 439 F.3d 1275, 1283 (11th Cir. 2006); *see also Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1440 (11th Cir. 1984) (per curiam) (the law of the case doctrine "comprehends things *decided by necessary implication* as well as those decided explicitly") (italics in original). Moreover, "[t]he fact that the earlier panel opinion in this case was decided during the preliminary injunction stage does not impact the applicability of the law-of-the-case doctrine in this case." *This That and the Other*, 439 F.3d

at 1284. *See also Arthur J. Gallagher Service Co. v. Egan*, 567 F. App'x 857, 858 (11th Cir. May 29, 2014) ("in the absence of any new evidence being introduced by the parties on that subject, the doctrine of the law of the case bars us from considering, for a second time, a legal issue that we resolved on appeal of the preliminary injunction").

Here, Dorfman appealed entry of the *Preliminary Injunction* and the Court's denial of his motion to dissolve to the Eleventh Circuit. In both appeals, Dorfman's sole argument was that Section 13(b) did not authorize the *Preliminary Injunction*. *See Simple Health*, 801 F. App'x at 687 ("Dorfman contends … that the district court exceeded its authority under section 13(b) of the FTC Act[.]"); *Simple Health*, 792 F. App'x at 762 ("Dorfman contends that dissolution of the preliminary injunction is required -- pursuant to section 13(b) of the FTC Act, 15 U.S.C. § 53(b) -- because the FTC failed to initiate an administrative proceeding within 20 days after the preliminary injunction issued.").

However, as shown above, Section 13(b) was not the sole basis for the *Preliminary Injunction*. And, Dorfman's two-substantive-page Motion argues no basis for dissolution of the *Preliminary Injunction* except for the asserted invalidity of Section 13(b). *See generally* Motion. That means, of course, that Dorfman's Motion must fail, because the overall validity of the *Preliminary Injunction* has been conceded by Dorfman to the extent it is not founded on Section 13(b) – and, clearly, the *Preliminary Injunction* stands with or without Section 13(b). Again, as the Eleventh Circuit expressly recognized, "Dorfman raises no challenge to the district court's factual findings or to the district court's determination that the FTC satisfied its burden of showing that a preliminary injunction was warranted in this case." *Simple Health*, 801 F. App'x at 687 (emphasis added).

By failing to raise any other challenge to the *Preliminary Injunction* other than the Section 13(b) issue, Dorfman waived all other issues, which means that he cannot raise them now. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 680 (11th Cir. 2014) ("When an appellant fails to challenge properly on appeal one of the grounds on which the district court based its judgment, he is deemed to

have abandoned any challenge of that ground, and it follows that the judgment is due to be affirmed."); *see also*, *e.g.*, *Silva v. Baptist Health South Florida, Inc.*, 838 F. App'x 376, 384 (11th Cir. Dec. 3, 2020) ("Plaintiffs do not directly challenge the district court's findings of fact and conclusions of law regarding their standing to obtain declaratory or injunctive relief. As a result, apart from the arguments we have discussed and rejected above, Plaintiffs have abandoned any challenge to the grounds offered by the district court for its standing determination."); *Elnenaey v. Fidelity Mgmt. Trust Co., Inc.*, 829 F. App'x 482, 484 (11th Cir. Oct. 7, 2020) ("Elnenaey did not argue why it was an error for the court to deny his *ex parte* motion for preliminary injunction. … Because these issues purportedly raised on appeal were not argued more than in passing reference and without citation to authority, they have been waived on appeal."); *SE Property Holdings, LLC v. Center*, 724 F. App'x 927, 928 (11th Cir. May 31, 2018) ("In sum, the defendants argue that the district court had no authority under one source of law [for its permanent injunction], but the district court relied upon a different source of law. Because the defendants' argument fails to address the basis for the district court's ruling, we must reject it.").

Simply stated, Dorfman conceded in the Eleventh Circuit that the *Preliminary Injunction* was properly entered *but for* the Section 13(b) issues. Dorfman's Motion brings nothing more to the table *but for* another Section 13(b) argument. But, neither the *Preliminary Injunction* nor the Eleventh Circuit's validations of the *Preliminary Injunction* were so limited in their foundations to only Section 13(b), and Dorfman waived any right he may have had to challenge the *Preliminary Injunction* on any other basis by raising no other issues in his appeal. Therefore, it is law of the case that the *Preliminary Injunction* stands – including, but not limited to, the asset-freeze aspect.

IV. DORFMAN'S CHALLENGE IS NOT EVEN RIPE

Finally, Dorfman's reliance on *AMG Capital* as a basis to challenge the *Preliminary Injunction* is trying to pound a large square peg into a small round hole. As noted above, *AMG Capital* arose in the context of a post-summary-judgment order of restitution and disgorgement. *See* 2021 WL 1566607 at

*2. "Tucker [the disgorging defendant] argued that §13(b) does not authorize the monetary relief the District Court had granted." *Id*. at *3 (emphasis added). Here, however, this Court has granted no monetary relief under Section 13(b); it has only frozen Defendants' assets as a precursor to a potential eventual grant, as a result of the FTC satisfying every element to be entitled to preliminary injunctive relief – which satisfaction of the elements, it must again be stated, Dorfman did not challenge on appeal. *See Simple Health*, 801 F. App'x at 687. And, as established above, the operative pleading – the *Second Amended Complaint* – is in no way limited to Section 13(b) as the basis for disgorgement or restitution (nor, for that matter, are the original *Complaint* or the *Preliminary Injunction*).

Consequently, Dorfman's claim is not ripe, which means it may not properly be considered at this time. For an issue properly to be considered by the Court, it "must be 'ripe'—not dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Trump v. New York*, 141 S.Ct. 530, 535 (2020) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). "The ripeness doctrine protects federal courts from engaging in speculation or wasting their resources through the review of potential or abstract disputes." *Digital Props. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir.1997); *see also id.* at 591 (First Amendment challenge unripe because "this action only constitutes a potential dispute, and this court has neither the power nor the inclination to resolve it").

Here, the Motion is based on the speculation that *if* the Court grants restitution or disgorgement, and *if* the Court does so based (solely) on Section 13(b), *then* the Supreme Court's *AMG Capital* decision would make that future decision erroneous. The Receiver strongly suspects that the Court would not do so in the face of *AMG Capital* and, in any event, Dorfman's speculation about potential future events shows that the issue at the heart of the Motion is not ripe – and therefore not properly decided at this time.

CONCLUSION

The Receiver respectfully requests that the Court deny the Motion.

Respectfully submitted,

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AKERMAN LLP
201 E. Las Olas Boulevard, Suite 1800
Fort Lauderdale, FL 33301-2999
Phone: (954) 463-2700
Fax: (954) 463-2224

/s/ Christopher S. Carver
Christopher S. Carver, Esq.
Florida Bar Number: 993580
Email: christopher.carver@akerman.com

Naim Surgeon, Esq.
Florida Bar Number: 101682
Email: naimsurgeon@akerman.com

Counsel for Receiver