

No. 19-10840-AA

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

–.3 STEVEN J. DORFMAN,
~~Defendant-Appellant.~~ (T.)1AAAAAAAAAAAAAAAAAAAAA

On Appeal from the United States District Court
for the Southern District of Florida
0:18-cv-62593-DPG (Hon. Darrin P. Gayles)

Eleventh Circuit Rule 26.1 Certificate of Interested Persons

Akerman LLC – Receiver/Counsel for Receiver

Crespo, Janelly – Counsel for Defendant-Appellant

Davis, James – FTC Attorney

DLA Piper LLP – Counsel for Defendant-Appellant

Dorfman, Steven – Defendant-Appellant

Federal Trade Commission – Plaintiff-Appellee

Gayles, The Hon. Darrin P.

Gershoni, Elan – Counsel for Defendant-Appellant

Goldberg, Michael – Receiver

Grossman, Bradley – FTC Attorney

Health Benefits One LLC – Defendant

Health Center Management LLC – Defendant

Innovative Customer Care LLC – Defendant

Levit, Joan – Counsel for Receiver

Marcus, Joel – FTC Attorney

O’Quinn, Ryan – Counsel for Defendant-Appellant

Peoples, Gera – Counsel for Receiver

Scott, Elizabeth – FTC Attorney

Senior Benefits One LLC – Defendant

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Practice & Procedure § 3922.1 (3d ed. 2018); accord *Fernandez-Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982). Therefore, unless the TRO in this case can be interpreted as a preliminary injunction, neither it nor orders pertaining to it are subject to appeal.

Although a TRO can sometimes be deemed a preliminary injunction if it extends beyond 14 days, it remains unappealable when the “adverse party consents to a[n] ... extension.” Fed. R. Civ. P. 65(b)(2). Here, the district court has extended the TRO on several occasions, but Dorfman *consented to or affirmatively requested each of those extensions*. He tried to deny that below and continues to do so now, but as the district court determined, “any reasonable review of this record indicates that [Dorfman] consented to the extension.” 2/22/19 Hearing Tr. (FTC Exh. 15) at 29. As a result, Dorfman may not appeal either the original issuance of the TRO or the district court’s decision not to dissolve it, since

BACKGROUND

A.

“extend[] the TRO until the Court rules on whether a preliminary injunction should be entered in this matter.” D.E. 17 (FTC Exh. 2); D.E. 18.

Eight days after the first continuance, Dorfman’s counsel told FTC counsel that he planned to seek a second continuance. He added, “Of course, an extension of the PI hearing date would contemplate and [sic] extension of the TRO.” D.E. 44-3 (FTC Exh. 4) at 3. The parties then jointly moved to postpone the hearing until at least January 22 and leave the TRO in place until the court’s ultimate ruling. D.E. 27 (FTC Exh. 3). The court granted the motion and set a January 29 hearing date. D.E. 30 (Dorfman Exh. A at 5).

Dorfman later sought and received yet a *third* continuance of the preliminary injunction hearing, this time over the FTC’s opposition. Citing an ongoing privilege dispute,³ Dorfman asked the court to defer the preliminary injunction hearing until an indeterminate time “twenty-eight (28) days after the FTC produces the Required Production,” and he attached a proposed order with a hearing date of 6.9 (s a)3.6 (f)

the TRO had “expired by operation of law” because he had only consented to an extension through January 29. *Id.* at 6, 8, 25. He complained that “[e]ven to the extent there was an unforeseen government furlough, the hearing could still have been held on January 29.” *Id.* at 25.

Dorfman failed to mention that it was *he* who asked the district court—over the FTC’s objection—to indefinitely postpone the January 29 hearing and to extend the TRO until after the rescheduled hearing date. *See supra* pp. 4-5. Dorfman also failed to mention that he had *requested* the April 16 hearing date eleven days earlier. *See supra* p. 6.

At a February 22 hearing, the district court denied Dorfman’s motion to strike the TRO. 2/22/19 Hearing Tr. (FTC Exh. 15) at 28. The court explained that “any reasonable review of this record indicates that the defendant consented to the extension.” *Id.* at 29. Nevertheless, the court advised Dorfman’s counsel that “if you want an earlier date, you are being afforded that opportunity.” *Id.* at 34.

Dorfman never sought an earlier hearing date. Instead, he filed the notice of appeal from the TRO and the district court’s order refusing to strike it. D.E. 85.

E. Dorfman’s Answer To Jurisdictional Question

On March 22, 2019, Dorfman responded to this Court’s Jurisdictional Question by maintaining—as he did before the district court—that his “consent” to the TRO “ended ... on January 29.” Dorfman’s Answer to Jurisdictional Question

to the extension.” 2/22/19 Hearing Tr. (FTC Exh. 15) at 29.⁵ He agreed three separate times to keep the TRO in place until the district court decided “whether a preliminary injunction should be entered in this matter.”⁶ D.E. 17 (FTC Exh. 2); D.E. 27 (FTC Exh. 3); D.E. 50-1 (FTC Exh. 6) at 5. Then, he affirmatively—and over the FTC’s objection—sought to postpone the hearing indefinitely beyond January 29 (D.E. 50 (FTC Exh. 5) at 5; D.E. 55), and eventually asked for a hearing on April 16 (D.E. 75 (FTC Exh. 11)).

Dorfman claimed below that his consent to the TRO expired during the government shutdown (D.E. 79 (FTC Exh. 13) at 25), but the district court properly rejected that theory, which cannot be squared with the record. Before the shutdown, Dorfman had *already* asked the court to postpone the hearing date until at least February 26 and agreed to the TRO’s remaining in force until the ultimate decision on the injunction. D.E. 50 (FTC Exh. 5) at 5; D.E. 50-1 (FTC Exh. 6) at

5

5.⁷ The shutdown ended *four weeks* before Dorfman's proposed February 26 hearing date. D.E 68. But when the district court asked the parties to propose hearing dates after the shutdown, Dorfman chose not to renew his request for a February 26 hearing, but instead requested April 16. D.E. 75

First, Dorfman’s counsel has taken clearly inconsistent positions while governed by a duty of candor to the court.⁸ As discussed above, he persuaded the district court to postpone the hearing and then pulled a U-turn after the court had done so. Second, Dorfman’s denial—both to the district court and now to this Court—that he consented to an extension beyond January 29 would seriously undermine the integrity of the courts’ processes. He successfully moved to postpone the January 29 hearing and he directly agreed to extend the TRO beyond that date. *See supra* pp. 4-5. He expressly asked for the April 16 hearing date, telling the court that the requested day “works for Mr. Dorfman,” and then reversed course just days later. *See supra* p. 6. Third, Dorfman would gain an unfair advantage if he were permitted to appeal the TRO. To this point, the FTC has not had an opportunity to present to the district court all the evidence to support preliminary relief. Similarly, this Court can examine the matter in this appeal only on a highly limited record that places the FTC at a disadvantage.

⁸ His submissions to the district court were governed by Fed. R. Civ. P. 11(b), which “may be fairly analogized to taking a position ‘under oath’ for the purposes of judicial estoppel.” *Valentine-Johnson v. Roche*, 386 F.3d 800, 812 (6th Cir. 2004). *See also Allapattah Servs., Inc. v. Exxon Corp.*, 372 F. Supp. 2d 1344, 1368 n.12 (S.D. Fla. 2005) (same).

II. DORFMAN LACKS STANDING TO CHALLENGE DELAYS IN HOLDING THE PRELIMINARY INJUNCTION HEARING

“To establish appellate standing, a litigant must ‘prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision.’” *United States v. i(9.6 (S)-336.08*

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction and lack of standing.

Respectfully submitted,

ALDEN F. ABBOTT

General Counsel

JOEL MARCUS

Deputy General Counsel

CERTIFICATE OF SERVICE

I certify that on March 27, 2019, I filed the foregoing with the Court's appellate CM-ECF system, and that I caused the foregoing to be served through the CM-ECF system on counsel of record for defendant-appellant, who are registered ECF users.

Dated: March 27, 2019

/s/ Bradley Grossman
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