No. 19-10840AA

IN THE UNITED STATES COURT OF APPEALS
FOR

Eleventh Circuit Rule 26.1 Certificate of Interested Persons

Akerman LLC – Receiver/Counsel for Receiver

Crespo, Janelly – Counsel for Defendant-Appellant

Davis, James –

Simple Health Plans LLC – Defendant

Simple Insurance Leads LLC – Defendant

Surgeon, Naim – Counsel for Receiver

Ward, Guy – FTC Attorney

Wei, Joannie – FTC Attorney

The Federal Trade Commission further states that, to the best of its

Even if the appeal could deprive the district court of jurisdiction over the question of monetary relief, the only issue Dorfman presents here, the court would retain jurisdiction over other aspects of the preliminary injunction proceeding, including a behavioral injunction and notification to Dorfman's victims. The district court can resolve [illegible] upon

point, and his legal argument that the FTC may not secure equitable monetary relief is flatly inconsistent with established precedent of this Court, *see* *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 468-70 (11th Cir. 1996).

Dorfman's claims of irreparable injury—principally, that holding the hearing will defame him and that he does not want to incur the costs involved—are risible. By contrast, staying the proceeding would severely harm victims of Dorfman's health insurance scam, who have already lost more than $150 million and many of whom are still paying monthly fees, unaware that their insurance is worthless. As the district court observed, "there is actually a great danger of irreparable harm to the public if the Court does not proceed with this hearing." 3/20/19 Hearing Tr. (FTC Exh. 15) at 16.

BACKGROUND

A. The FTC's Action Against Dorfman

The FTC's complaint charges Dorfman and his business[1] with selling useless "insurance" to tens of thousands of Americans in a classic bait-and-switch scheme. D.E. 1[2]

Consumers who incurred large medical bills learned too late that they lacked conventional health insurance, but had only discount memberships and limited benefit plans that did not nearly live up to the promises made. Id. ¶¶ 20, 53. Dorfman had charged monthly "premiums" of up to $500 (id. ¶¶ 38-39, 52) for products that failed to cover routine medical expenses and in some cases left

B. Dorfman's Three Requests To Extend The TRO

As we discuss more fully in our response to the Jurisdictional Question, Dorfman

date of February 26 at the earliest. D.E. 50 (FTC Exh. 6) at 5; D.E. 50-1 (FTC Exh. 7) at 5. The FTC objected because

counsel emailed chambers to verify that the April 16 hearing date "works for Mr. Dorfman" and he declared that it would "provide both parties sufficient time to prepare for the hearing." D.E. 96-1 (FTC Exh. 14) at 1. The court accepted Dorfman's recommendation and extended the TRO until the hearing date. D.E. 76 (FTC Exh. 13).

D. Dorfman's Motion To Strike The TRO

Eleven days later, Dorfman turned about-face and demanded that the court immediately strike the TRO because the court had taken too long to conduct the hearing. D.E. 79 (Dorfman Exh. A). Dorfman contended that the TRO had

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Dorfman also asked the court to lift the TRO's asset freeze on the ground that the FTC lacks authority to obtain monetary relief under 15 U.S.C. § 53(b). D.E. 79 (Dorfman Exh. A) at 9-24.

At a February 22 hearing, the district court denied Dorfman's motion to strike the TRO. 2/22/19 Hearing Tr. (Dorfman Exh. C) 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 31. The court also rejected Dorfman's argument that it lacked authority to freeze his assets. Id. at 29. Dorfman never sought an earlier hearing date, but instead filed a notice of appeal from the TRO and the district court's order refusing to strike it. D.E. 85.

E. Dorfman's Stay Motion

Dorfman next asked the district court to stay the April 16 injunction hearing—although he had specifically requested that date pending this appeal. D.E. 94 (Dorfman Exh. E). The district court denied Dorfman's motion. D.E. 100. At a March 20 hearing, the court rejected Dorfman's contention that his appeal divested it of jurisdiction to hold the preliminary injunction hearing, emphasizing that "[t]he defendant has identified a very narrow set of issues on appeal." 3/20/19 Hearing Tr. (FTC Exh. 15) at 15. It also found that a stay was not warranted

Dorfman who declined the district court's invitation to seek an earlier date. See supra p. 8. Dorfman omits these essential facts from his motion to stay and his response to this Court's Jurisdictional Question.

Indeed, even before the shutdown, Dorfman already asked the court to postpone the hearing date until at least February 26 and agreed to leave the TRO in place in the meantime. D.E. 50 (FTC Exh. 6) at 5; D.E. 50-1 (FTC Exh. 7) at 5. The shutdown ended four weeks before Dorfman's proposed February 26 hearing date. D.E 68. Yet when the district court asked the parties to propose hearing dates after the shutdown, Dorfman requested a hearing on April 16, not February 26. D.E. 75 (FTC Exh. 12). It is no surprise that the district court found that "any reasonable review of this record indicates that the defendant consented to the extension." 2/22/19 Hearing Tr. (Dorfman Exh. C) at 29.[5]

In any event, as we explain more fully in our response to the Court's Jurisdictional Question (at pp. 11-12), Dorfman should be judicially estopped from withdrawing his consent. He has "assume[d] a certain position in a legal proceeding, and succeed[ed] in maintaining that position," and he may not now "simply because his interests have changed, assume a contrary position." New Hampshire v. Maine, 532 U.S. 742, 749 (2001) (quoting Davis v. Wakelee, 156

[5] This Court "review[s] factual findings related to jurisdiction for clear error." United States v. Wilchcombe, 838 F.3d 1179, 1186 (11th Cir. 2016).

U.S. 680, 689 (1895)). Specifically, Dorfman asked the district court to delay the preliminary injunction hearing from November until the following April, and

See Mot. 13-15. He does not dispute the FTC's authority to obtain injunctive relief to halt his unlawful conduct, nor does he raise any factual defenses to the FTC's charges that he misled consumers. See Dorfman's Civil Appeal Statement (Mar. 18, 2019). Thus, the district court may still hold a hearing on whether the Commission is likely to succeed in proving that Dorfman's practices violated the law and whether an injunction against similar misdeeds is warranted. The court's consideration of such issues would have no impact on the narrow question presented in this appeal. i8 (sCITJ -0.00i (t)0.5 (hi)-8 (TJ 0.004 T.7 (p)-12)0.5 (n).8 (sC

before briefing, argument, and decision in this appeal.[6] Dorfman could then

"weigh[] heavily in favor of granting the stay." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (citation and quotation marks omitted).

Dorfman has shown no prospect of success on the merits and no serious claim of injury (let alone irreparable injury). Meanwhile, a stay of the preliminary

claimed injuries are also not redressable. Although Dorfman claimed below that he was deprived of a "meaningful opportunity to be heard" (D.E. 79 (Dorfman Exh. A) at 9), he will have that opportunity very soon at the April 16 hearing. Granting Dorfman's motion to stay the April hearing would exacerbate, not redress, his alleged injuries by postponing the hearing for several more months while he remains bound by the TRO pending this appeal.

Beyond claiming that the TRO has lasted too long, Dorfman raises just one challenge to the substance of the TRO: that Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), does not allow courts to award equitable monetary relief, including asset freezes, to the FTC. Mot. 13-14. He euphemistically describes his

Assocs., LP, 746 F.3d 1228, 1234 (11th Cir. 2014); FTC v. Washington Data Resources, Inc., 704 F.3d 1323, 1326 (11th Cir. 2013).[7]

that opinion properly recognized in the majority opinion authored by one of them that binding law required them to rule that the FTC can obtain monetary relief. Id. at 426-27. The concurrence calls for the full court to overturn its decades of consistent law, but it represents the views only of two judges on a court of two dozen. The opinion does not remotely show that Dorfman is likely to succeed on his claim.

Dorfman's reliance on SEC v. Graham, 823 F.3d 1357 (11th Cir. 2016), is likewise misplaced. There, this Court held, similar to Kokesh the following year, that SEC disgorgement remedies are subject to a five-year statute of limitations. Id. at 1363-64. It did not question the SEC's statutory authority to obtain equitable monetary relief. Dorfman does not argue here (nor could he) that the FTC's claims are time-barred.

B. Dorfman Has Not Shown Irreparable Harm

The other injunction factors cut particularly sharply against Dorfman. His claims of irreparable harm are trifling. He anticipates that the FTC might eventually obtain a final judgment "liquidat[ing] all of the Defendants' assets so they can be distributed to the U.S. Treasury, the Defendants' customers, and other entities." Mot. 15-16. If so, then Dorfman could take an appeal-

Dorfman also claims he will suffer injury because evidentiary hearings in federal court "by their nature are defamatory" and would "expose any and all [of his] trade and business secrets." Mot. 15. If he has legitimate trade secrets, he may ask the district court for a sealing order. The remainder of his charge is not only untrue on its face, but would justify a stay of every single injunction proceeding in federal court.

To the degree Dorfman complains about the costs of going through the preliminary injunction proceeding, Mot. 18, the Supreme Court determined long ago that "litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." FTC v. Standard Oil Co. of Cal., 449 U.S. 232, 244 (1980).[8]

C. The Public Will Suffer Irreparable Harm If The Case Is Stayed

The FTC brought this case in order to halt a fraudulent enterprise that deceived tens of thousands of consumers into purchasing what they falsely were led to believe was comprehensive health insurance. Many consumers only

them an opportunity to cancel. A stay will injure consumers by preventing the receiver from taking these protective steps. Dorfman responds that his victims can protect themselves because they "should have" read about his transgressions in the newspaper (Mot. 17), but that rationalization serves only Dorfman's interests and not those of the public.

Finally, Dorfman claims there is a public interest in hearing his statutory arguments about money relief. He of course remains free to raise those arguments before the district court and then again (if necessary) before this Court on a proper appeal. There is no public interest in Dorfman's presenting these arguments now.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that the foregoing motion complies with the volume limitations of Fed. R. App. P. 27(d) and 32(a)(7)(A) because it contains 5,066 words, as created by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 32(f).

March 27, 2019

/s/ Bradley Grossman

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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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