No. 19-10840-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

v.

STEVEN J. DORFMAN,
Defendant-Appellant.

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

Opposition of the Federal Trade Commission to Emergency Motion to Abate or Stay Proceeding in District Court Pending Resolution of Appeal

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Eleventh Circuit Rule 26.1 Certificate of Interested Persons

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Federal Trade Commission – Plaintiff-Appellee

Gayles, The Hon. Darrin P.

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Health Center Management LLC – Defendant

Innovative Customer Care LLC – Defendant

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Simple Health Plans LLC – Defendant

Simple Insurance Leads LLC – Defendant

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The Federal Trade Commission further states that, to the best of its knowledge, no publicly traded company or corporation has an interest in the outcome of this case or appeal.

OPPOSITION TO EMERGENCY MOTION TO ABATE OR STAY PROCEEDING IN DISTRICT COURT PENDING RESOLUTION OF APPEAL

The Court should deny the eleventh-hour attempt of appellant, Steven J. Dorfman, to disrupt a preliminary injunction hearing scheduled to take place in the district court on April 16. His pending appeal of the district court's temporary restraining order does not justify upending the orderly conduct of this case and a long-planned hearing to which he expressly agreed.

Dorfman's motion to "abate" the April hearing should be denied because this appeal does not affect the district court's jurisdiction to hold the hearing. A "notice of appeal from a nonappealable order should not divest the district court of jurisdiction." *United States v. Saintil*, 705 F.2d 415, 418 (11th Cir. 1983) (quoting *United States v. Hitchmon*, 602 F.2d 689, 694 (5th Cir. 1979) (en banc)). The TRO and the order declining to vacate it from which Dorfman appeals are nonappealable, *see Fernandez-Roque v. Smith*, 671 F.2d 426, 429-30 (11th Cir. 1982), and thus have no effect on the district court's authority to proceed. A TRO can be appealable if it is extended too long, but not when the "adverse party consents" to the extension. Fed. R. Civ. P. 65(b)(2). Dorfman has repeatedly requested or consented to extension of the TRO, including through the April 16 hearing, and it therefore "remains a nonappealable order." *Fernandez-Roque*, 671 F.2d at 430.

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 those matters without any effect on the narrow issue presented on appeal.

If this Court believes that the district court lacks jurisdiction over any part of the preliminary injunction proceedings, it should treat the district court's orders declining to vacate the TRO and scheduling the preliminary injunction hearing as an indicative ruling and remand for the limited purpose of completing the proceedings pursuant to Fed. R. App. P. 12.1. Any other approach will result in needless and wasteful proceedings in both this Court and the district court. With the hearing just three weeks away—long before briefing, argument, and decision in this appeal are likely—by far the most efficient course here is to await the outcome below and then allow the parties to litigate a proper appeal (if necessary) on a genuine preliminary injunction.

Dorfman also asks this Court to stay the preliminary injunction proceedings *even if* the district court still has jurisdiction, but he does not come close to meeting the prerequisites for a stay. Dorfman has no likelihood of success on the merits of his appeal because this Court lacks jurisdiction, Dorfman lacks standing at this

point, and his legal argument that the FTC may not secure equitable monetary relief is flatly inconsistent with established precedent of this Court. *E.g.*, *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 the 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 businesses[1] with selling useless "insurance" to tens of thousands of Americans in a classic bait-and-switch scheme. D.E. 1.[2] Dorfman's telemarketers and websites falsely told consumers that they were buying comprehensive, ACA-compliant insurance policies that would cover preexisting conditions for a nominal co-pay. *Id.* ¶¶ 15-47.

[1] The corporate defendants have neither appeared nor responded in this case and are not parties to this appeal.

[2] A copy of the district court docket sheet is attached hereto as FTC Exhibit 1.

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 consumers with uncovered medical bills of $60,000 or more (*id.* ¶¶ 40, 48, 50, 53).

That conduct violated Section 5(a) of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices, and Section 310.3 of the FTC's Telemarketing Sales Rule, 16 C.F.R. §§ 310.3(a)(2)(iii), (a)(2)(vii), & (a)(4), which prohibits deceptive telemarketing practices.

Upon filing its complaint, the FTC moved *ex parte* for a TRO with an asset freeze, temporary receivership, and an order to show cause why a preliminary injunction should not issue. D.E. 3. The FTC submitted evidence showing that Dorfman and his businesses cleared over $150 million from the scheme, and that Dorfman was rapidly spending millions of swindled dollars on jewelry, luxury cars, gambling sprees (including $368,000 at a single casino), nightclub trips (including $57,000 from one night's outing), an oceanfront condominium, and a lavish wedding decorated with $133,000 worth of flowers. D.E. 12 at 7, 31, 37.

On October 31, 2018, the district court issued the TRO and set a November 14 hearing date on the FTC's motion for a preliminary injunction. D.E. 15.

B. Dorfman's Three Requests To Extend The TRO

As we discuss more fully in our response to the Jurisdictional Question, Dorfman requested three continuances of the hearing date on the FTC's motion for preliminary injunction. In each instance, Dorfman consented to extension of the TRO through the date of the court's ruling on the preliminary injunction.

Dorfman's First Consent: One week after the district court entered the TRO, it granted the parties' joint motion to continue the preliminary injunction hearing until December 6 and extend the TRO until the court's ultimate ruling. D.E. 17 (FTC Exh. 2); D.E. 18.

Dorfman's Second Consent: Days after the first continuance, Dorfman's counsel told FTC counsel that he planned to seek a second continuance, emphasizing, "Of course, an extension of the PI hearing date would contemplate and [sic] extension of the TRO." D.E. 44-3 (FTC Exh. 5) at 3. The parties jointly moved to postpone the hearing until at least January 22 and leave the TRO in place until the court reached its decision. D.E. 27 (FTC Exh. 3). The court granted the motion and scheduled the hearing for January 29. D.E. 30 (FTC Exh. 4).

Dorfman's Third Consent: Dorfman successfully persuaded the district court to grant a *third* continuance of the January 29 hearing date and extension of the TRO, this time over the FTC's objection. Dorfman sought an extension until 28 days after the close of discovery and attached a proposed order with a hearing

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 Dorfman had failed to "justif[y] indefinitely delaying the preliminary injunction … hearing … which the Court already has extended twice." D.E. 52 (FTC Exh. 8) at 1. The district court nonetheless granted Dorfman's motion, explaining that it would set a new hearing date at a status conference in mid-January. D.E. 55.

C. The Government Shutdown And Dorfman's Agreement To An April 16 Hearing Date

On December 31, 2018, the FTC sought, and the district court granted, a temporary stay of the case due to the government shutdown and furlough of FTC staff. D.E. 58 (FTC Exh. 9); D.E. 59. One week later, Dorfman asked the court to reconsider the stay and either strike the TRO, or, "[i]n the alternative," order the FTC to produce additional discovery and set a hearing date for the preliminary injunction motion. D.E. 60 (FTC Exh. 10) at 5. The district court then partially lifted the stay "for the limited purposes of allowing discovery to proceed, and to promptly resolve discovery disputes." D.E. 64 (FTC Exh. 11). On January 29, the court vacated the remaining stay because the shutdown had ended. D.E. 68.

On February 5, the court asked the parties to propose dates for the preliminary injunction hearing. D.E. 71. Dorfman requested a hearing on April 16, *eleven weeks* after the end of the shutdown (FTC counsel independently proposed the same date). D.E. 75 (FTC Exh. 12); *see also* D.E. 74. Dorfman's

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 "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 acknowledge that *he* was the one 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. 5-6. Dorfman also failed to mention that he had agreed to the April 16 hearing date just eleven days earlier. *See supra* pp. 6-7.

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 34. 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

because Dorfman was unlikely to succeed on the merits and would not suffer irreparable damage. By contrast, "there is actually a great danger of irreparable harm to the public if the Court does not proceed with this hearing." *Id.* at 16.

ARGUMENT

I. DORFMAN'S APPEAL DOES NOT DIVEST THE DISTRICT COURT OF JURISDICTION TO HOLD THE PRELIMINARY INJUNCTION HEARING

Dorfman's principal claim is that because he filed an appeal of the TRO and the court's order declining to strike it, the district court no longer has jurisdiction over the scheduled preliminary injunction proceedings. Mot. 9-11.[3] That is not so for two reasons. First, as we explain at length in our answer to the Court's Jurisdictional Question and address more briefly below, the TRO and the district court's order declining to strike it are not subject to appeal, and "[f]iling a notice of appeal from a nonappealable order should not divest the district court of jurisdiction." *Saintil*, 705 F.2d at 418 (quoting *Hitchmon*, 602 F.2d at 694); *see United States v. Kapelushnik*, 306 F.3d 1090, 1095 (11th Cir. 2002) ("[A]

[3] The motion lacks page numbers, so we use the ECF pagination.

premature notice of appeal does not divest the district court of jurisdiction over the case.").[4]

Second, the narrow issue on appeal does not preclude all proceedings involving a preliminary injunction. Indeed, a hearing to determine the FTC's entitlement to a behavioral injunction would have no impact on the current appeal, which deals instead with the question of monetary relief.

A. The TRO And The District Court's Order Declining To Dissolve It Are Not Appealable

Congress has conferred appellate jurisdiction over "injunctions" and "orders refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). A TRO, however, generally does not count as an "injunction" for these purposes. *See* 16 Wright & Miller, *Federal Practice & Procedure* § 3922.1 (3d ed. 2018); *Fernandez-Roque*, 671 F.2d at 429. Courts may construe a TRO as an appealable preliminary injunction when it continues in force beyond 14 days and thus has "expired," but a TRO does not expire when "the adverse party consents" to an extension. Fed. R. Civ. P. 65(b)(2). Thus, if a TRO is "extended with the consent

[4] A contrary rule would "leave[] the court powerless to prevent intentional dilatory tactics, foreclose[] without remedy the nonappealing party's right to continuing trial court jurisdiction, and inhibit[] the smooth and efficient functioning of the judicial process." *Saintil*, 705 F.2d at 418-19 (quoting *Hitchmon*, 602 F.2d at 494).

of all parties," it "remains a nonappealable order." *Fernandez-Roque*, 671 F.2d at 430.

As the district court put it when denying the motion to strike the TRO, "any reasonable review of [the history of this case] indicates that the defendant consented to the extension." 2/22/19 Hearing Tr. (Dorfman Exh. C) at 29. Indeed, Dorfman 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." D.E. 17 (FTC Exh. 2); D.E. 27 (FTC Exh. 3); D.E. 50-1 (FTC Exh. 7) at 5. On the basis of those assurances, the district court agreed to Dorfman's request—over the FTC's objection—to postpone the preliminary injunction hearing indefinitely beyond January 29 (D.E. 50 (FTC Exh. 6) at 5; D.E. 55), and to set a hearing on April 16 (D.E. 75 (FTC Exh. 12)).

Dorfman concedes that he consented to extension of the TRO, but asserts that his consent expired either during the government shutdown or on January 29, which was the hearing date the district court had set after the parties' second joint extension request. D.E. 79 (Dorfman Exh. A) at 26; *see supra* p. 5. But it was *Dorfman* who moved—successfully, and over the FTC's objection—to extend the hearing date and TRO *beyond* January 29. D.E. 50 (FTC Exh. 6) at 5; D.E. 50-1 (FTC Exh. 7) at 5; D.E. 55. It was *Dorfman* who told the district court that the April 16 hearing date "works for" him. D.E. 96-1 (FTC Exh. 14) at 1. And it was

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 had *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 having convinced it to do so, he now has reversed course and complains that he can appeal the TRO because it extended too long. Dorfman's positions are "clearly inconsistent" and appear "calculated to make a mockery of the judicial system." *See Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1344-45 (11th Cir. 2006).

B. The Preliminary Injunction Hearing Would Not Interfere With The Narrow Matters On Appeal

Even if Dorfman were challenging an appealable order and the appeal could deprive the district court of *some* of its jurisdiction, the court was correct in finding that the issues for appeal are "very narrow" and thus do not remove *all* jurisdiction to conduct the preliminary injunction hearing. 3/20/19 Hearing Tr. (FTC Exh. 15) at 15. An interlocutory appeal does not "divest the district court of jurisdiction of collateral matters not affecting the questions presented on appeal." *Doe, 1-13* ex rel. *Doe Sr. 1-13 v. Bush*, 261 F.3d 1037, 1064 (11th Cir. 2001). Rather, the district court "has authority to proceed forward with portions of the case not related to the claims on appeal." *Green Leaf Nursery v. E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1309 (11th Cir. 2003) (citation omitted).

Dorfman's only claim on the merits is that the district court could not properly freeze his assets because the FTC may not legally obtain monetary relief.

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.

C. The Court May Treat The Scheduled Hearing As An Indicative Ruling And Remand For The Purpose Of Conducting The Hearing

Should the Court determine that Dorfman's appeal is proper and that it deprives the district court of any jurisdiction over this matter, it nevertheless may deem the district court's orders declining to vacate the TRO and scheduling the preliminary injunction hearing as an indicative ruling and remand to the district court for the limited purpose of completing the preliminary injunction proceeding. *See* Fed. R. Civ. P. 12.1; 11th Cir. R. 12.1-1. That procedural approach will avoid needless and wasteful proceedings in both this Court and the lower court. Indeed, a preliminary injunction proceeding could be finished in the district court long

before briefing, argument, and decision in this appeal.[6] Dorfman could then properly appeal from a genuine preliminary injunction, resulting in only one appellate proceeding.

By contrast, taking the appeal of the TRO will almost certainly result in further proceedings in district court (at least regarding a behavioral injunction) no matter how this Court rules, spurring yet another appeal. The most efficient course therefore is to allow the district court to complete its job and to hear any appeal in the ordinary course.

II. DORFMAN DOES NOT NEARLY MEET THE TEST FOR A STAY PENDING APPEAL

Dorfman's alternative request for a stay pending appeal also fails. To merit a stay, Dorfman must prove that (1) he is likely to succeed on the merits; (2) he will be irreparably injured absent a stay; (3) issuance of the stay will not substantially injure other parties; and (4) the public interest favors a stay. *See Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two factors "are the most critical." *Id.* Dorfman does not claim that he is likely to succeed on the merits—he asserts only that his case is "substantial" (Mot. 13)—so the remaining factors must

[6] Briefing on the motion for preliminary injunction is well underway. On March 25, Dorfman filed his memorandum in opposition to the preliminary injunction and accompanying exhibits. D.E. 104.

"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 injunction hearing pending appeal will seriously harm Dorfman's victims and the public interest.

A. Dorfman Is Highly Unlikely To Succeed On The Merits

Dorfman has virtually no chance of prevailing in this appeal. As discussed on pp. 5-7, 11-13, *supra*, and in our response to the Jurisdictional Question, the TRO is unappealable because Dorfman consented to it.

In addition, Dorfman lacks standing to object to the duration of the TRO or the district court's scheduling of 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. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)).

The district court's actions did not cause Dorfman to suffer any concrete or particularized injuries, since Dorfman *himself* was the primary cause of the delays in scheduling the preliminary injunction hearing. *See supra* pp. 11-13. Dorfman's

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 argument as "novel," *id.* at 14; a more accurate label would be "wrong." The claim contravenes the settled law of this Court and the eight other circuits that have decided the issue. As this Court has explained, "the unqualified grant of statutory authority to issue an injunction under section 13(b) carries with it the full range of equitable remedies, including the power to grant consumer redress and compel disgorgement of profits." *Gem Merch.*, 87 F.3d at 468-70; *accord FTC v. WV Universal Mgmt., LLC*, 877 F.3d 1234, 1239 (11th Cir. 2017); *FTC v. IAB Mktg.*

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]

Those decisions are binding on the panel that decides this appeal; the only way Dorfman could prevail is by convincing the full court to abandon its precedent and change its position. But he fails to explain why he has any likelihood of securing such an outcome. *See* Mot. 14-15. Dorfman speculates, based on *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), that the Supreme Court may someday hold that the FTC Act does not permit equitable monetary relief. *See* Mot. 11, 14. But *Kokesh* made clear that "[n]othing in this opinion should be interpreted as an opinion" on whether the SEC was authorized to obtain similar relief. 137 S. Ct. at 1642 n.3. This Court has continued to uphold equitable disgorgement remedies after *Kokesh*. *See, e.g.*, *SEC v. Hall*, No. 17-13897, 2019 WL 103892, at *4 (11th Cir. Jan. 4, 2019).

Dorfman mistakenly relies on a concurring opinion in *FTC v. AMG Capital Management, LLC*, 910 F.3d 417, 429 (9th Cir. 2018). The two judges who signed

[7] Every other court of appeals to have considered the issue agrees. *See FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 598-99 (9th Cir. 2016); *FTC v. Ross*, 743 F.3d 886, 890-91 (4th Cir. 2014); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 365-66 (2d Cir. 2011); *FTC v. Magazine Sols., LLC*, 432 F. App'x 155, 158 n.2 (3d Cir. 2011) (unpublished); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 15 (1st Cir. 2010); *FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1202 n.6 (10th Cir. 2005); *FTC v. Amy Travel Serv., Inc.*, 875 F.2d 564, 571-72 (7th Cir. 1989); *FTC v. Security Rare Coin & Bullion Corp.*, 931 F.2d 1312, 1314-14 (8th Cir. 1991).

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 of only 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 from the final judgment and seek a stay of *that* judgment pending appeal. No harm is posed now.

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 discovered the truth after they had incurred staggering medical bills, at which point it was too late. Some of Dorfman's customers have developed serious health

[8] Dorfman raises the expense issue as part of the public interest inquiry, but there is no public interest in reducing an accused fraudster's lawyer bills by exempting him from a hearing in court.

conditions that are going untreated because they are essentially uninsured. *See* Dorfman Exh. F at 33-109 (examples of consumer complaints). Far from serving the public interest, as the district court rightly found "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.

Dorfman is wrong that consumers are no longer being harmed because the defendants' "assets are frozen and held in receivership" due to the TRO. Mot. 16. In fact, thousands of victims are *still paying his "premiums" every month despite the TRO, unaware that Dorfman's products have left them practically uninsured*. For example, between December 2018 and February 2019, Dorfman's third-party administrator, Health Insurance Innovations, charged his customers 165,798 times, totaling $14.6 million, for "policies" Dorfman sold them. *See* Dorfman Exh. F at 30-31 (Supplemental Declaration of FTC investigator Nathaniel Al-Najjar) ¶¶ 5-7. Each month this litigation is stayed will be one more that those victims go without relief. If these consumers develop a serious illness, they may face a tragic choice between financial ruin and forgoing necessary treatment.

Under the TRO, the receiver has only a temporary appointment, which limits his ability to protect Dorfman's customers. A preliminary injunction would allow the receiver to contact (with court permission) each of Dorfman's customers who continue to pay fees, notify them about the true nature of his products, and give

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 monetary 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.

CONCLUSION

This Court should deny Dorfman's motion for a stay pending appeal.

Respectfully submitted,

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March 27, 2019

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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)(2)(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

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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

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