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)

Response of the Federal Trade Commission to Jurisdictional Question

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Eleventh Circuit Rule 26.1 Certificate of Interested Persons

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Federal Trade Commission – Plaintiff-Appellee

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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.

RESPONSE TO JURISDICTIONAL QUESTION

Steven J. Dorfman appeals the district court's October 2018 entry of a temporary restraining order and its February 2019 order refusing to strike the TRO. D.E. 85 (Notice of Appeal). The Court has inquired whether it has appellate jurisdiction over those two actions. The answer is no, and the Court therefore should dismiss this appeal.

The Court's Jurisdictional Question asks: "To the extent the … TRO … can be construed as a preliminary injunction, address whether the instant notice of appeal is timely to challenge that order, in addition to the … order denying the motion to strike the TRO." If the Court's jurisdiction turned simply on timing, the appeal might be proper. More fundamentally, however, the TRO may *not* properly be construed as a preliminary injunction, and as a result neither the TRO nor the order denying the motion to strike the TRO is even an appealable order. In addition, because Dorfman has asserted no injury redressable by appeal, he lacks standing.

Congress has granted the courts of appeals jurisdiction over district court orders "granting … injunctions" or "refusing to dissolve or modify injunctions." 28 U.S.C. § 1292(a)(1). But a temporary restraining order is not an "injunction" within the meaning of the statute, and orders pertaining to TROs thus are generally "not appealable … as orders respecting injunctions." 16 Wright & Miller, *Federal*

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 it was "issued or extended with the consent of all parties." *Fernandez-Roque*, 671 F.2d at 430.

The district court has scheduled a preliminary injunction hearing for April 16, a date specifically requested by Dorfman. Once the court has ruled on the preliminary injunction, Dorfman may file a proper appeal (if necessary) on a fully developed record. In the meantime, this Court should dismiss the pending appeal for lack of jurisdiction.

BACKGROUND

A. Charges Against Dorfman

The FTC's complaint charges Dorfman and his businesses[1] with selling essentially worthless products based on false promises that they were comprehensive, ACA-compliant insurance policies that would cover pre-existing conditions for only a nominal co-pay. D.E. 1.[2] The complaint alleges that these actions 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. 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

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

[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.

"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 February 26 at the earliest. D.E. 50 (FTC Exh. 5) at 5; D.E. 50-1 (FTC Exh. 6) at 5. Dorfman's proposed order again stipulated that "[a]ll other terms of the TRO remain in full force and effect pending the Court's determination as to whether a

[3] The dispute centered on whether the FTC had to produce the undercover identities that its agents used when making undercover purchases. The FTC claimed those identities were subject to the law enforcement privilege because the agency used the same identities in other investigations.

preliminary injunction should be entered in this matter." D.E. 50-1 (FTC Exh. 6) at 5.

The FTC opposed Dorfman's third extension request because he had failed to "justif[y] indefinitely delaying the preliminary injunction … hearing … which the Court already has extended twice." D.E. 52 (FTC Exh. 7) at 1. The FTC explained that it had long offered to produce the privileged material to Dorfman's counsel subject to a protective order and "Attorneys' Eyes Only" restriction, but that counsel had not responded to the offer for weeks. *Id.* at 1-6.

The district court nonetheless found "good cause" to grant Dorfman's request to "continue the Preliminary Injunction Hearing and extend the Temporary Restraining Order" in light of the discovery dispute. D.E. 55. The court indicated that it would set a new hearing date at a mid-January status conference. *Id.*

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 proceedings in the case due to the government shutdown and furlough of FTC staff. D.E. 58 (Dorfman Exh. A at 8); D.E. 59. One week later, despite having asked for an extension of the TRO and a late-February preliminary injunction hearing, Dorfman asked the court to reconsider the stay and either "(i) dissolv[e] the TRO and Asset Freeze; or, in the alternative (ii) order[] the FTC to produce [additional documents] forthwith and set[] a briefing deadline and hearing

on the FTC's request for a preliminary injunction." D.E. 60 at 5 (Dorfman Exh. A at 34). In response, the district court partially lifted the stay "for the limited purposes of allowing discovery to proceed, and to promptly resolve discovery disputes." D.E. 64 (FTC Exh. 9).[4] On January 29, the court vacated the remaining stay because the shutdown had ended. D.E. 68.

On February 5, the court directed the parties to propose dates for the preliminary injunction hearing. D.E. 71. Three days later, Dorfman requested a hearing on April 16 (the FTC independently asked for the same date). D.E. 74 (FTC Exh. 10); D.E. 75 (FTC Exh. 11). Dorfman's counsel emailed chambers verifying that the April 16 hearing date "works for Mr. Dorfman" and would "provide both parties sufficient time to prepare for the hearing." D.E. 96-1 at 1 (FTC Exh. 14). The court adopted that recommendation and extended the TRO until the hearing date. D.E. 76 (FTC Exh. 12).

D. Dorfman's Motion To Strike The TRO

Eleven days after he affirmatively asked the district court to set the preliminary injunction hearing for April 16, Dorfman abruptly changed course and demanded that the court immediately strike the TRO because the court had taken too long to conduct the hearing. D.E. 79 (FTC Exh. 13). Dorfman contended that

[4] On February 6, the magistrate judge resolved the privilege dispute in Dorfman's favor by ordering the FTC to produce its investigators' undercover identities without restriction. D.E. 72.

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

at 1. Dorfman again neglected to disclose that he had successfully moved the district court to *postpone* the January 29 preliminary injunction hearing and extend the TRO until the court reached its ultimate decision on the injunction.

DISCUSSION

I. BECAUSE DORFMAN CONSENTED TO THE TRO, IT IS NOT APPEALABLE

This Court lacks jurisdiction over the TRO and the district court's order refusing to strike it. Under 28 U.S.C. § 1292(a)(1), this Court has jurisdiction over "injunctions" and orders "refusing to dissolve or modify injunctions." But the general rule is that a TRO is not an appealable "injunction" for purposes of Section 1292. 16 Wright & Miller § 3922.1; *Fernandez-Roque*, 671 F.2d at 429. This Court can treat a TRO that extends beyond 14 days as an appealable preliminary injunction in some circumstances, *Fernandez-Roque*, 671 F.2d at 429, but a TRO does not become a preliminary injunction when the "adverse party consents to … [an] extension," Fed. R. Civ. P. 65(b)(2). A TRO "extended with the consent of all parties remains a nonappealable order." *Fernandez-Roque*, 671 F.2d at 430; *see Chicago United Indus., Ltd. v. City of Chicago*, 445 F.3d 940, 943 (7th Cir. 2006).

As the district court determined after reviewing the procedural history of this case, "any reasonable review of this record indicates that the defendant consented

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

[6] Dorfman's unqualified consent distinguishes this case from *AT&T Broadband v. Tech Communications, Inc.*, 381 F.3d 1309 (11th Cir. 2004), in which a defendant consented to the continuation of an asset freeze with a "stipulation that he could challenge its imposition at a later date." *Id.* at 1313. Here, Dorfman consented to the TRO without any qualification.

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 (FTC Exh. 11). Dorfman thus not only consented to the TRO *during* the shutdown, but for several months thereafter.

Dorfman also argued below that if the TRO did not expire during the shutdown, it expired on January 29, and he maintained that "the hearing could still have been held on January 29." D.E. 79 (FTC Exh. 13) at 25. He repeats the same claim in his answer to this Court's Jurisdictional Question (at p. 1). But Dorfman asked, over the FTC's objection, to extend the hearing date and TRO *beyond* January 29. D.E. 50 (FTC Exh. 5) at 5; D.E. 50-1 (FTC Exh. 6) at 5; D.E. 55. Before he filed that motion, Dorfman's counsel told the FTC that "[w]e would obviously be willing to extend the TRO" if the court postponed the January 29 hearing. D.E. 57-1 (FTC Exh. 8) at 4.

Even if it were possible to conclude from that record that Dorfman withdrew his consent to the TRO, he should be judicially estopped from claiming as much.

[7] In his answer to this Court's Jurisdictional Question (at p. 2), Dorfman suggests that the government shutdown caused the "cancellation of the January 29 hearing." In fact, Dorfman's *own motion* prompted the district court to cancel the January 29 hearing, ten days before the shutdown. *See* D.E. 55.

"[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, 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 U.S. 680, 689 (1895)). That is exactly what Dorfman is trying to do now. He 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 turned about-face and complains that he can appeal the TRO because it extended too long. His position is sandbagging, plain and simple. Having induced the court to postpone the preliminary injunction hearing by consenting to the TRO, Dorfman may not now retract that consent simply because he has changed his mind.

In deciding whether a party is judicially estopped from making an argument, this Court considers whether the party (1) has taken clearly inconsistent positions under oath, (2) did so intentionally in a manner "calculated to make a mockery of the judicial system," and (3) would gain an "unfair advantage" from his duplicity. *See Ajaka v. Brooksamerica Mortg. Corp.*, 453 F.3d 1339, 1344-45 (11th Cir. 2006). All of these factors favor estoppel here.

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. Amodeo*, 916 F.3d 967, 971 (11th Cir. 2019) (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)). Dorfman lacks standing under that test.

To begin with, we doubt that he has suffered a concrete or particularized injury in the Article III sense. The schedule of the preliminary injunction hearing is the product of Dorfman's own conduct. Indeed, the district court offered to set a hearing date earlier than April 16, but Dorfman did not respond. *See supra* p. 7. Having passed up the opportunity, he can hardly claim to be injured by its absence.

Dorfman also stands to gain no redress. His grievance is that he has been denied a "meaningful opportunity to be heard." D.E. 79 (FTC Exh. 13) at 9; *see id.* at 25-26. But the district court has scheduled a hearing on April 16, at which Dorfman will have the meaningful opportunity he purports to seek. If anything, this appeal will make him worse off by further delaying matters while the TRO remains in effect. If the district court enters a preliminary injunction, Dorfman may properly appeal from that order.

CONCLUSION

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

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 document complies with the volume limitations of Fed. R. App. P. 27(d)(2)(A) because it contains 3,121 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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