

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
Miami Division

Case No. 17-60907-CIV-MORENO

_____)
FEDERAL TRADE COMMISSION, and)
STATE OF FLORIDA,)
)
Plaintiffs,)
)
v.)
)
JEREMY LEE MARCUS, <i>et al.</i> ,)
)
Defendants and Relief Defendants.)
_____)

**THE FEDERAL TRADE COMMISSION’S REPLY IN SUPPORT
OF THE RECEIVER’S MOTION FOR ORDER TO SHOW CAUSE
AGAINST DEFENDANT JEREMY MARCUS**

The Federal Trade Commission (“FTC”) files this Reply in Support of the Receiver’s Motion for Order to Show Cause Against Defendant Jeremy Marcus and joins in the Receiver’s corresponding Reply. Docs. 330, 348. The FTC files its own Reply to address Defendant Marcus’s incorrect claim that the monetary judgment contained in his Stipulated Order for Permanent Injunction and Monetary Judgement (Doc. 231, the “stipulated final order”) is a penalty, citing *Kokesh v. SEC*, 137 S.Ct. 1635 (2017), and constitutes legal (as opposed to equitable) restitution, citing *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). *See* Doc. 345, Section B.1, pp. 6-8.

I. The Availability and Award of Equitable Monetary Relief

The FTC brought this case against Defendant Marcus and several others 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 Prevention Act, 15 U.S.C. §§ 6101-6108, seeking equitable

remedies for Defendants' deceptive acts and practices. Doc. 127.

Well-established, binding Eleventh Circuit precedent holds that the FTC may obtain equitable monetary relief pursuant to Section 13(b). *See FTC v. Gem Merch. Corp.*, 87 F.3d 466 (11th Cir. 1996); *FTC v. Washington Data Res.*, 704 F.3d 1323 (11th Cir 2013). These rulings hold that Section 13(b) provides an unqualified grant of statutory authority to issue the full range of equitable remedies, including equitable monetary relief. *See id.*

Here, not only was such equitable monetary relief available, it was agreed-upon by Defendant Marcus and entered by the Court. Doc. 231. In addition to a permanent injunction and bans on telemarketing and credit repair, debt relief, and financial products and services (Sections I-VI), the stipulated final order specifically imposes a judgment of "equitable monetary relief, in the amount of . . . \$85,326,648.45." Doc. 231, Section VII.A., p. 8.

II. *Kokesh* Does Not Disturb Established Eleventh Circuit Precedent

Despite the clear language of the stipulated final order, Marcus argues that *Kokesh*, which dealt with a narrow issue under a different statutory scheme with a different federal agency, somehow overturns well-established and directly-on-point Eleventh Circuit precedent or changes the meaning of the language contained in the stipulated final order.¹ It does neither.

In *Kokesh*, the Supreme Court addressed the narrow, discrete issue of the application of a five-year statute of limitations to an SEC enforcement action for punitive disgorgement. *Kokesh*, 137 S.Ct. at 1639. In addition to awarding the SEC statutorily authorized penalties, the underlying district court judgment awarded disgorgement for securities violations without providing for distribution to injured investors. In reviewing SEC disgorgement cases, the Supreme Court noted that SEC disgorgement was often "not compensatory," and compensating

¹ Also of note, *Kokesh* was decided over ten months before Marcus's stipulated final order was entered.

victims was a “distinctly secondary goal.” *Id.* at 1644. The Court ultimately found that disgorgement “as it is applied in SEC enforcement proceedings, operates as a penalty” for purposes of the general five-year statute of limitations. *Id.* (emphasis added).

Marcus attempts to expand this narrow ruling by claiming that the Supreme Court broadly held that disgorgement is a penalty for all purposes and therefore cannot be considered a proper form of equitable monetary relief. Marcus’s broad interpretation of *Kokesh* is belied by the *Kokesh* opinion itself, where the Court stated that “[n]othing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context.” *Id.* at 1642 n.3. Thus, the Supreme Court’s own words illustrate that *Kokesh* has no bearing on whether the SEC – or for that matter, the FTC or any other agency – can seek disgorgement as a proper form of equitable monetary relief.

For these reasons, courts addressing *Kokesh* have agreed that the decision does not disturb established precedent regarding equitable monetary relief in FTC Act cases. *See, e.g., FTC v. J. William Enterprises, LLC*, No. 6:16-cv-2123-Orl-31DCI, 2017 WL 4776669, at *2 (M.D. Fla. Oct. 23, 2017) (finding that *Kokesh* does not limit the FTC’s ability to seek equitable monetary relief under §13(b) and recognizing that “*Kokesh* did not involve section 13(b); it dealt with federal securities law,” that “[t]he Eleventh Circuit has remained firm in its position that the ‘full range of equitable remedies’ are available under Section 13(b),” and that *Kokesh* does nothing to disturb “the viability of that Eleventh Circuit precedent.”); *FTC v. AbbVie Inc.*, 329 F. Supp. 3d 98, 137 (E.D. Pa. June 29, 2018).² This Court should adopt the same reasoning of these

² In *AbbVie*, the court likewise recognized that “*Kokesh* did not involve section 13(b) but instead dealt with federal securities law” and stated “[w]e will not stretch *Kokesh* beyond its holding and will not read it to prevent the court from granting the well-established equitable relief of

courts and follow well-established Eleventh Circuit precedent that the FTC may (and did) obtain equitable monetary relief pursuant to Section 13(b). Such equitable monetary relief does not constitute a penalty.

III. *Great-West Life* Does Not Transform Equitable Restitution Into A Legal Remedy

Marcus argues that to the extent the monetary judgment in the stipulated final order “comprised restitution, it was legal restitution—not equitable restitution,” relying on *Great-West Life*. Doc. 345, p. 7. Marcus again misconstrues and misapplies that case.

Great-West Life involved claims between insurance companies under the Employee Retirement Income Security Act (“ERISA”). In determining whether the restitution sought in that case was legal or equitable for purposes of ERISA, the Supreme Court noted that “restitution is a legal remedy when ordered in a case at law and an equitable remedy . . . when ordered in an equity case, and whether it is legal or equitable depends on the basis for the plaintiff’s claim and the nature of the underlying remedies sought.” *Great-West Life*, 534 U.S. at 213 (internal quotations and citations omitted).

Here, there is no question that the basis of the FTC’s underlying case is a suit in equity, because the action was brought under Section 13(b), which only authorizes the FTC to seek equitable relief. Thus, the monetary relief amount in the judgment can only be considered to include equitable, not legal, restitution.

disgorgement . . . The weight of authority . . . supports the conclusion that the grant of authority in section 13(b) to provide injunctive relief includes the full range of equitable remedies, including the power to order a defendant to disgorge illegally obtained funds . . . [D]isgorgement ‘is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs.’” 329 F. Supp. 3d at 137.

IV. Conclusion

The equitable monetary relief Defendant Marcus agreed to and was ordered to pay is neither a penalty nor a legal remedy. It is equitable monetary relief. Because Defendant Marcus failed to turn over assets and violated this Court's orders, he should be held in contempt.

Dated: February 22, 2019

Respectfully submitted,

/s/ Angeleque P. Linville

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FEDERAL TRADE COMMISSION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 22nd day of February, 2019, I electronically filed the foregoing document with the Clerk of the Court by using the CM/ECF system. I also certify that the foregoing document is being served this date on all counsel of record on the attached Service List via transmission of Notices of Electronic Filing generated by the CM/ECF system, or for those counsel or parties who are not authorized to receive CM/ECF Notices of Electronic Filing, is being served in the manner specified.

/s/ Angeleque P. Linville

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