IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. HORNBEAM SPECIAL SITUATIONS, LLC, et al., Defendants.	CIVIL ACTION FILE NO. 1:17-cv-3094-TCB

O R D E R

This case comes before the Court on its sua sponte request for supplemental briefing on whether the Court should reconsider a portion of its earlier order holding that the FTC's "reason to believe" under 15 U.S.C. § 53(b) was unreviewable on a motion to dismiss.

I. Background

On April 16, 2018, the Court entered an order [181] denying motions to dismiss filed by various Defendants. In that motion, the EDP

Defendants[1] argued that the FTC's § 53(b) case should be dismissed unless it first avers facts demonstrating that Defendants "[are] violating, or [are] about to violate" a law committed to FTC enforcement. The Court refers to this as the "reason to believe" element of a § 53(b) case. Defendants argued that because their alleged unlawful conduct had ceased, the FTC could not satisfy this element, and therefore, the FTC failed to state a claim under § 53(b).

The Court initially rejected this argument, following the decision in *Federal Trade Commission v. National Urological Group, Inc.*, No. 1:04-cv-3294-CAP, 2006 WL 8431977 (N.D. Ga. Jan. 9, 2006), deferring to the FTC pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. § 701(a)(2), which precludes judicial review of administrative actions "committed to agency discretion." Following *National Urological*, the Court held that when the FTC brings a claim under § 53(b), it should defer to the FTC's averments regarding its "reason to believe" because the decision to file suit was committed to agency

[1] Including Dale Paul Cleveland, William R. Wilson, and EDebitPay, LLC.

discretion. Thus, the Court denied the motion to dismiss because Defendants were attempting to have the Court review the FTC's decision to file suit, which was unreviewable.

Defendants then filed a motion to dismiss for lack of subject-matter jurisdiction on similar grounds. They argued that the FTC had not pleaded adequate facts to invoke § 53(b), such that the Court lacked jurisdiction under § 53(b). The Court rejected the jurisdictional challenge as a successive motion to dismiss, but ordered supplemental briefing on whether it should reconsider its previous holding that § 53(b)'s "reason to believe" element was unreviewable on a 12(b)(6) motion to dismiss.

The issue has been briefed and is now ripe for the Court to reconsider.

II. Legal Standard

Ordinarily, reconsideration comes before the Court on the parties' motion. Here, the Court raised the issue sua sponte to deal with a possible error raised by Defendants' motion. Ordinarily, motions for reconsideration "should be reserved for certain limited situations,

namely the discovery of new evidence, an intervening development or change in the controlling law, or the need to correct a clear error or prevent a manifest injustice." *See Pres. Endangered Areas of Cobb's History, Inc. v. United States Army Corps of Eng'rs*, 916 F. Supp. 1557, 1560 (N.D. Ga. 1995). The Court has determined that reconsideration is necessary.[2]

III. Discussion

Many of the FTC's claims against Defendants are based largely on long-ceased misconduct. The FTC seeks to invoke § 53(b) to obtain injunctive and sundry other equitable remedies for Defendants' alleged deceptive marketing practices. Defendants argue that § 53(b) is designed to remedy only future, rather than past, misconduct, and to the extent the FTC is basing its claims for relief on past misconduct, it must make a Rule-8-compliant showing that Defendants are violating, or about to violate, the law.

[2] The Court is not concerned with Defendants' failure to cite the relevant standard for reconsideration or argue in those terms. This is because the Court raised the issue of reconsideration sua sponte. The Defendants were entitled to take this as an invitation to jump straight to the correctness of the Court's previous holding.

The FTC argues that it has discharged its Rule 8 pleading obligations. Naturally, Defendants disagree. This disagreement can be broken into two separate questions. First, there is a question of whether the Court defers to a conclusory pleading of the "reason to believe" element or the FTC must aver facts sufficient to survive a Rule 12(b)(6) motion to dismiss. Finding that the FTC must aver facts, the next question is what standard the FTC must aver to when it predicates "reason to believe" on past conduct. These are taken in turn.

A. The FTC Must Aver Facts Under Rule 8 to State a Claim for Relief Under § 53(b)

"The starting point for all statutory interpretation is the language of the statute itself." *United States v. DBB, Inc.*, 180 F.3d 1277, 1281 (11th Cir. 1999). Section 53(b) provides:

> Whenever the Commission has reason to believe (1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission . . . the Commission by any of its attorneys . . . may bring suit in a district court of the United States to enjoin any such act or practice.[3]

[3] The courts of appeals have interpreted this section to allow the FTC to seek a range of equitable remedies other than permanent and temporary injunctive relief, including disgorgement of ill-gotten gains. *See FTC v. Gem Merch. Corp.*, 87 F.3d 466, 470 (11th Cir. 1996).

This language plainly creates a precondition to the FTC's statutory authorization to bring suit under § 53(b). That is, the FTC may sue only when it has a "reason to believe" that a violation of law is occurring or about to occur, and filing the lawsuit is in the "interest of the public . . . ." 15 U.S.C. § 53(b). Thus, its "entitlement to relief" under Rule 8 necessarily depends upon the satisfaction of this element.

It is axiomatic that to survive a Rule 12(b)(6) motion, the pleader must "set[] forth 'well-pleaded facts . . . permit[ting] the court to infer more than the mere possibility of misconduct.'" *LabMD, Inc. v. FTC*, 894 F.3d 1221, 1233 (11th Cir. 2018) (some alterations in original) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009)). The factual allegations must be "enough to raise a right to relief above the speculative level," *Bell Atl. Corp. v. Twombly*, 544 U.S. 555, 555–56 (2007), and the averments should "allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. "Conclusory allegations are not sufficient." *Cox v. Stone Ridge at Vinings, LLC*, No. 1:12-cv-02633-AT, 2012 WL 12931994, at *2 (N.D. Ga. Oct. 23, 2013).

A straightforward application of these principles means that, in order to obtain the relief provided under § 53(b), the FTC must demonstrate by more than conclusory allegations that it has a reason to believe that the laws entrusted to its enforcement are being or about to be violated.

The FTC, however, takes issue with this conclusion. It maintains, and the Court previously held, that the "reason to believe" element is unreviewable on a Rule 12(b)(6) motion because it is within the agency's discretion to file suit. In other words, the Court should defer to the agency's conclusory averment that it has the requisite reason to believe. In support of this, the FTC (and the Court) relied on *National Urological*.

National Urological involved an FTC suit under § 53(b) against defendants for false advertising. When the agency sued, the defendants filed a counterclaim against the FTC under the APA, alleging that the FTC's suit was, inter alia, arbitrary and capricious. The Court held that under the APA, the FTC's decision to initiate suit was committed to agency discretion. As a result, the action was unreviewable.

Upon further reflection and after reviewing the briefs, *National Urological* is distinguishable. Its posture involved judicial review of agency action under the APA. Here, the Court is faced with whether the FTC has stated a claim under the Federal Rules of Civil Procedure. These postures are governed by two different statutory frameworks, the former by the APA, which explicitly precludes judicial review for actions "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), and the latter by Rule 8, which contains no such exemption. Quite the opposite. It is precisely the Court's duty under Rule 8 to scrutinize a party's right to proceed in federal court. Here, the Court is not reviewing the FTC's decision to sue. It is analyzing whether it has satisfied the federal pleading standards.

The FTC argues that averments supporting its "reason to believe" are not required because no court has imposed any such requirement in any other case involving § 53(b). That may be true, but it is persuasive only in that it is an argument from silence, a silence for which there are several plausible explanations. The silence may be as much a result of the parties' failure to raise the issue as it is an indication that no such

requirement exists. It could also be that the FTC's "reason to believe" was not in dispute in the cited cases. Here, however, the parties have raised the issue and brought the FTC's "reason to believe" into dispute.

What is more, the cases cited by the FTC are not helpful to resolve the question before it. Two cases hardly address § 53(b). *See FTC v. Tashman*, 318 F.3d 1273, 1277 (11th Cir. 2003) (deciding narrow issue of whether misrepresentations were material under 15 U.S.C. § 45(a)); *Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1356 (11th Cir. 1988) (reviewing FTC order on direct appeal under 15 U.S.C. § 45(c)–(d)).

The other two cases involved § 53(b), yet are still inapposite. One dealt with whether the FTC had the authority to seek equitable remedies other than an injunction under § 53(b), *see Gem Merch. Corp.*, 87 F.3d at 470, and the other, whether an injunction under § 53(b) should issue at all, *see FTC v. RCA Credit Servs., LLC*, No. 8:08-cv-2062-T-27AEP, 2010 WL 2990068, at *5 (M.D. Fla. July 29, 2010). Thus, the cases provide little guidance for determining what should happen if the FTC's "reason to believe" is wanting from the face of the complaint.

Consider also this oddity if the Court simply defers to the FTC's averments: Since filing, two Defendants have died. Even though their estates may remain responsible for the temporal consequences of their decedents' *past* misdeeds, it strains credulity to blindly accept that the dead men are violating (or about to violate) any laws.

The FTC has the power to act only to the extent Congress has authorized it. Limitations on this power are enshrined in the words of statutory text. *See NLRB v. Cmty. Health Servs.*, 812 F.3d 768, 780 (10th Cir. 2016) (Gorsuch, J., dissenting) ("[I]n our legal order federal agencies must take care to respect the boundaries of their congressional charters."). To ensure that the powers granted to the FTC are exercised properly, especially when it seeks to do so by engaging the Court's Article III powers, the Court must carefully scrutinize the scope of its exercise.

Congress has spoken plainly about when deference to agency discretion is appropriate, for example, in the APA. But this stage of the proceedings is governed by Rule 8, and Rule 8 provides for no such deference. Thus, the Court must conclude that it was improper to defer

to a conclusory allegation by the FTC that it has a reason to believe that a violation of law is occurring or about to occur. Instead, the FTC is required to aver facts sufficient for this purpose.

B. The FTC's "Reason to Believe" Is a Distinct Statutory Standard from the Injunction Inquiry

The Court has already determined the FTC must make factual averments regarding its "reason to believe." Now it moves on to the content of those averments. The FTC's case targets Defendants' past conduct. Yet the FTC is proceeding under § 53(b) on the theory that, based on Defendants' past conduct, they are "about to" violate the law. The Court must therefore determine what "about to" means and whether the FTC has satisfied the Court that, based on its averments, it is plausible that the Defendants are about to violate the law.

The FTC argues that it means that that the misconduct is likely to recur, i.e., the same showing required to establish that injunctive relief would not be moot. Defendants contend that this is not what the text of the statute says, and argue for a more exacting definition.

Part of the confusion comes from the analogical relationship of the mootness inquiry for an injunction and the "about to violate" scenario.

When seeking an injunction based solely on past conduct, there is a risk that an injunction would be moot. To determine whether mootness is an issue, a court asks whether "the defendant's past conduct indicates that there is a reasonable likelihood of further violations in the future." *RCA Credit Servs., LLC*, 2010 WL 2990068, at *5 (quoting *SEC v. Caterinicchia*, 613 F.2d 102, 105 (5th Cir. 1980)). This is the standard the FTC seeks to have the Court apply to the "about to violate" provision of § 53(b). Further confusion obtains due to many courts that have accepted this interpretation of § 53(b). The Court believes, however, that such an interpretation is inconsistent with the plain language of § 53(b).

This issue was raised in *FTC v. Shire ViroPharma, Inc.*, No. 17-131-RGA, 2018 WL 1401329 (D. Del. Mar. 20, 2018), *appeal docketed*, No. 18-1807 (3d Cir. Apr. 12, 2018). There, the FTC sued drug manufacturers for improper use of patents and drug listings. The defendant-manufacturers challenged the FTC's action under Rule 12(b)(6), arguing that the FTC had not demonstrated that the defendants were violating or about to violate the law because their

alleged illegal acts had ceased. The FTC similarly argued that satisfying the "reason to believe" element was equivalent to demonstrating that injunctive relief would not be moot, i.e., that the alleged misconduct was "likely to recur." *Id.* at *5. The court disagreed. It held that the questions of whether injunctive relief was appropriate and whether the FTC was entitled to bring suit in the first place were distinct inquiries.

This Court agrees. The statutory text of § 53(b) must be given its plain meaning, and unless Congress says otherwise, the requisite showing should not be conflated with standards that, though analytically related, do not comport with the statutory language.

The linguistic distinction is evident when we look at the ordinary meaning of "about to." *See SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016) (looking to dictionaries to find the "ordinary meaning" of statutory language); *Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1254 (11th Cir. 2006) (same). This phrase evokes imminence, as if the offending action could be resumed with little delay. *See About*, OXFORD ENGLISH DICTIONARY ONLINE (2018) ("12. At the very

point when one is going *to* do something; intending or preparing immediately *to* do something."); *About*, THE AMERICAN HERITAGE DICTIONARY (5th ed. 2016) ("8a. On the verge of doing something; presently going to do something.").

This is contrasted with the mootness standard of "likely to recur." Likelihood of recurrence is less immediate than "about to." It is similar to a preponderance, "more likely than not," and therefore cannot be considered synonymous with "about to." Conflating them would do violence to the plain language, jiggering it by judicial sleight.

The FTC complains that this interpretation requires it to show more to survive a Rule 12(b)(6) challenge than is required to obtain the injunctive relief it seeks under § 53(b). That may be true, but because this is the interpretation demanded by the plain language, the Court can accept such an outcome.

Even if the FTC is correct, the outcome is consistent with the statute's plain meaning unencumbered by judicial gloss. Section 53(b) is not, on its face, a broad and sweeping avenue of relief, certainly not as broad as it has become through generous interpretation. It is simply an

injunctive remedy, a stop-gap to discontinue ongoing or threatening conduct violative of the laws the FTC enforces. It is a discrete authorization for the FTC to invoke the federal courts to assist it in the enforcement of its statutory mandates. If applying the plain language means that the showing to get into the courthouse is greater than the one required once the FTC is inside, narrowing § 53(b)'s scope, that is fine because that is what the language demands.[4]

It would not be fine, however, if applying the plain language created an outcome that is *absurd*. But this outcome is at most odd, not absurd. It therefore does not require deviation from the statute's language. As the Eleventh Circuit has observed:

> We have recognized that courts may reach results inconsistent with the plain meaning of a statute "if giving the words of a statute their plain and ordinary meaning produces a result that is not just unwise but is clearly absurd." However, we have also observed that:
>
> > Though venerable, the principle is rarely applied, because the result produced by the plain meaning

[4] The *Shire ViroPharma* court is in accord. The Court stated, "I appreciate the argument, [but] I see no reason why I should ignore the plain language of the statute, which authorizes the FTC to file suit in federal court only if it has reason to believe a corporation 'is violating, or is about to violate' a provision of law enforced by the FTC." *Shire ViroPharma*, 2018 WL 1401329, at *5 n.7.

> canon must be *truly absurd* before the principle trumps it. Otherwise, clearly expressed legislative decisions would be subject to the policy predilections of judges.
>
> In other words, it is irrelevant that "[w]e may not have made the same policy decision had the matter been ours to decide [if] we cannot say that it is absurd, ridiculous, or ludicrous for Congress to have decided the matter in the way the plain meaning of the statutory languages indicates it did."

CBS, Inc. v. PrimeTime 24 Joint Venture, 245 F.3d 1217, 1228 (11th Cir. 2001) (alterations in original) (emphasis added) (quoting *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1188 (11th Cir. 1997); then quoting *id.*; and then quoting *id.*).

Again, the outcome is odd, but not absurd. It would be admittedly easier to apply an already existing framework (i.e., the injunction mootness standard) to the statute, but ignoring the clearly distinct statutory language risks making the Court a super-legislature; it would be substituting its own judgment for Congress's. This is not the Court's role. The Court's role is to apply the text of a statute, and it ends there.

The difficulty of statutes like § 53(b) arises from the accretions of time, those well-meaning or oversighted judicial glosses that encrust themselves upon a law through loose interpretation. Among these

encrustations is the ubiquitous holding of the courts of appeals that equitable relief under § 53(b) other than injunctions is available. This is not supported by the plain text of the statute, but has been read into it by well-meaning judicial efforts to effect the "purpose" of the statute. These meta-textual pontifications seem good in the short run, but a long journey on even a narrowly wrong heading can be ruinous. Section 53(b) clearly states that it is a provision for injunctive relief, temporary or permanent. It mentions nothing of disgorgement or otherwise. The Court is, of course, bound to accept the binding interpretations of higher courts on this matter. But if it can prevent further encrustation through linguistic fidelity, it will.

The issue becomes even more apparent when one considers that retrospective relief (including remedies resembling disgorgement) is available to the FTC in an action under 15 U.S.C. § 57b. But unlike § 53(b), § 57b contains a statute of limitations. That makes sense if § 53(b) is only prospective in effect. A statute aimed at only future conduct would not be concerned with expiration because by definition the conduct it targets would be either ongoing or imminent.

Interpreting § 53(b) with both prospective *and* retrospective application means § 57b gets neglected. Without the burden of a statute of limitations, the FTC will be inclined to proceed under § 53(b) because it can obtain the same relief through equitable disgorgement under § 53(b) as is provided under § 57b *without limitation*. Thus, § 57b is denatured. The Court hopes that its holding here prevents further deterioration of this statutory scheme.

The Court is also aware of the need to carefully scrutinize an agency's suggested interpretations of its mandates and which have the effect of expanding its authority beyond the statutory bounds. If an agency was meant to have authority to do such and such a thing, Congress must say so. And when it has said, "Thus far and no farther," it is the Court's responsibility to blow the whistle and call the out of bounds. *See City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) ("The fox-in-the-henhouse syndrome is to be avoided not by establishing an arbitrary and undefinable category of agency decision making that is accorded no deference, but by taking seriously, and applying rigorously,

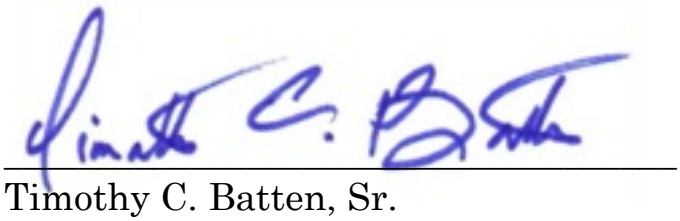
in all cases, statutory limits on agencies' authority. Where Congress has established a clear line, the agency cannot go beyond it[.]").

Therefore, in keeping with the plain meaning of the statute, the Court holds that when the FTC attempts to bring suit under § 53(b), it must satisfy the Court under Rule 8 that it has a reason to believe that *each* of the Defendants is violating or is about to violate the law. When the FTC's reason to believe is predicated upon past conduct, it must show that a defendant is "about to" violate the law—requiring more than mere likelihood of resuming the offending conduct—in order to state a claim. Its previous opinion [181] must therefore be vacated as to Part III.D.2.

The next step is for the Court to go Defendant-by-Defendant and ascertain whether the FTC has properly alleged that each "is violating or is about to violate" the law. Prior to this step, however, the Court will hear from the parties in light of this Order. And at the FTC's behest, it will be granted leave to file a second amended complaint within twenty-one days to correct any deficiencies. Upon the filing of the FTC's second amended complaint or the expiration of twenty-one days, whichever is

sooner, Defendants will have ten days to file motions to dismiss, strictly limited to the issue of whether the FTC has adequately pleaded facts showing that Defendants are violating or about to violate the law under § 53(b) as described in this Order. Defendants should also reiterate which claims would be time-barred under § 57b if the FTC has failed to make the requisite showing to invoke § 53(b) as to those claims.

IT IS SO ORDERED this 15th day of October, 2018.



Timothy C. Batten, Sr.
United States District Judge