Federal Trade Commission v. AdvoCare International, L.P. et al

2020 | Cited 0 times | E.D. Texas | November 16, 2020

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF TEXAS

SHERMAN DIVISION FEDERAL TRADE COMMISSION v. ADVOCARE INTERNATIONAL, L.P., ET AL.

§ § § § § §

CIVIL NO. 4:19-CV-715-SDJ

MEMORANDUM OPINION AND ORDER Before the Court are two motions: state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), (Dkt. #17), and

factual allegations, documents, and legal arguments included in Reply Brief, (Dkt. #20). For the following reasons, the Court GRANTS Motion to Dismiss, (Dkt. #17), and DENIES as moot

I. BACKGROUND In March 2017, consumers filed a class-action lawsuit in the Northern District of Texas against AdvoCare International, L.P. , alleging that AdvoCare had been operating as an illegal pyramid scheme. Ranieri v. AdvoC L.P., No. 3:17-cv-00691-B, 2017 WL 947224 (N.D. Tex. Mar. 9, 2017); see also (Dkt. #1 at 25, #17 at 12). That suit named, among others, Danny McDaniel but not his wife, Diane McDaniel as a defendant. Ranieri, 2017 WL 947224. However, the district court ultimately dismissed with prejudice the action against Danny McDaniel, holding that if AdvoCare indeed operated an illegal pyramid scheme, Danny McDaniel did not

operate said scheme. Ranieri v. AdvoC L.P., 336 F.Supp.3d 701, 718 (N.D. Tex. 2018); 1

see also (Dkt. #17 at 12). Separately, investigating AdvoCare for potential violations of consumer-protection law. (Dkt. #1

at 25). In July 2019, during negotiations with the FTC, AdvoCare terminated its -level , which was alleged to be an illegal pyramid scheme. (Dkt. #1 at 25 26).

On October 2, 2019, the FTC brought a complaint in this Court requesting a permanent injunction and other equitable relief against AdvoCare and at least five individual members thereof, including

the McDaniels. (Dkt. #1). The Complaint alleges that Defendants engaged in unlawful business practices in violation of the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. See, e.g., (Dkt. #1 at 26). In particular, the Complaint alleges that AdvoCare which the FTC describes as a multi- deceived AdvoCare, the majority of whom never earned compensation for their sales. (Dkt. #1

at 4 6). The Complaint further alleges that Defendants consistently and deceptively portrayed AdvoCare - 9), and trained recruits to do the same, (Dkt. #1 at 9). The Complaint thus asserts that AdvoCare operated an unlawful pyramid

1 In the instant case, Plaintiffs have not shown that creating and disseminating promotional materials . . . caused Plaintiffs injuries, and they have not shown that the Individual Defendants operated the alleged pyramid scheme . . . Id.

structure relied on the fraudulent recruitment of Distributors and Advisors who would unwittingly pass on profits to those higher up the chain of command. (Dkt. #1 at 16 23).

Simultaneous to, or immediately after, the , on October 2, 2019, all named Defendants except for the McDaniels reached a settlement agreement with the FTC. (Dkt. #2, #2-1, #2-2). Pursuant to the settlement agreement, the settling Defendants, including AdvoCare, submitted to a host of sanctions, including an outright ban on: multi-level marketing; operating programs or similar schemes; managing compensation for any business ventures unless certain criteria are satisfied; and making material misrepresentations regarding any business venture. (Dkt. #2-2 at 3 5, #15, #16). The settling Defendants also agreed to (a) provide equitable monetary relief and payment to the Commission, (b) cooperate in the settlement, and (c) record progress while otherwise submitting to wide-reaching compliance monitoring. (Dkt. #2-2 at 5 16, #15, #16). The FTC has continued to pursue the instant action against the McDaniels, which the McDaniels now move to dismiss under Rule 12(b)(6).

II. LEGAL STANDARD Under the relaxed pleading standards of Federal Rule of Civil Procedure Such a statement requires only

that the plaintiff provide Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d

929 (2007). The Supreme Court has instructed that plausibility, under Twombly, means , but not necessarily a probability. Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). When assessing a motion to dismiss under Rule 12(b)(6), the facts pleaded are entitled to a presumption of truth, but legal conclusions that lack factual support are not entitled to the same presumption. Id. [its] Id. at 679 80 (first quoting Twombly, 550

U.S. at 570, then citing Iqbal v. Hasty, 490 F.3d 143, 157 58 (2nd Cir. 2007)) (internal quotation marks omitted). plaintiff pleads factual content that allows the court to draw the reasonable inference that the Id. at 678 (citing Twombly, 550 U.S. at 556).

Further, when evaluating a Rule 12(b)(6) motion to dismiss, review is limited to the complaint, any documents attached to the complaint, and any

documents attached to the motion to dismiss that are central to the claim and Lone Star Fund V (U.S.), L.P. v. Barclays Bank PLC, 594 F.3d 383, 387 (5th Cir. 2010). However, a district court may also consider any matters of which a court may take judicial notice Funk v. Stryker Corp., 631 F.3d 777, 783 (5th Cir. 2011) (quoting Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007)). Courts have taken judicial notice of the existence and content of settlement agreements when evaluating Rule

12(b)(6) motions to dismiss. See, e.g., ASARCO, LLC v. Union Pac. R.R. Co., 765 F.3d 999, 1008 n.2 (9th Cir. 2014) (holding that because the settlement agreement was filed with the court and is a publicly available record, it is properly subject to judicial notice and thus may be considered on a Rule 12(b)(6) motion); Estate of Brown v. Arc Music Grp., 523 F. holding that the settlement agreement was a public record, of which the court could take judicial notice without converting the motion into one for summary judgment). Finally, a court may take judicial notice sua sponte. FED. R. CIV. P. 201(c)(1).

Here, the Court takes judicial notice of the settlement agreement between Plaintiff and all Defendants to the instant action besides the McDaniels, (Dkt. #2, #15, #16). 2

The Court thus considers the existence and content of the settlement agreement in its analysis.

III. DISCUSSION A. T Complaint is Not Exempt from the Pleading Standards

Prescribed by the Federal Rules of Civil Procedure.

The Federal Trade Commission Act instructs the Commission practices in or affe The Commission administrative proceedings and litigation in federal court. FTC v. Shire Viropharma,

Inc., 917 F.3d 147, 155 (3d Cir. 2019).

2 The Unopposed Motion for Settlement, (Dkt. #2), was filed with the Court the same day as the Complaint, (Dkt. #1), October 2, 2019, and the Court entered the stipulated orders, (Dkt. #15, #16), which collectively granted the motion, one week later.

As relevant here, Section 13(b) of the FTC Act empowers the violates the FTC Act. 15 U.S.C. § 53(b). To bring such an action, the FTC must have

the Act. Id.

The McDaniels contend Rule 12(b)(6) because the Complaint fails to state a plausible claim under Section

(Dkt. #17 at 6). Pointing to the Complaint itself, as well as the settlement agreement with AdvoCare and the other Defendants, the McDaniels assert that the FTC recognizes that the alleged pyramid scheme operated by AdvoCare, and in which the McDaniels were allegedly involved, ended in July 2019. (Dkt. #17 at 7 8). The McDaniels further argue that there are no factual allegations supporting the conclusory contention that the McDaniels are presently violating the FTC Act or are

3

3 jurisdiction in this matter. Although their dismissal motion included some language suggesting a potential jurisdiction argument, see (Dkt. #17 at 8), the substance of the McDaniels See (Dkt. #20 at 1 n.3) (the that they are not raising a jurisdictional challenge). In any claim arises under a law of the United States, 15 U.S.C. § 53(b), and therefore falls within the general grant of jurisdiction in 28 U.S.C. § 1331. See Arbaugh v. Y&H Corp., 546 U.S. 500, 5 claim that arises under the Constitution or the laws of the United States).

is to suggest that, because the agency has already be are the

Complaint before the Court is largely immunized from judicial scrutiny under Rule 12(b)(6).

(Dkt. #19 at 5). The FTC goes on to cite and quote Standard Oil Co. of California v. FTC, 596 F.2d 1381, 1386 (9th Cir. 1979), , 449 U.S. 232, 101 S.Ct. 488, 66 L.Ed.2d 416 as a fact that the FTC made the (Dkt. #19 at 5). Ultimately, the FTC asserts that, rather than

engaging in a straightforward application of pleading standards under Rule 8, the n to believe

determination. (Dkt. #19 at 12 13). According to the Commission of

The Court disagrees. T mean that, no matter how insubstantial the factual allegations in an FTC complaint

under Section 13(b), a court must accept that the complaint is sufficient to withstand a Rule 12(b) motion so long a defendant is Case 4:19-cv-00715-SDJ Document 52 Filed 11/16/20 Page 7 of 15 PageID #: 875 deceptive acts or practices. pleading and finds no support in applicable case law.

First, Rule 8(a) of the Federal Rules of Civil Procedure requires that anyone for the ion 13(b) case, that requirement includes factual allegations from the FTC that there FTC Act.

Iqbal,

the Twombly, 550 U.S. at 570. This Court is fully capable of determining whether

requisite about-to-violate showing. Therefore, there is no reason to conclude that

Congress intended to eliminate judicial scrutiny under Rule 8.

The cases that the FTC cites do not support its argument that its internal, to dismiss a Section 13(b) complaint brought by the FTC in federal court. For example,

Standard Oil addressed a challenge by an oil company to an administrative proceeding initiated by the FTC in connection with unfair trade practices. 596 F.2d

at 1384. challenge under the APA. Id. at 1385. Standard Oil did not involve a lawsuit brought

by the FTC and it says nothing about deference to the FTC in cases in which the FTC, as the plaintiff in federal court, bears the threshold burden to meet the requirements of Rule 8 and state a claim for relief that is plausible on its face.

The other cases cited by the FTC are equally unhelpful because they involve the inapposite circumstances of judicial review of agency action. See Slough v. FTC, 396 F.2d 870 (5th Cir. 1968) (suit seeking review of a cease and desist order issued by the FTC after an administrative hearing); FTC v. Nat Urological Grp., Inc., No. 1:04-cv-3294-CAP, 2006 WL 8431977 (N.D. Ga. Jan. 9, 2006) (dismissing counterclaims brought under the APA challenging the lawsuit); Boise Cascade Corp. v. FTC, 498 F.Supp. 772 (D. Del. 1980) (involving an

APA action seeking an order that the FTC withdraw an administrative complaint).

Judicial review of agency action under the APA is governed by the APA itself, § 701(a)(2). No such review is at issue here. Instead, the motion raises a different issue: whether the FTC has stated a claim under the Federal

Rules of Civil Procedure. 8 of the Federal Rules of Civil Procedure, which mandates, rather than precludes,

judicial review to ensure compliance with federal ple Case 4:19-cv-00715-SDJ Document 52 Filed 11/16/20 Page 9 of 15 PageID #: 877 FTC v. Hornbeam Special Situations, LLC, No. 1:17-cv-3094-TCB,

2018 WL 6254580, at *4 (N.D. Ga. Oct. 15, 2018).

In sum, to avoid dismissal of its Section 13(b) action at the pleadings stage, the FTC must plausibly allege, in satisfaction of Iqbal and Twombly, that the McDaniels are currently violating the FTC Act

or are about to do so. B. Factual Allegations Pertain Only to Past Misconduct by the

McDaniels and not to Present or Future Misconduct.

Section 13(b) of the FTC Act empowers the Commission to file a claim in partnership, or corporation is violating, or is about to violate, any provision of law

enforced by the [FTC] . . . . § 53(b) (emphasis added). Section 13(b) thus unambiguously requires plausible factual allegations supporting a reasonable belief of present or future misconduct. Shire, 917 F.3d at 156 the law . . . . [T]his language is unambiguous; it prohibits existing or impending

conduct . . . [and] does not permit the FTC to bring a claim based on long-past conduct

In Shire, the conduct in question was five years past. Here, the McDaniels past conduct is more recent; at the time the FTC filed the Complaint, only three months had passed since the McDaniels ceased their alleged misconduct. However, like in

Shire, the FTC identifies no ongoing misconduct and, in fact, appears to concede that alleged misconduct continued only until July 2019. 4

Further, even if the FTC had alleged ongoing or impending violations by the McDaniels, such allegations are implausible because, factual allegations, at the time the Complaint was filed, the primary mechanism of , the MLM program, had been permanently defunct for months. (Dkt. #1 at 26). Additionally, the sole business through which the McDaniels allegedly undertook such actions AdvoCare had, either before or entered into a comprehensive agreement to halt unlawful activities, reform its business practices, and submit to government compliance monitoring. (Dkt. #2, #2-1, #2-2).

The FTC has not alleged that the McDaniels are currently violating or are about to violate the law enforced by the FTC. Every factual allegation that the FTC presents refers to past misconduct by the McDaniels. Although this misconduct was extensive and longstanding all factual allegations indicate that the alleged violations ended entirely in

am was permanently terminated. (Dkt. #1 at 25 26). And it is implausible that the McDaniels can commit ongoing violations because the MLM program is now defunct, (Dkt. #1 at 26), and AdvoCare has been extensively sanctioned, reformed, and monitored for compliance, (Dkt. #15, #16).

4 els . . . continued to engage in deception until AdvoCare abandoned its multi- at 26).

Finally, the FTC has not alleged either in the initial Complaint filed in October 2019 or in any amended pleadings since that time that either the MLM is still operating or that the McDaniels are otherwise continuing to engage in misconduct after July 2019. C. Past Violations May Sometimes

Give Rise to an Inference of Ongoing or

Future Violations, but the FTC has not Plausibly Alleged that Such is the Case Here.

Section 13(b) generally cannot be used to remedy past violations. FTC v. Evans Prods. Co., 775 F.2d 1084, 1087 (9th Cir. 1985). However, a plaintiff may state a plausible claim under Section 13(b) by showing that a past violation or series of past violations is likely to recur. Id. In some instances, courts have found that an extensive history of past violations is itself sufficient to create an inference of ongoing violations. See, e.g., FTC v. GTP Mktg., Inc., No. 4-90-123-K, 1990 WL 54788, at *5 (N.D. Tex. Mar. 15, 1990) (quoting United States v. Odessa Union Warehouse Co-op, 833 F.2d 172, 176 (9th Cir. 1987)) The Fifth Circuit, however, has

held merely that past violations may, but do not necessarily, support an inference of future substantive violations. SEC v. First Fin. Grp. Tex., 645 F.2d 429, 434 (5th Cir. 1981) (holding in an analogous context that finding a reasonable likelihood of future securities-law violations requires that indicate a (emphasis added)).

In each of the above cases, the recurrence of violations was at least possible, and in some instances likely, because the channels of misconduct utilized by the defendants remained open i.e., free and clear of government sanction upon filing

of the litigation. See, e.g., Odessa, 833 F.2d at 176 77. In Odessa, for instance, the defendant warehouse co-op was still fully operational at the outset of litigation. Id. Moreover, while the defendant stated an intent to comply with sanitation laws, it continued to manage its own sanitation practices free of government intervention. Id. Absent such intervention, the court held that [ed] the would recur or continue. Id.

Here, by contrast, at the outset of litigation and pursuant to FTC intervention, channel of misconduct was either permanently defunct (in the case of the MLM program) or reformed, lawful, and monitored for compliance (in the case of AdvoCare more broadly). To this end, the FTC not only fails to adequately allege ongoing or future misconduct by the McDaniels but appears to affirmatively concede that the channels through which the McDaniels engaged in misconduct are permanently closed. (Dkt. #1 at 26); see also (Dkt. #2, #15, #16). Therefore, under the circumstances, an inference of present or future violations by the McDaniels is unsupported.

IV. CONCLUSION The FTC is authorized to bring an action under Section 13(b) of the FTC Act only when there is that a defendant is currently engaged in, or about to engage in, conduct violating the Act. 15 U.S.C. § 53(b). Here, each of the past misconduct by the McDaniels. While courts may sometimes infer ongoing or future violations based on an extensive history of past violations, here such an inference is improper because the sole channel

through which the McDaniels allegedly engaged in violations AdvoCare agreed to abandon its MLM program entirely (as well as all other allegedly unlawful practices) and subject itself to wide-ranging government monitoring for compliance. This fundamental transformation program in July 2019 and culminated in , of which the Court takes judicial notice. Under the

circumstances, the FTC has failed to provide plausible factual allegations that there is reason to believe that the McDaniels are currently violating the FTC Act or are about to violate the Act.

Finally, the FTC has filed with the Court a Motion to Exclude, (Dkt. #23), arguing that certain documents, legal arguments, and factual allegations presented in Reply Brief, (Dkt. #20), should be excluded from consideration. In he Court did not consider or rely upon any of the arguments, alleged facts, or documents complained of in the Motion to Exclude. For this reason, be DENIED as moot.

It is therefore ORDERED that Defendants Motion to Dismiss, (Dkt. #17), is GRANTED. The Federal Trade

Commission s claims against the McDaniels, see (Dkt. #1), are hereby DISMISSED without prejudice. 5

It is further ORDERED that the FTC is granted leave to

5 Because the Court dismisses the claims asserted against the McDaniels by the FTC, scope of the remedies that would be against the McDaniels were successful.

replead its claims by filing an amended complaint, with such amended complaint to be filed within thirty (30) days from the date of the issuance of this Order.

It is further ORDERED that DENIED as moot.

It is further ORDERED that all other motions pending before the Court are DENIED as moot.