UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, INC., a Texas corporation, *et al.*,

Defendants

Case No. 4:26-cv-00748-O

BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER VENUE

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Introduction

From the filing of the Federal Trade Commission's complaint in this Court, WPATH has made one thing clear: It is willing to litigate this case *anywhere but here*. It first asked a district court in Washington, D.C., to enjoin this litigation. TRO Motion, ECF No. 45, *WPATH v. FTC*, No. 26-00532-JEB (D.D.C. June 30, 2026). That gambit was declined. Order, ECF No. 58, *WPATH v. FTC*, No. 26-00532-JEB (D.D.C. July 10, 2026). WPATH now asks this Court to transfer this case back to D.C., or maybe to Chicago, or maybe to a different Texas district court down the road. Anywhere but here.

But venue is appropriate in this Court.

WPATH argues that this Court lacks personal jurisdiction over it because WPATH lacks minimum contacts with the Northern District of Texas. This is wrong. The FTC is proceeding under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes nationwide service of process. The relevant inquiry for personal jurisdiction in such a case is whether the defendant has minimum contacts with the United States, not with any particular district. WPATH does not dispute that has the requisite minimum contacts with the United States, making venue in this district proper.

WPATH's arguments in favor of transfer to another venue are equally unavailing. WPATH has been incorporated in Texas since 1980. WPATH suggests that its headquarters and principal place of business is in East Dundee, Illinois. WPATH's Memorandum in Support of it Motion to Dismiss or Transfer, ECF No. 55 at 1, 5 (the "Memorandum"). But its claims are replete with inaccuracies and half-truths. WPATH has consistently represented to the Internal Revenue Service that its domicile is Texas, not Illinois. And WPATH's does not have "headquarters" in Illinois as ordinary speakers of English would use that term. It maintains neither an office, nor employees, nor operations in East Dundee. *See* ECF No. 55-1, Decl. Leo Lewis ("Lewis Decl.) ¶ 6

("WPATH . . . does not directly employ any individuals."). The address WPATH identifies as its principal place of business is the office of Veritas—a management company specializing in providing services to medical organizations. Indeed, 30 medical organizations also list Veritas's address as their own. *See* Ex. 1, Declaration of Jay Bugbee ("Bugbee Decl.") ¶ 12. And, in any event, these loose connections to Illinois are meaningless even to WPATH. When it previously sued the FTC over compulsory process issued in the investigation leading up to this litigation, it sued in D.C. rather than Illinois despite having no physical presence or business operations there.

Venue is lawful and appropriate in the Northern District of Texas. This Court should not reward WPATH's desperate attempt to forum-shop its way out of this Court. The motion should be denied.

Background

I. WPATH

WPATH is an active Texas domestic corporation, with a registered agent and a registered office in Texas. Am. Compl., ECF No. 70 at ¶ 34. It was incorporated in Texas in 1980. Lewis Decl. ¶ 34; Mem. at 1. After terminating that status in 2020, WPATH sought and obtained reinstatement in 2023. Lewis Decl. ¶ 3. WPATH's current bylaws state that it is a Texas corporation. *Id.* Its most recent public tax filings claim WPATH's "state of legal domicile" is Texas and nowhere else. Bugbee Decl. ¶ 10 (citing 2024 IRS 990 form). WPATH was also incorporated in Illinois in 2017. Lewis Decl. ¶ 4. But when contesting jurisdiction in a Montana lawsuit in 2024, WPATH argued: "WPATH is incorporated in Texas[.]" Bugbee Decl. ¶ 11. It did not claim incorporation in any other state. *See id.*

WPATH does not have any employees and its only known addresses belong to a third-party management company or registered agents. Lewis Decl. ¶¶ 5, 6, Ex. 5; Am. Compl. ¶¶ 34, 42. WPATH's "Executive Director," Leo Lewis, does not reside in Illinois and is actually employed by a third-party contractor named Veritas, which is not a defendant in this action. Lewis Decl. ¶¶ 1, 6. Veritas, which lists over 30 clients on its website, has an Illinois address. Bugbee Decl. ¶ 12. It seems implausible that dozens of medical associations all conduct meaningful business from this single office. WPATH's board members are scattered across the globe. Lewis Decl. ¶ 7. WPATH does not have any more physical operations in Illinois than in Texas or anywhere else.

II. Plaintiffs Sue WPATH

Plaintiffs sued WPATH in June 2026 (the "Enforcement Action") for giving clinicians the means to deceive children and their parents about pediatric medical transition. The complaint charges violations of the Federal Trade Commission Act and the consumer protection laws of Texas, Alaska, Iowa, and Nebraska. Its allegations are discussed in Plaintiffs' Mem. in Opp. to Mot. Dismiss. This suit rests on a detailed complaint, backed by sworn declarations from victims and witnesses. Three of these declarations describe misrepresentations made in Texas to local children and their families. *See* Am. Compl., Exs. 1–3.

Plaintiffs named three entities as defendants in the Enforcement Action: WPATH of Texas, WPATH of Illinois, and USPATH. WPATH treats the former two entities as though they are one and the same. *See* Lewis Decl. ¶¶ 3–4. USPATH is an unincorporated entity formed under WPATH's bylaws.[1] Am. Compl. ¶¶ 36, 48. USPATH has its own Board of Directors. Am. Compl. ¶ 19. WPATH has not disclosed the directors' domiciles.

Plaintiffs served WPATH in Texas via WPATH's registered agent (ECF No. 25; Am. Compl. ¶ 34) and in New York via WPATH's president (ECF No. 26; Am. Compl. ¶ 44). WPATH

[1] 28 U.S.C. § 1391(d) by its terms governs "a defendant that is a corporation." USPATH is unincorporated, Compl. ¶¶ 36, 48, so its residence is governed by Section 1391(c)(2) without that qualification, and it resides in any district where it is subject to personal jurisdiction—which, under 15 U.S.C. § 53(b), is every district in the United States.

claims it was served in Illinois, but that is false. *Compare* Mem. at 1 *with* ECF Nos. 25–27. Plaintiffs served USPATH's president in California. ECF No. 27; Am. Compl. ¶ 48.

Legal Standard and Framework

While WPATH exclusively focuses on the general federal venue statute, 28 U.S.C. § 1391, the FTC may bring suit pursuant to the FTC Act's special venue provision, which allows the agency to sue, as relevant here, wherever a defendant "resides." 15 U.S.C. § 53(b)(2). A corporate defendant "shall be deemed to reside" in "any judicial district in which such defendant is subject to the court's personal jurisdiction." 28 U.S.C. § 1391(c)(2). The FTC Act provides nationwide personal jurisdiction over a domestic corporation through its nationwide service of process provision. 15 U.S.C. § 53(b)(2); *see Busch v. Buchman, Buchman & O'Brien, Law Firm*, 11 F.3d 1255, 1258 (5th Cir. 1994).

Under Section 1406(a), a court may dismiss or transfer the case to another district if it finds venue is improper. *See* 28 U.S.C. § 1406(a). On such a motion, "the court must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff." *Braspetro Oil Servs. Co. - Brasoil v. Modec (USA), Inc.*, 240 F. App'x 612, 615 (5th Cir. 2007). A venue motion permits the court to consider evidence outside the pleadings. *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 237–38 (5th Cir. 2009).[2]

A court may also transfer venue for "the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). But plaintiffs are generally entitled to their choice of venue, which "places a significant burden on the movant to show good cause for the transfer." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314 n.10 (5th Cir. 2008) (en banc). Thus, "[i]t is the

[2] WPATH also seeks dismissal under Rule 12(b)(2). *See* Mem. at 1, 11. As discussed *infra* § I.A., this argument fails because Court has personal jurisdiction over WPATH.

movant's burden—and the movant's alone—to 'adduce evidence and arguments that clearly establish good cause for transfer based on convenience and justice.'" *In re Clarke*, 94 F.4th 502, 508 (5th Cir. 2024) (quoting *Def. Distributed v. Bruck*, 30 F.4th 414, 433 (5th Cir. 2022)).

Argument

I. WPATH's Motion to Dismiss Should Be Denied Because Venue Is Proper in the Northern District of Texas.

Venue is proper in the Northern District of Texas based on two independent grounds: the FTC's special venue statute and the "substantial events" test.

A. This Court Has Personal Jurisdiction Over WPATH for the FTC Act Claims Because WPATH Has Minimum Contacts with the United States.

The FTC Act's nationwide service of process section provides personal jurisdiction over WPATH in every district in the United States, including this one. The FTC Act "provide[s] for nationwide service on defendants and personal jurisdiction over them in any federal district court in the country." *Canaday v. Anthem Companies, Inc.*, 9 F.4th 392, 398 (6th Cir. 2021) (citing 15 U.S.C. §§ 53(a), (b)). When such a provision exists, a court has personal jurisdiction so long as "the defendant had minimum contacts with the United States." *Busch*, 11 F.3d at 1258.[3] And where a defendant resides in the United States, such minimum contacts exist. *See Luallen v. Higgs*, 277 Fed. App'x at 404 (affirming the Northern District of Texas's exercise of personal jurisdiction over Nevada residents under nationwide service of process provision). This principle has been repeatedly applied in FTC Act actions. *See, e.g.*, *FTC v. Mallett*, 818 F. Supp. 2d 142, 147 (D.D.C. 2011); *FTC v. Bay Area Bus. Council, Inc.*, No. 02 C 5762, 2003 WL 21003711, at *2 (N.D. Ill.

[3] While one panel questioned *Busch*, *see Bellaire Gen. Hosp. v. Blue Cross Blue Shield*, 97 F.3d 822, 826 (5th Cir. 1996), the Fifth Circuit "dutifully appl[ies]" it, *id.; see also Tr. Co. of Louisiana v. N.N.P. Inc.*, 104 F.3d 1478, 1486–87 (5th Cir. 1997); *Luallen v. Higgs*, 277 F. App'x 402, 405 (5th Cir. 2008).

May 1, 2003); *FTC v. Navestad*, No. 09-CV-6329T, 2010 WL 743899, at *1 (W.D.N.Y. Feb. 25, 2010).

For venue purposes, a corporate defendant resides in "any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." 28 U.S.C. § 1391(c)(2). And it may be sued where it resides. *Id.* § 1391(b)(1). As a result, a domestic corporate defendant may be sued under the FTC Act in any judicial district. *See Bay Area Bus. Council, Inc.*, 2003 WL 21003711 at *2; *FTC v. Cleverlink Trading Ltd.*, No. 05 C 2889, 2006 WL 1735276, at *4 (N.D. Ill. June 19, 2006).

The FTC Act's nationwide service of process provision, 15 U.S.C. § 53(b), gives this Court personal jurisdiction over WPATH. It is an American corporation, and so it resides in the Northern District of Texas by virtue of the existence of personal jurisdiction. 28 U.S.C. § 1391(c)(2). Venue here is proper under 28 U.S.C. § 1391(b)(1).

B. A Substantial Part of the Events or Omissions Giving Rise to this Lawsuit Occurred in the Northern District of Texas, Making Venue Proper.

In determining whether a substantial part of events or omissions occurred in a district for purposes of venue under section 1391(b)(2), "[t]he test is not whether a majority of the activities pertaining to the action were performed in a particular district, but rather, whether a substantial portion of the activities giving rise to the action occurred in the district." *Insp. Leasing Inc. v. Tavas LLC*, 2024 WL 4329035, at *4 (W.D. Tex. Aug. 30, 2024). "Venue is proper in a district where a substantial part of the events took place . . . even if there are other venues where more, or even the most, substantial activities took place." *Snelling Empl., LLC v. Doc Johnson Enters.*, 2018 WL 3659067, at *3 (N.D. Tex. Aug. 2, 2018) (cleaned up). Plaintiffs alleged that a substantial part of the events or omissions giving rise to this action occurred in the Northern District of Texas. SOC-8 was signed by at least one co-author affiliated with the University of Texas Southwestern Medical

Center, which is located in this District. ECF No. 53 at 6 (citing SOC-8 at S1–S3). And, as alleged in the Amended Complaint, events occurred in this District that resulted in significant harm to children. For example, Cassidy Andrews received treatment at GENECIS, a pediatric transition clinic in Dallas. Am. Compl. Ex. 2 at ¶¶ 12–24. A psychologist there persuaded her parents to consent to the treatment at least in part by advising them that WPATH recommended it. *See id.* ¶ 18.

These are not the actions of mere "third parties." Mem. at 6. "WPATH's deceptive statements provide clinicians with the means and instrumentalities to mislead consumers," Am. Compl. ¶ 324, and that clinicians have used these statements to deceive consumers in this District, Am. Compl. ¶¶ 198, 327, 338. Under the FTC Act, defendants are responsible for promotional materials they "put into the hands of others" by which "they mislead the public." *FTC v. Neora LLC*, 2023 WL 8446166, at *30 (N.D. Tex. Sept. 28, 2023) (quoting *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963)).

Nor is it relevant that state law now bans the medical transition of minors in Texas. *See* Mem. at 6–7. The question for venue is whether events occurred in the district giving rise to the lawsuit, not whether injunctive relief is appropriate, and WPATH cites no contrary authority.

II. The Motion to Transfer Venue Pursuant to 28 U.S.C. § 1404(a) Should Be Denied.

WPATH's request for transfer under 28 U.S.C. § 1404(a) should be denied because WPATH fails to satisfy its burden to establish that either the District of Columbia District Court or the Northern District of Illinois is a "clearly more convenient" forum than this Court.

Section 1404(a) permits transfer "[f]or the convenience of parties and witnesses, in the interest of justice." Courts only grant such a motion where "the movant demonstrates that the transferee venue is clearly more convenient." *In re TikTok, Inc.*, 85 F.4th 352, 358 (5th Cir. 2023) (quotation omitted); *see also Van Dusen v. Barrack*, 376 U.S. 612, 645–46 (1964) (court should not transfer case to "a forum likely to prove equally convenient"); *In re Clarke*, 94 F.4th at 508 ("good cause" "standard is not met if the movant merely shows that the transferee venue 'is more likely than not to be more convenient'"). The considerations are:

> (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; (4) all other practical problems that make trial of a case easy, expeditious and inexpensive; (5) the administrative difficulties flowing from court congestion; (6) the local interest in having localized interests decided at home; (7) the familiarity of the forum with the law that will govern the case; and (8) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.

In re TikTok, Inc., 85 F.4th at 358 (cleaned up). The first four factors are considered "private interest" and the latter four, "public interest." *In re Volkswagen of Am., Inc.*, 545 F.3d at 315.

Courts give "considerable deference to a plaintiff's choice of forum." *Terra Int'l v. Mississippi Chem. Corp.*, 119 F.3d 688, 695 (8th Cir. 1997); *accord In re Chamber of Com. Of United States of Am.*, 105 F.4th 297, 302 (5th Cir. 2024) ("deference is given to a plaintiff's initial choice of venue"); *Schexnider v. McDermott Int'l, Inc.*, 817 F.2d 1159, 1163 (5th Cir. 1987) ("the plaintiff's choice of forum should rarely be disturbed"). This is particularly so in instances where "the Plaintiffs' chosen forum was selected pursuant to a special venue statute which 'represents an affirmative congressional policy choice to allow . . . the widest possible choice of forums in which to sue.'" *FTC v. Big Dog Solutions LLC*, No. 16-cv-6607, 2016 WL 5391391, at *2 (N.D. Ill. Sept. 27, 2016) (quoting *SEC v. Electronics Warehouse, Inc.*, 689 F. Supp. 53, 75 (D. Conn. 1988)). Plaintiffs rely on such a statute here. *See supra* § I.A.

WPATH argues the interests weigh in favor of transfer to either the District of Columbia or the Northern District of Illinois. Mem. at 10–11.[4] But WPATH concedes that factors 7 and 8 are

[4] WPATH mentions in a footnote that its "only contacts in Texas are in the Western District." Mem. at 4 n.1. To the extent it implies this action should be transferred there, it offers no justification for

neutral and do not favor any venue. Mem. at 11. And the remaining public and private factors weigh *against* those venues, particularly with regard to witness convenience and court congestion, or are at a minimum neutral.

A. WPATH Is Not Meaningfully Connected to Illinois or Washington, D.C.

WPATH argues the public and private factors generally support a transfer to the Northern District of Illinois because that is where "WPATH is incorporated and headquartered, where its management company employs individuals who perform work on behalf of WPATH, and where its operations occur." Mem. at 8. WPATH is not headquartered in Illinois in any real sense. Its alleged "principal place of business" in East Dundee, IL, belongs to a third-party management company, Veritas. *See* Lewis Decl. ¶¶ 5–6. WPATH does not identify *anyone* who performs work for it out of that location, much less explain why their testimony would be needed here. *See id.* ¶ 1. WPATH's claim to store "business records" in East Dundee (as opposed to in a digital format available anywhere) strains credulity. *See* Mem. at 11. Plus, WPATH has consistently publicly claimed that Texas, not Illinois, is its domicile, since 1980. *See supra* at 2.

Transferring this litigation to the Northern District of Illinois does not clearly make "access to sources of proof" easier (Factor 1), nor does the Northern District of Illinois have a "local interest" in deciding claims related to WPATH (Factor 6). By contrast, this District does have a local interest in deciding these claims because WPATH is domiciled here, and has been since 1980, meaning Factor 6 weighs against transfer.

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such a transfer other than its incorporation there, which it argues elsewhere is irrelevant. As discussed *supra* § I, venue is proper in the Northern District of Texas.

B. Neither Illinois nor the District of Columbia is More Accessible to Witnesses.

WPATH claims "the availability of witnesses, and the cost of attendance for witnesses [is] most favorable in the Northern District of Illinois," citing all the private factors. *See* Mem. at 11. It does not claim Washington, D.C., is more convenient for witnesses.

Under section 1404(a), it is the movant's burden to identify witnesses it plans to call and summarize their expected testimony. *See Hathcock v. BNSF Ry. Co.*, No. 3:13-cv-00230, 2014 WL 1660633, at *2 (E.D. Ark. Apr. 24, 2014) (quoting *Peacock v. Pace Int'l Union Pension Fund Plan*, 2007 WL 4403689, *10 (M.D. Tenn. Aug. 23, 2007)); *see also Big Dog Solutions LLC*, No. 16-cv-6607, 2016 WL 5391391, at *3. WPATH does not name any witnesses. This alone is grounds to deny its motion. *Id.*

By contrast, Plaintiffs have submitted declarations from third-party witnesses who reside in Texas. *See* Am. Compl., Ex. 1 ¶ 1, Ex. 3 ¶ 1. Crucially, the interests of third-party witnesses are entitled to greater weight than party witnesses because party witnesses "are presumed to be more willing to testify in a different forum." *See D2L Ltd. v. Blackboard, Inc.*, 671 F. Supp. 2d 768, 782 (D. Md. 2009). Plaintiffs have identified 14 additional potential witnesses who are spread throughout the country. *See* Am. Compl., Exs. 2, 4–16. This means witnesses for both parties will need to travel for court proceedings. Both the Northern District of Texas and the Northern District of Illinois are central locations with major airports near the courthouses, making neither more convenient. *See Salinas v. O'Reilly Auto., Inc.*, 358 F. Supp. 2d 569, 572 (N.D. Tex. 2005) (no meaningful difference between Dallas, Texas and Springfield, Missouri for convenience since "both cities are centrally located").

WPATH has failed to meet its burden of proving that the Northern District of Illinois or Washington, D.C. is clearly more convenient for witnesses. And because this District is more convenient for third-party witnesses, and WPATH has not established that the proposed transferee venues make obtaining other sources of evidence or testimony from other witnesses easier, Factors 2–4 weigh against transfer.

C. The Northern District of Texas Is Less Congested Than WPATH's Preferred Venues.

The section 1404(a) analysis favors venues with a faster time to trial. *See In re: TikTok*, 85 F.4th at 358 (factors include "practical problems that make trial of a case . . . expeditious" and "administrative difficulties flowing from court congestion"). Neither of WPATH's preferred venues offers this. In fact, they are considerably more congested than this district.

Based on analysis of median months from filing to trial for civil cases in the last six years, time to trial in the Northern District of Texas has been well below the median for all U.S. District Courts, while time to trial in the Northern District of Illinois and the District of Columbia has been higher than the median in each year statistics are available. *See* Bugbee Decl. ¶ 9. For example, in the most recent twelve-month period ending March 31, 2026, the Northern District of Texas had a median time from filing to trial of 28.6 months, while the Northern District of Illinois was at 49.0 months and the District of Columbia was at 59.2 months. *See id.*

District	2021	2022	2023	2024	2025	2026
N.D. Texas	n/r	25.1	26.9	22.7	23.7	28.6
National	26.1	32.6	35.0	35.4	33.1	34.8
N.D. Illinois	35.5	53.8	53.5	55.4	58.6	49.0
D.D.C.	n/r	45.3	53.5	52.9	n/r	59.2

Table 1. Median Months from Filing to Trial, civil cases only, for twelve-month periods ending March 31. The entry n/r ("not reported") indicates that no median was reported for that period.

If this case were transferred to either the Northern District of Illinois or the District of Columbia, it could take years more for the case to reach trial, delaying an outcome for all parties. Factor 5 weighs strongly against transfer.

D. Plaintiffs Are Not Engaged in Forum Shopping.

Finally, WPATH disregards the actual factors governing transfer and argues instead that this Court should transfer because "the FTC is engaging in inappropriate forum shopping." Mem. at 10. This is wrong. This is a proper venue. WPATH has been incorporated in Texas for decades and is at home here. And Congress has explicitly granted the FTC the authority to sue anywhere in the United States. In any event, it is WPATH that is forum shopping as it desperately seeks to litigate in any forum but the Northern District of Texas.

III. Relief

This Court should deny WPATH's venue motion. It cannot dismiss this action under Rule 12(b)(3) because venue is proper. And it should not transfer the action under 28 U.S.C. § 1404(a) because WPATH has not met its burden to show that the factors favor transfer.

The key facts supporting Plaintiffs' choice of venue are undisputed. But if this Court is not inclined to deny the motion in its entirety, Plaintiffs request leave to conduct discovery as to WPATH's contacts and business transactions in Texas, Illinois, and Washington, D.C. *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978) ("where issues arise as to . . . venue, discovery is available to ascertain the facts bearing on such issues").

If this Court finds that venue is improper, it should not dismiss the action but rather transfer it "in the interest of justice." *See* 28 U.S.C. § 1406(a).

Conclusion

The Court should deny WPATH's venue motion in its entirety.

Dated: August 18, 2026

Respectfully submitted,

/s/ R. Cooper Vaughan
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Certificate of Service

I, R. Cooper Vaughan, hereby certify that this document complies with the length limits specified in this Court's order of August 14, ECF No. 66, because it and Plaintiffs' concurrently filed Brief in Opposition to Motion to Dismiss do not exceed 55 pages, excluding the items listed in Federal Rule of Appellate Procedure 32(f) and Local Rule (Civil) 7.2(c).

/s/ R. Cooper Vaughan
R. Cooper Vaughan

Exhibit 1

DECLARATION OF FTC INVESTIGATOR JONATHAN BUGBEE PURSUANT TO 28 U.S.C. § 1746

I, Jonathan Bugbee, have personal knowledge of the facts stated below and am competent to testify about them:

1. I am a citizen of the United States and am over eighteen (18) years of age. I am employed as an Investigator assigned to the Federal Trade Commission's ("FTC") Bureau of Consumer Protection. My mailing address is 600 Pennsylvania Avenue, NW, Washington, D.C. 20580.

2. I have been an Investigator with the FTC since October 2023. Prior to working at the FTC, I was a Labor-Law Investigator with the Department of Labor and Industry, Commonwealth of Pennsylvania from 2021 to 2023, and an Investigator/Special Agent with the United States Army Criminal Investigation Command from 2008 to 2017, assigned to conduct investigations into violations of Title 18 U.S.C. and the Uniform Code of Military Justice.

3. I served for about 12 years on active duty in the United States Army and deployed several times to Iraq and Afghanistan where I served in combat operations, and then I left the Army 2017 as a Non-Commissioned Officer.

4. Since November of 2025 I have been a Certified Fraud Examiner ("CFE"). The CFE certification is awarded by the Association of Certified Fraud Examiners. To become a CFE, I had to pass an exam which tested four

subject areas: (1) fraud prevention and deterrence; (2) fraudulent financial transactions; (3) fraud investigations; and (4) legal elements of fraud.

5. I have earned several IT and cybersecurity certifications from CompTIA, which is the Computing Technology Industry Association. I also attended the Department of Defense Cyber Investigations training academy and I'm a Certified Crisis Negotiator, and a Certified Child Forensic Interviewer.

6. I hold a Bachelor of Science in Computer Forensics and Digital Investigation from Champlain College, VT and a Certificate in Blockchain Technology also from that institution.

7. I am the Investigator assigned to *Federal Trade Commission v. WPATH*, No. 4:26-cv-00748-O.

8. In this capacity, I conducted research onto Federal Court statistics for the Northern District of Texas, the Northern District of Illinois, and the District of Columbia using the online Federal Court Management Statistics website published by the Administrative Office of the U.S. Courts.[1]

9. ***Table 1*** below shows median months from filing to trial, for civil cases only, for the twelve-month periods ending March 31 of each year. The entry N/R ("not reported") indicates that no median was reported for that period.

[1] https://www.uscourts.gov/data-news/reports/statistical-reports/federal-court-management-statistics

Table 1. Filing to Trial Median Time Chart

District	**2021**	**2022**	**2023**	**2024**	**2025**	**2026**
Northern District of Texas	N/R	25.1	26.9	22.7	23.7	28.6
All U.S. District Courts	26.1	32.6	35.0	35.4	33.1	34.8
Northern District of Illinois	35.5	53.8	53.5	55.4	58.6	49.0
District of Columbia	N/R	45.3	53.5	52.9	N/R	59.2

10. I reviewed WPATH's Tax Year 2024 Form 990 filing on the publicly available Internal Revenue Service website[2] which revealed WPATH made the required regulatory 990 filing with a state of legal domicile of Texas reflected in box M. Ms. Sue O'Sullivan was the signatory on the form and the signature is dated 2025-06-17. A true and accurate copy of the WPATH Tax Year 2024 Form 990 is appended hereto as ***Attachment A***.

11. I reviewed the Third-Party Defendant World Professional Association for Transgender Health's Brief in Support of Motion to Dismiss from Case No. ADV-25-2024-0000261-CR wherein WPATH represents that (it) "is

[2] https://apps.irs.gov/app/eos/

incorporated in Texas and headquartered in Illinois." A true and accurate copy of the Third-Party Defendant World Professional Association for Transgender Health's Brief in Support of Motion to Dismiss from Case No. ADV-25-2024-0000261-CR is appended hereto as ***Attachment B***.

12. Veritas Association Management (Veritas) is an Association Management company headquarters in Illinois. According to Veritas' website, their organization manages WPATH along with 51 other medical organizations and is headquartered at 1061 East Main Street, Suite 300 East Dundee, Illinois 60118. ***Table 2*** below lists the organizations managed according to Veritas' website.

Table 2. Organization List from Veritas' Website

Organization:
American Academy of Clinical Toxicology (AACT)
American Association of Clinical Urology (AACU)
American Pediatric Surgical Association (APSA)
American Society of Andrology
American Venous Forum (AVF)
Big XII Team Physicians

Celebrate Champions (Institute for Surgical Excellence / Healthcare Explorers Day)
Chicago Dermatological Society
Developments in Ureteroscopic Stone Treatment (DUST)
Endoscopic Cardiac Surgeons Club (ECSC)
The Fleischner Society
Frontiers in Oncologic Prostate Care and Ablative Local Therapy (FOCAL)
The Heartland Endocrine Roundtable
Illinois Dermatological Society (IDS)
International Fetal Medicine and Surgery Society (IFMSS)
Integrating Functional Reconstructive Urology & Endourology
International Functional & Reconstructive Urology Update
ISS (Musculoskeletal Science & Education group)
International Society for the Study of Sleep (ISSS)
International Symposium on Urolithiasis
INM (Nuclear Medicine group)
Mid-Atlantic Section of the American Urological Association (MAAUA)
Musculoskeletal (MSK) courses program

North American Robotic Urologic Surgery (NARUS)
North American Society of Cardiovascular Imaging (NASCI)
New York Radiological Society (NYRS)
North American Society for Pediatric and Adolescent Gynecology (NASPAG)
OUS (Urologic Society)
Pediatric Colorectal and Pelvic Learning Consortium (PCPLC)
Pediatric Pharmacy Practice initiative
Ponte Vedra Beach Women's Health and Robotics Symposium
Rheumatology Nurses Society (RNS)
Society for the Advancement of Patient Blood Management (SABM)
Society for Basic Urologic Research (SBUR)
Society for Abdominal Radiology (SAR)
Society of Academic Urologists (SAU)
Society of Cardiovascular Anesthesiologists (SCA)
Society of Genitourinary Reconstructive Surgeons
Society for Minimally Invasive and Incisionless Surgery
Society of OB/GYN Hospitalists (SOGH)
Society for Robotic Surgery (SRS)

Society for Skeletal Radiology (SSR)
Society of Thoracic Radiology (STR)
Society for Vascular Medicine (SVM)
Strategic Alliance for Intercultural Advocacy in GI (SAIA)
United States Professional Association for Transgender Health (USPATH)
UAB Medicine
Vanderbilt Urology Society (VUS)
Western Pediatric Trauma Conference (WPTC)
Women in Endoscopy (WIE)
Women in Surgery (WIS)
World Professional Association for Transgender Health (WPATH)

13. Skiptracing is a form of public data aggregation offered by various vendors such as Thomson-Reuters. The FTC subscribes to a number of these web-based applications which typically contain voluminous amounts of information on individuals and businesses. Available data for businesses includes DUNS numbers, addresses, company officers, dates of incorporation, among other data types.

14. A query of available skiptracing databases revealed 30 different medical organizations which are registered under the Veritas headquarters address.

I state under penalty of perjury that the foregoing is true and correct. Executed on this 17th day of August, 2026 in St Augustine, FL.

Jonathan Bugbee
Investigator

ATTACHMENT A

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Form **990**

Return of Organization Exempt From Income Tax

OMB No. 1545-0047

2024

Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except private foundations)

Do not enter social security numbers on this form as it may be made public.

Go to *www.irs.gov/Form990* for instructions and the latest information.

Open to Public Inspection

Department of the Treasury
Internal Revenue Service

A For the 2024 calendar year, or tax year beginning 01-01-2024 , and ending 12-31-2024

B Check if applicable:
☐ Address change
☐ Name change
☐ Initial return
☐ Final return/terminated
☐ Amended return
☐ Application pending

C Name of organization
WORLD PROF ASSN FOR TRANSGENDER HEALTH

Doing business as

Number and street (or P.O. box if mail is not delivered to street address) | Room/suite
1061 E MAIN ST STE 300

City or town, state or province, country, and ZIP or foreign postal code
EAST DUNDEE, IL 60118

D Employer identification number
94-2675140

E Telephone number
(847) 532-6245

G Gross receipts $ 2,360,387

F Name and address of principal officer:
ASA RADIX MD PHD MPH

H(a) Is this a group return for subordinates? ☐ Yes ☑ No
H(b) Are all subordinates included? ☐ Yes ☐ No
If "No," attach a list. See instructions.
H(c) Group exemption number

I Tax-exempt status: ☑ 501(c)(3) ☐ 501(c) ( ) (insert no.) ☐ 4947(a)(1) or ☐ 527

J Website: WWW.WPATH.ORG

K Form of organization: ☑ Corporation ☐ Trust ☐ Association ☐ Other

L Year of formation: 1979

M State of legal domicile: TX

Part I Summary

Activities & Governance

1 Briefly describe the organization's mission or most significant activities:
TO PROMOTE, EDUCATE AND ADVOCATE THE UNDERSTANDING AND TREATMENT OF GENDER IDENTITY DISORDERS.

2 Check this box ☐ if the organization discontinued its operations or disposed of more than 25% of its net assets.

3 Number of voting members of the governing body (Part VI, line 1a)	3	17
4 Number of independent voting members of the governing body (Part VI, line 1b)	4	17
5 Total number of individuals employed in calendar year 2024 (Part V, line 2a)	5	0
6 Total number of volunteers (estimate if necessary)	6	17
7a Total unrelated business revenue from Part VIII, column (C), line 12	7a	0
b Net unrelated business taxable income from Form 990-T, Part I, line 11	7b	

	Prior Year	Current Year
Revenue		
8 Contributions and grants (Part VIII, line 1h)	834,664	765,649
9 Program service revenue (Part VIII, line 2g)	1,362,559	1,544,328
10 Investment income (Part VIII, column (A), lines 3, 4, and 7d)	19,966	22,662
11 Other revenue (Part VIII, column (A), lines 5, 6d, 8c, 9c, 10c, and 11e)		27,748
12 Total revenue—add lines 8 through 11 (must equal Part VIII, column (A), line 12)	2,217,189	2,360,387
Expenses		
13 Grants and similar amounts paid (Part IX, column (A), lines 1–3)		0
14 Benefits paid to or for members (Part IX, column (A), line 4)		0
15 Salaries, other compensation, employee benefits (Part IX, column (A), lines 5–10)		0
16a Professional fundraising fees (Part IX, column (A), line 11e)		0
b Total fundraising expenses (Part IX, column (D), line 25) 0		
17 Other expenses (Part IX, column (A), lines 11a–11d, 11f–24e)	2,434,679	2,522,090
18 Total expenses. Add lines 13–17 (must equal Part IX, column (A), line 25)	2,434,679	2,522,090
19 Revenue less expenses. Subtract line 18 from line 12	-217,490	-161,703
Net Assets or Fund Balances	**Beginning of Current Year**	**End of Year**
20 Total assets (Part X, line 16)	1,717,149	1,996,007
21 Total liabilities (Part X, line 26)	383,094	718,603
22 Net assets or fund balances. Subtract line 21 from line 20	1,334,055	1,277,404

Part II Signature Block

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Sign Here

****** | 2025-06-17
Signature of officer | Date

SUE O'SULLIVAN MANAGING DIRECTOR
Type or print name and title

Paid Preparer Use Only

Print/Type preparer's name	Preparer's signature	Date	Check ☐ if self-employed	PTIN
		2025-06-18		P00286059

Firm's name MILLER VERCHOTA INC CPAS | Firm's EIN 36-4387304

Firm's address 444 N IL ROUTE 31 STE 104
CRYSTAL LAKE, IL 60012 | Phone no. (815) 477-8000

May the IRS discuss this return with the preparer shown above? See Instructions. ☑ Yes ☐ No

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Part III **Statement of Program Service Accomplishments**

Check if Schedule O contains a response or note to any line in this Part III . . . . ☑

1 Briefly describe the organization's mission:

AS AN INTERNATIONAL MULTIDISCIPLINARY PROFESSIONAL ASSOCIATION, THE MISSION OF THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH (WPATH) IS TO PROMOTE EVIDENCE-BASED CARE, EDUCATION, RESEARCH, ADVOCACY, PUBLIC POLICY AND RESPECT IN TRANSGENDER HEALTH.

2 Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ? . . . . ☐ **Yes** ☑ **No**

If "Yes," describe these new services on Schedule O.

3 Did the organization cease conducting, or make significant changes in how it conducts, any program services? . . . . ☐ **Yes** ☑ **No**

If "Yes," describe these changes on Schedule O.

4 Describe the organization's program service accomplishments for each of its three largest program services, as measured by expenses. Section 501(c)(3) and 501(c)(4) organizations are required to report the amount of grants and allocations to others, the total expenses, and revenue, if any, for each program service reported.

4a (Code:) (Expenses $ 1,288,654 including grants of $) (Revenue $ 1,068,472)

Description: See Additional Data

4b (Code:) (Expenses $ 198,513 including grants of $) (Revenue $ 381,271)

Description: See Additional Data

4c (Code:) (Expenses $ 55,000 including grants of $) (Revenue $ 88,055)

Description: See Additional Data

4d Other program services (Describe in Schedule O.)

(Expenses $ 8,615 including grants of $) (Revenue $ 6,530)

(Code:) (Expenses $ 8,615 including grants of $) (Revenue $ 6,530)

THE ORGANIZATION PROVIDES ADDITIONAL BENEFITS TO THE MEMBERSHIP THROUGH DEVELOPMENT EFFORTS, MAINTAINING PROFESSIONAL MEMBERSHIPS WITH OTHER ORGANIZATIONS, PROVIDING RESEARCH GRANT OPPORTUNITIES, AND BY PROVIDING AN EDUCATIONAL JOURNAL TO THE MEMBERSHIP.

4e **Total program service expenses** 1,550,782

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Part IV Checklist of Required Schedules

		Line	Yes	No
1	Is the organization described in section 501(c)(3) or 4947(a)(1) (other than a private foundation)? *If "Yes," complete Schedule A*	1	Yes	
2	Is the organization required to complete *Schedule B, Schedule of Contributors*? See instructions.	2		No
3	Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? *If "Yes," complete Schedule C, Part I*	3		No
4	**Section 501(c)(3) organizations.** Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? *If "Yes," complete Schedule C, Part II*	4		No
5	Is the organization a section 501(c)(4), 501(c)(5), or 501(c)(6) organization that receives membership dues, assessments, or similar amounts as defined in Rev. Proc. 98-19? *If "Yes," complete Schedule C, Part III*	5		No
6	Did the organization maintain any donor advised funds or any similar funds or accounts for which donors have the right to provide advice on the distribution or investment of amounts in such funds or accounts? *If "Yes," complete Schedule D,*Part I	6		No
7	Did the organization receive or hold a conservation easement, including easements to preserve open space, the environment, historic land areas, or historic structures? *If "Yes," complete Schedule D, Part II*	7		No
8	Did the organization maintain collections of works of art, historical treasures, or other similar assets? *If "Yes," complete Schedule D,* Part III	8		No
9	Did the organization report an amount in Part X, line 21 for escrow or custodial account liability; serve as a custodian for amounts not listed in Part X; or provide credit counseling, debt management, credit repair, or debt negotiation services? *If "Yes," complete Schedule D, Part IV*	9		No
10	Did the organization, directly or through a related organization, hold assets in temporarily restricted endowments, permanent endowments, or quasi endowments? *If "Yes," complete Schedule D, Part V*	10		No
11	If the organization's answer to any of the following questions is "Yes," then complete Schedule D, Parts VI, VII, VIII, IX, or X, as applicable.			
a	Did the organization report an amount for land, buildings, and equipment in Part X, line 10? *If "Yes," complete Schedule D,* Part VI.	11a		No
b	Did the organization report an amount for investments—other securities in Part X, line 12 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VII*	11b		No
c	Did the organization report an amount for investments—program related in Part X, line 13 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part VIII*	11c		No
d	Did the organization report an amount for other assets in Part X, line 15 that is 5% or more of its total assets reported in Part X, line 16? *If "Yes," complete Schedule D, Part IX*	11d		No
e	Did the organization report an amount for other liabilities in Part X, line 25? *If "Yes," complete Schedule D, Part X*	11e		No
f	Did the organization's separate or consolidated financial statements for the tax year include a footnote that addresses the organization's liability for uncertain tax positions under FIN 48 (ASC 740)? *If "Yes," complete Schedule D, Part X*	11f		No
12a	Did the organization obtain separate, independent audited financial statements for the tax year? *If "Yes," complete Schedule D, Parts XI and XII*	12a	Yes	
b	Was the organization included in consolidated, independent audited financial statements for the tax year? *If "Yes," and if the organization answered "No" to line 12a, then completing Schedule D, Parts XI and XII is optional*	12b		No
13	Is the organization a school described in section 170(b)(1)(A)(ii)? *If "Yes," complete Schedule E*	13		No
14a	Did the organization maintain an office, employees, or agents outside of the United States?	14a		No
b	Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, investment, and program service activities outside the United States, or aggregate foreign investments valued at $100,000 or more? *If "Yes," complete Schedule F, Parts I and IV*	14b		No
15	Did the organization report on Part IX, column (A), line 3, more than $5,000 of grants or other assistance to or for any foreign organization? *If "Yes," complete Schedule F, Parts II and IV*	15		No
16	Did the organization report on Part IX, column (A), line 3, more than $5,000 of aggregate grants or other assistance to or for foreign individuals? *If "Yes," complete Schedule F, Parts III and IV*	16		No
17	Did the organization report a total of more than $15,000 of expenses for professional fundraising services on Part IX, column (A), lines 6 and 11e? *If "Yes," complete Schedule G, Part I.* See instructions.	17		No
18	Did the organization report more than $15,000 total of fundraising event gross income and contributions on Part VIII, lines 1c and 8a? *If "Yes," complete Schedule G, Part II*	18		No
19	Did the organization report more than $15,000 of gross income from gaming activities on Part VIII, line 9a? *If "Yes," complete Schedule G, Part III*	19		No
20a	Did the organization operate one or more hospital facilities? *If "Yes," complete Schedule H*	20a		No
b	If "Yes" to line 20a, did the organization attach a copy of its audited financial statements to this return?	20b		
21	Did the organization report more than $5,000 of grants or other assistance to any domestic organization or domestic government on Part IX, column (A), line 1? *If "Yes," complete Schedule I, Parts I and II*	21		No

Part IV **Checklist of Required Schedules** *(continued)*

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			Yes	No
22	Did the organization report more than $5,000 of grants or other assistance to or for domestic individuals on Part IX, column (A), line 2? *If "Yes," complete Schedule I, Parts I and III*	22		No
23	Did the organization answer "Yes" to Part VII, Section A, line 3, 4, or 5, about compensation of the organization's current and former officers, directors, trustees, key employees, and highest compensated employees? *If "Yes," complete Schedule J*	23		No
24a	Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002? *If "Yes," answer lines 24b through 24d and complete Schedule K. If "No," go to line 25a*	24a		No
b	Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception?	24b		
c	Did the organization maintain an escrow account other than a refunding escrow at any time during the year to defease any tax-exempt bonds?	24c		
d	Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year?	24d		
25a	**Section 501(c)(3), 501(c)(4), and 501(c)(29) organizations.** Did the organization engage in an excess benefit transaction with a disqualified person during the year? *If "Yes," complete Schedule L,* Part I	25a		No
b	Is the organization aware that it engaged in an excess benefit transaction with a disqualified person in a prior year, and that the transaction has not been reported on any of the organization's prior Forms 990 or 990-EZ? *If "Yes," complete Schedule L,* Part I	25b		No
26	Did the organization report any amount on Part X, line 5 or 22 for receivables from or payables to any current or former officer, director, trustee, key employee, creator or founder, substantial contributor, or 35% controlled entity or family member of any of these persons? *If "Yes," complete Schedule L, Part II*	26		No
27	Did the organization provide a grant or other assistance to any current or former officer, director, trustee, key employee, creator or founder, substantial contributor, or employee thereof, a grant selection committee member, or to a 35% controlled entity (including an employee thereof) or family member of any of these persons? *If "Yes," complete Schedule L,*Part III	27		No
28	Was the organization a party to a business transaction with one of the following parties (see the Schedule L, Part IV instructions for applicable filing thresholds, conditions, and exceptions):			
a	A current or former officer, director, trustee, key employee, creator or founder, or substantial contributor? *If "Yes," complete Schedule L, Part IV*	28a		No
b	A family member of any individual described in line 28a? *If "Yes," complete Schedule L, Part IV*	28b		No
c	A 35% controlled entity of one or more individuals and/or organizations described in line 28a or 28b? *If "Yes," complete Schedule L, Part IV*	28c		No
29	Did the organization receive more than $25,000 in non-cash contributions? *If "Yes," complete Schedule M*	29		No
30	Did the organization receive contributions of art, historical treasures, or other similar assets, or qualified conservation contributions? *If "Yes," complete Schedule M*	30		No
31	Did the organization liquidate, terminate, or dissolve and cease operations? *If "Yes," complete Schedule N, Part I*	31		No
32	Did the organization sell, exchange, dispose of, or transfer more than 25% of its net assets? *If "Yes," complete Schedule N, Part II*	32		No
33	Did the organization own 100% of an entity disregarded as separate from the organization under Regulations sections 301.7701-2 and 301.7701-3? *If "Yes," complete Schedule R, Part I*	33		No
34	Was the organization related to any tax-exempt or taxable entity? *If "Yes," complete Schedule R, Part II, III, or IV, and Part V, line 1*	34		No
35a	Did the organization have a controlled entity within the meaning of section 512(b)(13)?	35a		No
b	If 'Yes' to line 35a, did the organization receive any payment from or engage in any transaction with a controlled entity within the meaning of section 512(b)(13)? *If "Yes," complete Schedule R, Part V, line 2*	35b		
36	**Section 501(c)(3) organizations.** Did the organization make any transfers to an exempt non-charitable related organization? *If "Yes," complete Schedule R, Part V, line 2*	36		No
37	Did the organization conduct more than 5% of its activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? *If "Yes," complete Schedule R, Part VI*	37		No
38	Did the organization complete Schedule O and provide explanations on Schedule O for Part VI, lines 11b and 19? **Note.** All Form 990 filers are required to complete Schedule O.	38	Yes	

Part V **Statements Regarding Other IRS Filings and Tax Compliance**

Check if Schedule O contains a response or note to any line in this Part V ☐

					Yes	No
1a	Enter the number reported in box 3 of Form 1096. Enter -0- if not applicable	1a	27			
b	Enter the number of Forms W-2G included on line 1a. Enter -0- if not applicable	1b	0			
c	Did the organization comply with backup withholding rules for reportable payments to vendors and reportable gaming (gambling) winnings to prize winners?			1c		

Part V **Statements Regarding Other IRS Filings and Tax Compliance** *(continued)*

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				Yes	No
2a	Enter the number of employees reported on Form W-3, Transmittal of Wage and Tax Statements, filed for the calendar year ending with or within the year covered by this return	**2a** 0			
b	If at least one is reported on line 2a, did the organization file all required federal employment tax returns?		**2b**		
3a	Did the organization have unrelated business gross income of $1,000 or more during the year?		**3a**		No
b	If "Yes," has it filed a Form 990-T for this year? *If "No" to line 3b, provide an explanation in Schedule O*		**3b**		
4a	At any time during the calendar year, did the organization have an interest in, or a signature or other authority over, a financial account in a foreign country (such as a bank account, securities account, or other financial account)?		**4a**		No
b	If "Yes," enter the name of the foreign country: ______ See instructions for filing requirements for FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR).				
5a	Was the organization a party to a prohibited tax shelter transaction at any time during the tax year?		**5a**		No
b	Did any taxable party notify the organization that it was or is a party to a prohibited tax shelter transaction?		**5b**		No
c	If "Yes," to line 5a or 5b, did the organization file Form 8886-T?		**5c**		
6a	Does the organization have annual gross receipts that are normally greater than $100,000, and did the organization solicit any contributions that were not tax deductible as charitable contributions?		**6a**		No
b	If "Yes," did the organization include with every solicitation an express statement that such contributions or gifts were not tax deductible?		**6b**		
7	**Organizations that may receive deductible contributions under section 170(c).**				
a	Did the organization receive a payment in excess of $75 made partly as a contribution and partly for goods and services provided to the payor?		**7a**		No
b	If "Yes," did the organization notify the donor of the value of the goods or services provided?		**7b**		
c	Did the organization sell, exchange, or otherwise dispose of tangible personal property for which it was required to file Form 8282?		**7c**		No
d	If "Yes," indicate the number of Forms 8282 filed during the year	**7d**			
e	Did the organization receive any funds, directly or indirectly, to pay premiums on a personal benefit contract?		**7e**		No
f	Did the organization, during the year, pay premiums, directly or indirectly, on a personal benefit contract?		**7f**		No
g	If the organization received a contribution of qualified intellectual property, did the organization file Form 8899 as required?		**7g**		No
h	If the organization received a contribution of cars, boats, airplanes, or other vehicles, did the organization file a Form 1098-C?		**7h**		No
8	**Sponsoring organizations maintaining donor advised funds.** Did a donor advised fund maintained by the sponsoring organization have excess business holdings at any time during the year?		**8**		
9	**Sponsoring organizations maintaining donor advised funds.**				
a	Did the sponsoring organization make any taxable distributions under section 4966?		**9a**		
b	Did the sponsoring organization make a distribution to a donor, donor advisor, or related person?		**9b**		
10	**Section 501(c)(7) organizations.** Enter:				
a	Initiation fees and capital contributions included on Part VIII, line 12	**10a**			
b	Gross receipts, included on Form 990, Part VIII, line 12, for public use of club facilities	**10b**			
11	**Section 501(c)(12) organizations.** Enter:				
a	Gross income from members or shareholders	**11a**			
b	Gross income from other sources. (Do not net amounts due or paid to other sources against amounts due or received from them.)	**11b**			
12a	**Section 4947(a)(1) non-exempt charitable trusts.** Is the organization filing Form 990 in lieu of Form 1041?		**12a**		
b	If "Yes," enter the amount of tax-exempt interest received or accrued during the year.	**12b**			
13	**Section 501(c)(29) qualified nonprofit health insurance issuers.**				
a	Is the organization licensed to issue qualified health plans in more than one state? **Note.** See the instructions for additional information the organization must report on Schedule O.		**13a**		
b	Enter the amount of reserves the organization is required to maintain by the states in which the organization is licensed to issue qualified health plans	**13b**			
c	Enter the amount of reserves on hand	**13c**			
14a	Did the organization receive any payments for indoor tanning services during the tax year?		**14a**		No
b	If "Yes," has it filed a Form 720 to report these payments? *If "No," provide an explanation in Schedule O*		**14b**		
15	Is the organization subject to the section 4960 tax on payment(s) of more than $1,000,000 in remuneration or excess parachute payment(s) during the year? If "Yes," see the instructions and file Form 4720, Schedule N.		**15**		No
16	Is the organization an educational institution subject to the section 4968 excise tax on net investment income? If "Yes," complete Form 4720, Schedule O.		**16**		No
17	**Section 501(c)(21) organizations.** Did the trust, or any disqualified or other person engage in any activities that would result in the imposition of an excise tax under section 4951, 4952, or 4953? If "Yes," complete Form 6069.		**17**		

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Part VI **Governance, Management, and Disclosure.** *For each "Yes" response to lines 2 through 7b below, and for a "No" response to lines 8a, 8b, or 10b below, describe the circumstances, processes, or changes in Schedule O. See instructions.*

Check if Schedule O contains a response or note to any line in this Part VI . . . . ☑

Section A. Governing Body and Management

					Yes	No
1a	Enter the number of voting members of the governing body at the end of the tax year. If there are material differences in voting rights among members of the governing body, or if the governing body delegated broad authority to an executive committee or similar committee, explain in Schedule O.	**1a**	17			
b	Enter the number of voting members included in line 1a, above, who are independent	**1b**	17			
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?			**2**		No
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person?			**3**	Yes	
4	Did the organization make any significant changes to its governing documents since the prior Form 990 was filed?			**4**		No
5	Did the organization become aware during the year of a significant diversion of the organization's assets?			**5**		No
6	Did the organization have members or stockholders?			**6**		No
7a	Did the organization have members, stockholders, or other persons who had the power to elect or appoint one or more members of the governing body?			**7a**		No
b	Are any governance decisions of the organization reserved to (or subject to approval by) members, stockholders, or persons other than the governing body?			**7b**		No
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:					
a	The governing body?			**8a**	Yes	
b	Each committee with authority to act on behalf of the governing body?			**8b**	Yes	
9	Is there any officer, director, trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O*			**9**		No

Section B. Policies (*This Section B requests information about policies not required by the Internal Revenue Code.*)

			Yes	No
10a	Did the organization have local chapters, branches, or affiliates?	**10a**		No
b	If "Yes," did the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with the organization's exempt purposes?	**10b**		
11a	Has the organization provided a complete copy of this Form 990 to all members of its governing body before filing the form?	**11a**	Yes	
b	Describe on Schedule O the process, if any, used by the organization to review this Form 990.			
12a	Did the organization have a written conflict of interest policy? *If "No," go to line 13*	**12a**		No
b	Were officers, directors, or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	**12b**		
c	Did the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe on Schedule O how this was done*	**12c**		
13	Did the organization have a written whistleblower policy?	**13**		No
14	Did the organization have a written document retention and destruction policy?	**14**		No
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision?			
a	The organization's CEO, Executive Director, or top management official	**15a**		No
b	Other officers or key employees of the organization	**15b**		No
	If "Yes" to line 15a or 15b, describe the process on Schedule O. See instructions.			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	**16a**		No
b	If "Yes," did the organization follow a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and take steps to safeguard the organization's exempt status with respect to such arrangements?	**16b**		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed
IL

18 Section 6104 requires an organization to make its Form 1023 (1024 or 1024-A, if applicable), 990, and 990-T (section 501(c)(3)s only) available for public inspection. Indicate how you made these available. Check all that apply.

☐ Own website ☐ Another's website ☑ Upon request ☐ Other (explain in Schedule O)

19 Describe in Schedule O whether (and if so, how) the organization made its governing documents, conflict of interest policy, and financial statements available to the public during the tax year.

20 State the name, address, and telephone number of the person who possesses the organization's books and records:
VERITAS ASSOCIATION MANAGEMENT 1601 E MAIN ST STE 300 EAST DUNDEE, IL 60118 (847) 752-6245

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Part VII Compensation of Officers, Directors,Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors

Check if Schedule O contains a response or note to any line in this Part VII . . . . ☐

Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees

1a Complete this table for all persons required to be listed. Report compensation for the calendar year ending with or within the organization's tax year.

- List all of the organization's **current** officers, directors, trustees (whether individuals or organizations), regardless of amount of compensation. Enter -0- in columns (D), (E), and (F) if no compensation was paid.
- List all of the organization's **current** key employees, if any. See the instructions for definition of "key employee."
- List the organization's five **current** highest compensated employees (other than an officer, director, trustee or key employee) who received reportable compensation (box 5 of Form W-2, box 6 of Form 1099-MISC, and/or box 1 of Form 1099-NEC) of more than $100,000 from the organization and any related organizations.
- List all of the organization's **former** officers, key employees, or highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organizations.
- List all of the organization's **former directors or trustees** that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organizations.

See the instructions for the order in which to list the persons above.

☑ Check this box if neither the organization nor any related organization compensated any current officer, director, or trustee.

(A) Name and title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position (do not check more than one box, unless person is both an officer and a director/trustee): Individual trustee or director	Institutional Trustee	Officer	Key employee	Highest compensated employee	Former	(D) Reportable compensation from the organization (W-2/1099-MISC/1099-NEC)	(E) Reportable compensation from related organizations (W-2/1099-MISC/1099-NEC)	(F) Estimated amount of other compensation from the organization and related organizations
(1) ASA RADIX MD PHD MPH PRESIDENT	4.00	X		X				0	0	0
(2) MARCI BOWERS MD IMM PAST PRE	4.00	X		X				0	0	0
(3) LOREN SCHECHTER MD PRESIDENT EL	4.00	X		X				0	0	0
(4) CHRIS MCLACHLAN MA SECRETARY	4.00	X		X				0	0	0
(5) STEPHEN ROSENTHAL MD TREASURER	4.00	X		X				0	0	0
(6) KAMILLA KAMARUDDIN MD DIRECTOR	1.00	X						0	0	0
(7) SCOTT LEIBOWITZ MD DIRECTOR	1.00	X						0	0	0
(8) SARI REISNER SCD DIRECTOR	1.00	X						0	0	0
(9) JOSHUA SAFER MD DIRECTOR	1.00	X						0	0	0
(10) JAVIER BELINKY MD DIRECTOR	1.00	X						0	0	0
(11) BETH MCELREA MBCHB DIRECTOR	1.00	X						0	0	0
(12) TONIA POTEAT DIRECTOR	1.00	X						0	0	0
(13) JOZ MOTMANS PHD MA EPATH REP	1.00	X						0	0	0
(14) CARL STREED JR MD MPH FACP USPATH REP	1.00	X						0	0	0
(15) FLORENCE CHENEL WSI REP	1.00	X						0	0	0
(16) SUE O'SULLIVAN MANAGING DIR	8.00	X						0	0	0
(17) JAMIE HICKS ASSOC EXEC D	1.00	X						0	0	0

Part VII **Section A. Officers, Directors, Trustees, Key Employees, and Highest Compensated Employees** *(continued)*

(A) Name and title	(B) Average hours per week (list any hours for related organizations below dotted line)	(C) Position: Individual trustee or director	Institutional Trustee	Officer	Key employee	Highest compensated employee	Former	(D) Reportable compensation from the organization (W-2/1099-MISC/1099-NEC)	(E) Reportable compensation from related organizations (W-2/1099-MISC/1099-NEC)	(F) Estimated amount of other compensation from the organization and related organizations

	(D)	(E)	(F)
1b Sub-Total			
c Total from continuation sheets to Part VII, Section A . .			
d Total (add lines 1b and 1c)			

2 Total number of individuals (including but not limited to those listed above) who received more than $100,000 of reportable compensation from the organization

			Yes	No
3	Did the organization list any **former** officer, director or trustee, key employee, or highest compensated employee on line 1a? *If "Yes," complete Schedule J for such individual*	3		No
4	For any individual listed on line 1a, is the sum of reportable compensation and other compensation from the organization and related organizations greater than $150,000? *If "Yes," complete Schedule J for such individual*	4		No
5	Did any person listed on line 1a receive or accrue compensation from any unrelated organization or individual for services rendered to the organization?*If "Yes," complete Schedule J for such person*	5		No

Section B. Independent Contractors

1 Complete this table for your five highest compensated independent contractors that received more than $100,000 of compensation from the organization. Report compensation for the calendar year ending with or within the organization's tax year.

(A) Name and business address	(B) Description of services	(C) Compensation
VERITAS ASSOCIATION MANAGEMENT 1601 E MAIN ST STE 300 EAST DUNDEE, IL 60118	MANAGEMENT	601,481

2 Total number of independent contractors (including but not limited to those listed above) who received more than $100,000 of compensation from the organization 1

Part VIII Statement of Revenue

Check if Schedule O contains a response or note to any line in this Part VIII

			(A) Total revenue	(B) Related or exempt function revenue	(C) Unrelated business revenue	(D) Revenue excluded from tax under sections 512 - 514
Contributions, Gifts, Grants and Other Similar Amounts 1a Federated campaigns	1a					
b Membership dues	1b	728,259				
c Fundraising events	1c					
d Related organizations	1d					
e Government grants (contributions)	1e					
f All other contributions, gifts, grants, and similar amounts not included above	1f	37,390				
g Noncash contributions included in lines 1a - 1f:$	1g					
h **Total.** Add lines 1a-1f			765,649			
Program Service Revenue		Business Code				
2a CONFERENCE REVENUE		611430	1,068,472	1,068,472		
b GLOBAL EDUCATION INSTITUTE		611430	381,271	381,271		
c HEALTH PLAN PROVIDER TRAINING		611430	88,055	88,055		
d REVENUE SHARE		611430	6,530	6,530		
e						
f All other program service revenue.						
g **Total.** Add lines 2a–2f.			1,544,328			

Other Revenue		(i) Real / (i) Securities	(ii) Personal / (ii) Other	(A)	(B)	(C)	(D)
3 Investment income (including dividends, interest, and other similar amounts)				22,662			22,662
4 Income from investment of tax-exempt bond proceeds							
5 Royalties							
		(i) Real	(ii) Personal				
6a Gross rents	6a						
b Less: rental expenses	6b						
c Rental income or (loss)	6c						
d Net rental income or (loss)							
		(i) Securities	(ii) Other				
7a Gross amount from sales of assets other than inventory	7a						
b Less: cost or other basis and sales expenses	7b						
c Gain or (loss)	7c						
d Net gain or (loss)							
8a Gross income from fundraising events (not including $ ____ of contributions reported on line 1c). See Part IV, line 18	8a						
b Less: direct expenses	8b						
c Net income or (loss) from fundraising events							
9a Gross income from gaming activities. See Part IV, line 19	9a						
b Less: direct expenses	9b						
c Net income or (loss) from gaming activities							
10a Gross sales of inventory, less returns and allowances	10a						
b Less: cost of goods sold	10b						
c Net income or (loss) from sales of inventory							

Miscellaneous Revenue	Business Code	(A)	(B)	(C)	(D)
11a MANAGEMENT REIMBURSEMENTS	611430	27,748	27,748		
b					
c					
d All other revenue					
e **Total.** Add lines 11a–11d		27,748			
12 **Total revenue.** See instructions		2,360,387	1,572,076		22,662

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Part IX Statement of Functional Expenses

Section 501(c)(3) and 501(c)(4) organizations must complete all columns. All other organizations must complete column (A).

Check if Schedule O contains a response or note to any line in this Part IX . . . ☑

Do not include amounts reported on lines 6b, 7b, 8b, 9b, and 10b of Part VIII.	(A) Total expenses	(B) Program service expenses	(C) Management and general expenses	(D) Fundraising expenses
1 Grants and other assistance to domestic organizations and domestic governments. See Part IV, line 21				
2 Grants and other assistance to domestic individuals. See Part IV, line 22				
3 Grants and other assistance to foreign organizations, foreign governments, and foreign individuals. See Part IV, lines 15 and 16.				
4 Benefits paid to or for members				
5 Compensation of current officers, directors, trustees, and key employees				
6 Compensation not included above, to disqualified persons (as defined under section 4958(f)(1)) and persons described in section 4958(c)(3)(B)				
7 Other salaries and wages				
8 Pension plan accruals and contributions (include section 401 (k) and 403(b) employer contributions)				
9 Other employee benefits				
10 Payroll taxes				
11 Fees for services (non-employees):				
a Management	601,481	55,000	546,481	
b Legal	71,713		71,713	
c Accounting	13,073		13,073	
d Lobbying				
e Professional fundraising services. See Part IV, line 17				
f Investment management fees				
g Other (If line 11g amount exceeds 10% of line 25, column (A) amount, list line 11g expenses on Schedule O)	278,526	129,116	149,410	
12 Advertising and promotion				
13 Office expenses	26,866	9,540	17,326	
14 Information technology	588,227	512,450	75,777	
15 Royalties				
16 Occupancy				
17 Travel	92,254	89,590	2,664	
18 Payments of travel or entertainment expenses for any federal, state, or local public officials				
19 Conferences, conventions, and meetings	509,080	508,452	628	
20 Interest				
21 Payments to affiliates				
22 Depreciation, depletion, and amortization				
23 Insurance	13,442		13,442	
24 Other expenses. Itemize expenses not covered above (List miscellaneous expenses in line 24e. If line 24e amount exceeds 10% of line 25, column (A) amount, list line 24e expenses on Schedule O.)				
a DIRECT PROGRAM EXPENSE	160,438	157,742	2,696	
b BANK AND CREDIT CARD FEES	75,682	275	75,407	
c CME EXPENSE	72,362	72,362		
d DUES AND SUBSCRIPTIONS	18,946	16,255	2,691	
e All other expenses				
25 **Total functional expenses.** Add lines 1 through 24e	2,522,090	1,550,782	971,308	0
26 **Joint costs.** Complete this line only if the organization reported in column (B) joint costs from a combined educational campaign and fundraising solicitation. Check here ☐ if following SOP 98-2 (ASC 958-720).				

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Part X **Balance Sheet**

Check if Schedule O contains a response or note to any line in this Part IX . . . . ☐

				(A) Beginning of year		(B) End of year
Assets	1	Cash–non-interest-bearing		572,638	1	262,828
	2	Savings and temporary cash investments			2	
	3	Pledges and grants receivable, net			3	
	4	Accounts receivable, net		62,675	4	491,314
	5	Loans and other receivables from any current or former officer, director, trustee, key employee, creator or founder, substantial contributor, or 35% controlled entity or family member of any of these persons			5	
	6	Loans and other receivables from other disqualified persons (as defined under section 4958(f)(1)), and persons described in section 4958(c)(3)(B)			6	
	7	Notes and loans receivable, net			7	
	8	Inventories for sale or use			8	
	9	Prepaid expenses and deferred charges		34,755	9	106,852
	10a	Land, buildings, and equipment: cost or other basis. Complete Part VI of Schedule D	10a			
	b	Less: accumulated depreciation	10b		10c	
	11	Investments—publicly traded securities		1,047,081	11	1,135,013
	12	Investments—other securities. See Part IV, line 11			12	
	13	Investments—program-related. See Part IV, line 11			13	
	14	Intangible assets			14	
	15	Other assets. See Part IV, line 11			15	
	16	**Total assets.** Add lines 1 through 15 (must equal line 33)		1,717,149	16	1,996,007
Liabilities	17	Accounts payable and accrued expenses		115,701	17	67,298
	18	Grants payable			18	
	19	Deferred revenue		267,393	19	651,305
	20	Tax-exempt bond liabilities			20	
	21	Escrow or custodial account liability. Complete Part IV of Schedule D			21	
	22	Loans and other payables to any current or former officer, director, trustee, key employee, creator or founder, substantial contributor, or 35% controlled entity or family member of any of these persons			22	
	23	Secured mortgages and notes payable to unrelated third parties			23	
	24	Unsecured notes and loans payable to unrelated third parties			24	
	25	Other liabilities (including federal income tax, payables to related third parties, and other liabilities not included on lines 17 - 24). Complete Part X of Schedule D			25	
	26	**Total liabilities.** Add lines 17 through 25		383,094	26	718,603
Net Assets or Fund Balances		**Organizations that follow FASB ASC 958, check here** ☑ **and complete lines 27, 28, 32, and 33.**				
	27	Net assets without donor restrictions		1,324,714	27	1,268,063
	28	Net assets with donor restrictions		9,341	28	9,341
		Organizations that do not follow FASB ASC 958, check here ▶ ☐ **and complete lines 29 through 33.**				
	29	Capital stock or trust principal, or current funds			29	
	30	Paid-in or capital surplus, or land, building or equipment fund			30	
	31	Retained earnings, endowment, accumulated income, or other funds			31	
	32	Total net assets or fund balances		1,334,055	32	1,277,404
	33	Total liabilities and net assets/fund balances		1,717,149	33	1,996,007

Part XI Reconcilliation of Net Assets

Check if Schedule O contains a response or note to any line in this Part XI . . . . ☐

1	Total revenue (must equal Part VIII, column (A), line 12)	1	2,360,387
2	Total expenses (must equal Part IX, column (A), line 25)	2	2,522,090
3	Revenue less expenses. Subtract line 2 from line 1	3	-161,703
4	Net assets or fund balances at beginning of year (must equal Part X, line 32, column (A))	4	1,334,055
5	Net unrealized gains (losses) on investments	5	90,843
6	Donated services and use of facilities	6	
7	Investment expenses	7	7,074
8	Prior period adjustments	8	7,135
9	Other changes in net assets or fund balances (explain in Schedule O)	9	
10	Net assets or fund balances at end of year. Combine lines 3 through 9 (must equal Part X, line 32, column (B))	10	1,277,404

Part XII Financial Statements and Reporting

Check if Schedule O contains a response or note to any line in this Part XII . . . . ☐

			Yes	No
1	Accounting method used to prepare the Form 990: ☐ Cash ☑ Accrual ☐ Other ______ If the organization changed its method of accounting from a prior year or checked "Other," explain on Schedule O.			
2a	Were the organization's financial statements compiled or reviewed by an independent accountant?	2a		No
	If 'Yes,' check a box below to indicate whether the financial statements for the year were compiled or reviewed on a separate basis, consolidated basis, or both: ☐ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
b	Were the organization's financial statements audited by an independent accountant?	2b	Yes	
	If 'Yes,' check a box below to indicate whether the financial statements for the year were audited on a separate basis, consolidated basis, or both: ☑ Separate basis ☐ Consolidated basis ☐ Both consolidated and separate basis			
c	If "Yes," to line 2a or 2b, does the organization have a committee that assumes responsibility for oversight of the audit, review, or compilation of its financial statements and selection of an independent accountant?	2c	Yes	
	If the organization changed either its oversight process or selection process during the tax year, explain in Schedule O.			
3a	As a result of a federal award, was the organization required to undergo an audit or audits as set forth in the Uniform Guidance, 2 C.F.R. Part 200, Subpart F?	3a		No
b	If "Yes," did the organization undergo the required audit or audits? If the organization did not undergo the required audit or audits, explain why in Schedule O and describe any steps taken to undergo such audits.	3b		

Additional Data

Software ID:

Software Version:

EIN: 94-2675140

Name: WORLD PROF ASSN FOR TRANSGENDER HEALTH

Form 990 (2024)

Form 990, Part III, Line 4a:

WPATH PROVIDES OPPORTUNITIES FOR PROFESSIONALS FROM VARIOUS SUB-SPECIALTIES TO COMMUNICATE WITH EACH OTHER IN THE CONTEXT OF RESEARCH AND TREATMENT OF GENDER DYSPHORIA INCLUDING SPONSORING BIENNIAL SCIENTIFIC SYMPOSIA.

Form 990, Part III, Line 4b:

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THE GLOBAL EDUCATION INITIATIVE (GEI) PROVIDES COURSES TO A VARIETY OF AUDIENCES. ATTENDEES FROM MANY COUNTRIES ARE ENCOURAGED TO PROVIDE CONSTRUCTIVE FEEDBACK, WHICH THE BOARD REVIEWS THOROUGHLY. IN ATTENDANCE AT GEI COURSES ARE PSYCHOLOGISTS, PSYCHIATRISTS, THERAPISTS, SOCIAL WORKERS, FAMILY PRACTICE PROVIDERS, NURSES, NURSE PRACTITIONERS, PHYSICIAN ASSISTANTS, ENDOCRINOLOGISTS, UROLOGISTS, GYNECOLOGISTS, PLASTIC SURGEONS AND PROFESSIONAL EDUCATORS. ALSO IN ATTENDANCE ARE SPIRITUAL LEADERS, STUDENTS, ADDICTION COUNSELORS, HIV CASE MANAGERS, AND RESEARCHERS. ATTENDEES HAVE WORKED AT MILITARY BASES, THE PENTEGON, FEDERAL AND STATE CORRECTIONAL INSTITUTIONS, MEDICAL SCHOOLS, PRIVATE PRACTICES, PUBLIC HEALTH DEPARTMENTS, CLINICS AND COMMUNITY HOSPITALS. MORE THAN ANYTHING ELSE, WE HAVE REALIZED THAT THERE IS MUCH MORE TO BE DONE. WE ARE CURRENTLY FORMING TASK FORCES TO ASSIST IN CREATING TARGETED TRAINING TO MEET THE VARIED EDUCATIONAL NEEDS OF PROVIDERS AND IMPROVE ACCESS TO CARE.

Form 990, Part III, Line 4c:

THE ORGANIZATION PROMOTES THE HIGHEST STANDARDS OF HEALTH CARE FOR INDIVIDUALS THROUGH THE ARTICULATION OF STANDARDS OF CARE (SOC) FOR THE HEALTH OF TRANSSEXUAL, TRANSGENDER, AND GENDER NONCONFORMING PEOPLE. THE SOC ARE BASED ON THE BEST AVAILABLE SCIENCE AND EXPERT PROFESSIONAL CONSENSUS. VOLUME 7 OF THE STANDARDS OF CARE IS AVAILABLE IN 18 DIFFERENT LANGUAGES. VOLUME 8 IS IN PROCESS.

SCHEDULE A (Form 990)

Department of the Treasury
Internal Revenue Service

Public Charity Status and Public Support

Complete if the organization is a section 501(c)(3) organization or a section 4947(a)(1) nonexempt charitable trust.
▶ Attach to Form 990 or Form 990-EZ.
▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No. 1545-0047
2024
Open to Public Inspection

Name of the organization	Employer identification number
WORLD PROF ASSN FOR TRANSGENDER HEALTH	94-2675140

Part I Reason for Public Charity Status (All organizations must complete this part.) See instructions.

The organization is not a private foundation because it is: (For lines 1 through 12, check only one box.)

1 ☐ A church, convention of churches, or association of churches described in **section 170(b)(1)(A)(i).**

2 ☐ A school described in **section 170(b)(1)(A)(ii).** (Attach Schedule E (Form 990).)

3 ☐ A hospital or a cooperative hospital service organization described in **section 170(b)(1)(A)(iii).**

4 ☐ A medical research organization operated in conjunction with a hospital described in **section 170(b)(1)(A)(iii).** Enter the hospital's name, city, and state:

5 ☐ An organization operated for the benefit of a college or university owned or operated by a governmental unit described in **section 170 (b)(1)(A)(iv).** (Complete Part II.)

6 ☐ A federal, state, or local government or governmental unit described in **section 170(b)(1)(A)(v).**

7 ☐ An organization that normally receives a substantial part of its support from a governmental unit or from the general public described in **section 170(b)(1)(A)(vi).** (Complete Part II.)

8 ☐ A community trust described in **section 170(b)(1)(A)(vi)**. (Complete Part II.)

9 ☐ An agricultural research organization described in **170(b)(1)(A)(ix)** operated in conjunction with a land-grant college or university or a non-land grant college of agriculture. See instructions. Enter the name, city, and state of the college or university:

10 ☑ An organization that normally receives: (1) more than 33 1/3% of its support from contributions, membership fees, and gross receipts from activities related to its exempt functions—subject to certain exceptions, and (2) no more than 33 1/3% of its support from gross investment income and unrelated business taxable income (less section 511 tax) from businesses acquired by the organization after June 30, 1975. See **section 509(a)(2).** (Complete Part III.)

11 ☐ An organization organized and operated exclusively to test for public safety. See **section 509(a)(4).**

12 ☐ An organization organized and operated exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more publicly supported organizations described in **section 509(a)(1)** or **section 509(a)(2).** See **section 509(a)(3).** Check the box on lines 12a through 12d that describes the type of supporting organization and complete lines 12e, 12f, and 12g.

a ☐ **Type I.** A supporting organization operated, supervised, or controlled by its supported organization(s), typically by giving the supported organization(s) the power to regularly appoint or elect a majority of the directors or trustees of the supporting organization. **You must complete Part IV, Sections A and B.**

b ☐ **Type II.** A supporting organization supervised or controlled in connection with its supported organization(s), by having control or management of the supporting organization vested in the same persons that control or manage the supported organization(s). **You must complete Part IV, Sections A and C.**

c ☐ **Type III functionally integrated.** A supporting organization operated in connection with, and functionally integrated with, its supported organization(s) (see instructions). **You must complete Part IV, Sections A, D, and E.**

d ☐ **Type III non-functionally integrated.** A supporting organization operated in connection with its supported organization(s) that is not functionally integrated. The organization generally must satisfy a distribution requirement and an attentiveness requirement (see instructions). **You must complete Part IV, Sections A and D, and Part V.**

e ☐ Check this box if the organization received a written determination from the IRS that it is a Type I, Type II, Type III functionally integrated, or Type III non-functionally integrated supporting organization.

f Enter the number of supported organizations . . . .

g Provide the following information about the supported organization(s).

(i) Name of supported organization	(ii) EIN	(iii) Type of organization (described on lines 1- 10 above (see instructions))	(iv) Is the organization listed in your governing document? Yes	No	(v) Amount of monetary support (see instructions)	(vi) Amount of other support (see instructions)
Total						

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Part II **Support Schedule for Organizations Described in Sections 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi)**
(Complete only if you checked the box on line 5, 7, or 8 of Part I or if the organization failed to qualify under Part III. If the organization failed to qualify under the tests listed below, please complete Part III.)

Section A. Public Support

Calendar year (or fiscal year beginning in) ▶	(a) 2020	(b) 2021	(c) 2022	(d) 2023	(e) 2024	(f) Total
1 Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grant.")						
2 Tax revenues levied for the organization's benefit and either paid to or expended on its behalf						
3 The value of services or facilities furnished by a governmental unit to the organization without charge..						
4 **Total.** Add lines 1 through 3						
5 The portion of total contributions by each person (other than a governmental unit or publicly supported organization) included on line 1 that exceeds 2% of the amount shown on line 11, column (f)						
6 **Public support.** Subtract line 5 from line 4.						

Section B. Total Support

Calendar year (or fiscal year beginning in) ▶	(a) 2020	(b) 2021	(c) 2022	(d) 2023	(e) 2024	(f) Total
7 Amounts from line 4.						
8 Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources.						
9 Net income from unrelated business activities, whether or not the business is regularly carried on.						
10 Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.).						
11 **Total support.** Add lines 7 through 10						

12 Gross receipts from related activities, etc. (see instructions) 12

13 **First 5 years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here** . . . . ▶ ☐

Section C. Computation of Public Support Percentage

14 Public support percentage for 2024 (line 6, column (f) divided by line 11, column (f)) 14

15 Public support percentage for 2023 Schedule A, Part II, line 14 15

16a **33 1/3% support test—2024.** If the organization did not check the box on line 13, and line 14 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . ▶ ☐

b **33 1/3% support test—2023.** If the organization did not check a box on line 13 or 16a, and line 15 is 33 1/3% or more, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . . ▶ ☐

17a **10%-facts-and-circumstances test—2024.** If the organization did not check a box on line 13, 16a, or 16b, and line 14 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . ▶ ☐

b **10%-facts-and-circumstances test—2023.** If the organization did not check a box on line 13, 16a, 16b, or 17a, and line 15 is 10% or more, and if the organization meets the "facts-and-circumstances" test, check this box and **stop here.** Explain in Part VI how the organization meets the "facts-and-circumstances" test. The organization qualifies as a publicly supported organization . . . . ▶ ☐

18 **Private foundation.** If the organization did not check a box on line 13, 16a, 16b, 17a, or 17b, check this box and see instructions . . . . ▶ ☐

Part III **Support Schedule for Organizations Described in Section 509(a)(2)**

(Complete only if you checked the box on line 10 of Part I or if the organization failed to qualify under Part II. If the organization fails to qualify under the tests listed below, please complete Part II.)

Section A. Public Support

	Calendar year (or fiscal year beginning in) ▶	(a) 2020	(b) 2021	(c) 2022	(d) 2023	(e) 2024	(f) Total
1	Gifts, grants, contributions, and membership fees received. (Do not include any "unusual grants.") .	639,736	650,374	731,898	834,664	765,649	3,622,321
2	Gross receipts from admissions, merchandise sold or services performed, or facilities furnished in any activity that is related to the organization's tax-exempt purpose	654,981	796,218	1,802,330	1,362,559	1,572,076	6,188,164
3	Gross receipts from activities that are not an unrelated trade or business under section 513						
4	Tax revenues levied for the organization's benefit and either paid to or expended on its behalf . . .						
5	The value of services or facilities furnished by a governmental unit to the organization without charge						
6	**Total.** Add lines 1 through 5	1,294,717	1,446,592	2,534,228	2,197,223	2,337,725	9,810,485
7a	Amounts included on lines 1, 2, and 3 received from disqualified persons						
b	Amounts included on lines 2 and 3 received from other than disqualified persons that exceed the greater of $5,000 or 1% of the amount on line 13 for the year.						
c	Add lines 7a and 7b. .						
8	**Public support.** (Subtract line 7c from line 6.)						9,810,485

Section B. Total Support

	Calendar year (or fiscal year beginning in) ▶	(a) 2020	(b) 2021	(c) 2022	(d) 2023	(e) 2024	(f) Total
9	Amounts from line 6. . .	1,294,717	1,446,592	2,534,228	2,197,223	2,337,725	9,810,485
10a	Gross income from interest, dividends, payments received on securities loans, rents, royalties and income from similar sources. .	4,127	11,735	19,860	19,966	22,662	78,350
b	Unrelated business taxable income (less section 511 taxes) from businesses acquired after June 30, 1975.						
c	Add lines 10a and 10b.	4,127	11,735	19,860	19,966	22,662	78,350
11	Net income from unrelated business activities not included on line 10b, whether or not the business is regularly carried on.						
12	Other income. Do not include gain or loss from the sale of capital assets (Explain in Part VI.) . .						
13	**Total support.** (Add lines 9, 10c, 11, and 12.). .	1,298,844	1,458,327	2,554,088	2,217,189	2,360,387	9,888,835

14 **First 5 years.** If the Form 990 is for the organization's first, second, third, fourth, or fifth tax year as a section 501(c)(3) organization, check this box and **stop here**. . . . . ▶ ☐

Section C. Computation of Public Support Percentage

15	Public support percentage for 2024 (line 8, column (f) divided by line 13, column (f)) . . .	15	99.210 %
16	Public support percentage from 2023 Schedule A, Part III, line 15 . . .	16	99.320 %

Section D. Computation of Investment Income Percentage

17	Investment income percentage for **2024** (line 10c, column (f) divided by line 13, column (f)) . . .	17	1.000 %
18	Investment income percentage from **2023** Schedule A, Part III, line 17 . . .	18	1.000 %

19a **33 1/3% support tests-2024.** If the organization did not check the box on line 14, and line 15 is more than 33 1/3%, and line 17 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . ▶ ☑

b **33 1/3% support tests—2023.** If the organization did not check a box on line 14 or line 19a, and line 16 is more than 33 1/3% and line 18 is not more than 33 1/3%, check this box and **stop here.** The organization qualifies as a publicly supported organization . . . ▶ ☐

20 **Private foundation.** If the organization did not check a box on line 14, 19a, or 19b, check this box and see instructions . . . ▶ ☐

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Part IV Supporting Organizations

(Complete only if you checked a box on line 12 of Part I. If you checked box 12a, of Part I, complete Sections A and B. If you checked box 12b, of Part I, complete Sections A and C. If you checked box 12c, of Part I, complete Sections A, D, and E. If you checked box 12d, of Part I, complete Sections A and D, and complete Part V.)

Section A. All Supporting Organizations

			Yes	No
1	Are all of the organization's supported organizations listed by name in the organization's governing documents? *If "No," describe in* ***Part VI*** *how the supported organizations are designated. If designated by class or purpose, describe the designation. If historic and continuing relationship, explain.*	1		
2	Did the organization have any supported organization that does not have an IRS determination of status under section 509 (a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *how the organization determined that the supported organization was described in section 509(a)(1) or (2).*	2		
3a	Did the organization have a supported organization described in section 501(c)(4), (5), or (6)? *If "Yes," answer lines 3b and 3c below.*	3a		
b	Did the organization confirm that each supported organization qualified under section 501(c)(4), (5), or (6) and satisfied the public support tests under section 509(a)(2)? *If "Yes," describe in* ***Part VI*** *when and how the organization made the determination.*	3b		
c	Did the organization ensure that all support to such organizations was used exclusively for section 170(c)(2)(B) purposes? *If "Yes," explain in* ***Part VI*** *what controls the organization put in place to ensure such use.*	3c		
4a	Was any supported organization not organized in the United States ("foreign supported organization")? *If "Yes" and if you checked box 12a or 12b in Part I, answer lines 4b and 4c below.*	4a		
b	Did the organization have ultimate control and discretion in deciding whether to make grants to the foreign supported organization? *If "Yes," describe in* ***Part VI*** *how the organization had such control and discretion despite being controlled or supervised by or in connection with its supported organizations.*	4b		
c	Did the organization support any foreign supported organization that does not have an IRS determination under sections 501(c)(3) and 509(a)(1) or (2)? *If "Yes," explain in* ***Part VI*** *what controls the organization used to ensure that all support to the foreign supported organization was used exclusively for section 170(c)(2)(B) purposes.*	4c		
5a	Did the organization add, substitute, or remove any supported organizations during the tax year? *If "Yes," answer lines 5b and 5c below (if applicable). Also, provide detail in* ***Part VI,*** *including (i) the names and EIN numbers of the supported organizations added, substituted, or removed; (ii) the reasons for each such action; (iii) the authority under the organization's organizing document authorizing such action; and (iv) how the action was accomplished (such as by amendment to the organizing document).*	5a		
b	**Type I or Type II only.** Was any added or substituted supported organization part of a class already designated in the organization's organizing document?	5b		
c	**Substitutions only.** Was the substitution the result of an event beyond the organization's control?	5c		
6	Did the organization provide support (whether in the form of grants or the provision of services or facilities) to anyone other than (i) its supported organizations, (ii) individuals that are part of the charitable class benefited by one or more of its supported organizations, or (iii) other supporting organizations that also support or benefit one or more of the filing organization's supported organizations? *If "Yes," provide detail in* ***Part VI.***	6		
7	Did the organization provide a grant, loan, compensation, or other similar payment to a substantial contributor (defined in section 4958(c)(3)(C)), a family member of a substantial contributor, or a 35% controlled entity with regard to a substantial contributor? *If "Yes," complete Part I of Schedule L (Form 990) .*	7		
8	Did the organization make a loan to a disqualified person (as defined in section 4958) not described on line 7? *If "Yes," complete Part I of Schedule L (Form 990).*	8		
9a	Was the organization controlled directly or indirectly at any time during the tax year by one or more disqualified persons, as defined in section 4946 (other than foundation managers and organizations described in section 509(a)(1) or (2))? *If "Yes," provide detail in* ***Part VI.***	9a		
b	Did one or more disqualified persons (as defined on line 9a) hold a controlling interest in any entity in which the supporting organization had an interest? *If "Yes," provide detail in* ***Part VI.***	9b		
c	Did a disqualified person (as defined on line 9a) have an ownership interest in, or derive any personal benefit from, assets in which the supporting organization also had an interest? *If "Yes," provide detail in* ***Part VI.***	9c		
10a	Was the organization subject to the excess business holdings rules of section 4943 because of section 4943(f) (regarding certain Type II supporting organizations, and all Type III non-functionally integrated supporting organizations)? *If "Yes," answer line 10b below.*	10a		
b	Did the organization have any excess business holdings in the tax year? *(Use Schedule C, Form 4720, to determine whether the organization had excess business holdings).*	10b		

Part IV Supporting Organizations (continued)

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			Yes	No
11	Has the organization accepted a gift or contribution from any of the following persons?			
a	A person who directly or indirectly controls, either alone or together with persons described on lines 11b and 11c below, the governing body of a supported organization?	**11a**		
b	A family member of a person described on 11a above?	**11b**		
c	A 35% controlled entity of a person described on line 11a or 11b above? *If "Yes" to 11a, 11b, or 11c, provide detail in* ***Part VI.***	**11c**		

Section B. Type I Supporting Organizations

			Yes	No
1	Did the officers, directors, trustees, or membership of one or more supported organizations have the power to regularly appoint or elect at least a majority of the organization's directors or trustees at all times during the tax year? *If "No," describe in* ***Part VI*** *how the supported organization(s) effectively operated, supervised, or controlled the organization's activities. If the organization had more than one supported organization, describe how the powers to appoint and/or remove directors or trustees were allocated among the supported organizations and what conditions or restrictions, if any, applied to such powers during the tax year.*	**1**		
2	Did the organization operate for the benefit of any supported organization other than the supported organization(s) that operated, supervised, or controlled the supporting organization? *If "Yes," explain in* ***Part VI*** *how providing such benefit carried out the purposes of the supported organization(s) that operated, supervised or controlled the supporting organization.*	**2**		

Section C. Type II Supporting Organizations

			Yes	No
1	Were a majority of the organization's directors or trustees during the tax year also a majority of the directors or trustees of each of the organization's supported organization(s)? *If "No," describe in* ***Part VI*** *how control or management of the supporting organization was vested in the same persons that controlled or managed the supported organization(s).*	**1**		

Section D. All Type III Supporting Organizations

			Yes	No
1	Did the organization provide to each of its supported organizations, by the last day of the fifth month of the organization's tax year, (i) a written notice describing the type and amount of support provided during the prior tax year, (ii) a copy of the Form 990 that was most recently filed as of the date of notification, and (iii) copies of the organization's governing documents in effect on the date of notification, to the extent not previously provided?	**1**		
2	Were any of the organization's officers, directors, or trustees either (i) appointed or elected by the supported organization (s) or (ii) serving on the governing body of a supported organization? *If "No," explain in* ***Part VI*** *how the organization maintained a close and continuous working relationship with the supported organization(s).*	**2**		
3	By reason of the relationship described in line 2 above, did the organization's supported organizations have a significant voice in the organization's investment policies and in directing the use of the organization's income or assets at all times during the tax year? *If "Yes," describe in* ***Part VI*** *the role the organization's supported organizations played in this regard.*	**3**		

Section E. Type III Functionally-Integrated Supporting Organizations

1 Check the box next to the method that the organization used to satisfy the Integral Part Test during the year **(see instructions)**:

- **a** ☐ The organization satisfied the Activities Test. Complete **line 2** below.
- **b** ☐ The organization is the parent of each of its supported organizations. Complete **line 3** below.
- **c** ☐ The organization supported a governmental entity. Describe in **Part VI** how you supported a government entity (see instructions)

			Yes	No
2	Activities Test. **Answer lines 2a and 2b below.**			
a	Did substantially all of the organization's activities during the tax year directly further the exempt purposes of the supported organization(s) to which the organization was responsive? *If "Yes," then in* ***Part VI identify those supported organizations and explain*** *how these activities directly furthered their exempt purposes, how the organization was responsive to those supported organizations, and how the organization determined that these activities constituted substantially all of its activities.*	**2a**		
b	Did the activities described on line 2a, above constitute activities that, but for the organization's involvement, one or more of the organization's supported organization(s) would have been engaged in? *If "Yes," explain in* ***Part VI*** *the reasons for the organization's position that its supported organization(s) would have engaged in these activities but for the organization's involvement.*	**2b**		
3	Parent of Supported Organizations. **Answer lines 3a and 3b below.**			
a	Did the organization have the power to regularly appoint or elect a majority of the officers, directors, or trustees of each of the supported organizations?*If "Yes" or "No", provide details in* ***Part VI.***	**3a**		
b	Did the organization exercise a substantial degree of direction over the policies, programs and activities of each of its supported organizations? *If "Yes," describe in* ***Part VI.*** *the role played by the organization in this regard.*	**3b**		

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Part V **Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations**

1 ☐ Check here if the organization satisfied the Integral Part Test as a qualifying trust on Nov. 20, 1970 (*explain in* **Part VI**). **See instructions.** All other Type III non-functionally integrated supporting organizations must complete Sections A through E.

	Section A - Adjusted Net Income		(A) Prior Year	(B) Current Year (optional)
1	Net short-term capital gain	1		
2	Recoveries of prior-year distributions	2		
3	Other gross income (see instructions)	3		
4	Add lines 1 through 3	4		
5	Depreciation and depletion	5		
6	Portion of operating expenses paid or incurred for production or collection of gross income or for management, conservation, or maintenance of property held for production of income (see instructions)	6		
7	Other expenses (see instructions)	7		
8	**Adjusted Net Income** (subtract lines 5, 6 and 7 from line 4)	8		

	Section B - Minimum Asset Amount		(A) Prior Year	(B) Current Year (optional)
1	Aggregate fair market value of all non-exempt-use assets (see instructions for short tax year or assets held for part of year):	1		
a	Average monthly value of securities	1a		
b	Average monthly cash balances	1b		
c	Fair market value of other non-exempt-use assets	1c		
d	**Total** (add lines 1a, 1b, and 1c)	1d		
e	**Discount** claimed for blockage or other factors (*explain in detail in* ***Part VI***):			
2	Acquisition indebtedness applicable to non-exempt use assets	2		
3	Subtract line 2 from line 1d	3		
4	Cash deemed held for exempt use. Enter 0.015 of line 3 (for greater amount, see instructions).	4		
5	Net value of non-exempt-use assets (subtract line 4 from line 3)	5		
6	Multiply line 5 by 0.035	6		
7	Recoveries of prior-year distributions	7		
8	**Minimum Asset Amount** (add line 7 to line 6)	8		

	Section C - Distributable Amount			Current Year
1	Adjusted net income for prior year (from Section A, line 8, Column A)	1		
2	Enter 85% of line 1	2		
3	Minimum asset amount for prior year (from Section B, line 8, Column A)	3		
4	Enter greater of line 2 or line 3	4		
5	Income tax imposed in prior year	5		
6	**Distributable Amount.** Subtract line 5 from line 4, unless subject to emergency temporary reduction (see instructions)	6		

7 ☐ Check here if the current year is the organization's first as a non-functionally-integrated Type III supporting organization (see instructions)

Part V **Type III Non-Functionally Integrated 509(a)(3) Supporting Organizations** (continued)

Section D - Distributions		**Current Year**
1 Amounts paid to supported organizations to accomplish exempt purposes	**1**	
2 Amounts paid to perform activity that directly furthers exempt purposes of supported organizations, in excess of income from activity	**2**	
3 Administrative expenses paid to accomplish exempt purposes of supported organizations	**3**	
4 Amounts paid to acquire exempt-use assets	**4**	
5 Qualified set-aside amounts (*prior IRS approval required - provide details in* ***Part VI***)	**5**	
6 Other distributions (*describe in* ***Part VI***). See instructions	**6**	
7 **Total annual distributions.** Add lines 1 through 6.	**7**	
8 Distributions to attentive supported organizations to which the organization is responsive (*provide details in* ***Part VI***). See instructions	**8**	
9 Distributable amount for 2024 from Section C, line 6	**9**	
10 Line 8 amount divided by Line 9 amount	**10**	

Section E - Distribution Allocations (see instructions)	**(i)** **Excess Distributions**	**(ii)** **Underdistributions Pre-2024**	**(iii)** **Distributable Amount for 2024**
1 Distributable amount for 2024 from Section C, line 6			
2 Underdistributions, if any, for years prior to 2024 (reasonable cause required-- *explain in* ***Part VI***). See instructions.			
3 Excess distributions carryover, if any, to 2024:			
a From 2019.			
b From 2020.			
c From 2021.			
d From 2022.			
e From 2023.			
f **Total** of lines 3a through e			
g Applied to underdistributions of prior years			
h Applied to 2024 distributable amount			
i Carryover from 2019 not applied (see instructions)			
j Remainder. Subtract lines 3g, 3h, and 3i from line 3f.			
4 Distributions for 2024 from Section D, line 7: $			
a Applied to underdistributions of prior years			
b Applied to 2024 distributable amount			
c Remainder. Subtract lines 4a and 4b from line 4.			
5 Remaining underdistributions for years prior to 2024, if any. Subtract lines 3g and 4a from line 2. If the amount is greater than zero, *explain in* ***Part VI***. See instructions.			
6 Remaining underdistributions for 2024. Subtract lines 3h and 4b from line 1. If the amount is greater than zero, *explain in* ***Part VI***. See instructions.			
7 **Excess distributions carryover to 2025.** Add lines 3j and 4c.			
8 Breakdown of line 7:			
a Excess from 2020.			
b Excess from 2021.			
c Excess from 2022.			
d Excess from 2023.			
e Excess from 2024.			

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Part VI **Supplemental Information.** Provide the explanations required by Part II, line 10; Part II, line 17a or 17b; Part III, line 12; Part IV, Section A, lines 1, 2, 3b, 3c, 4b, 4c, 5a, 6, 9a, 9b, 9c, 11a, 11b, and 11c; Part IV, Section B, lines 1 and 2; Part IV, Section C, line 1; Part IV, Section D, lines 2 and 3; Part IV, Section E, lines 1c, 2a, 2b, 3a and 3b; Part V, line 1; Part V, Section B, line 1e; Part V Section D, lines 5, 6, and 8; and Part V, Section E, lines 2, 5, and 6. Also complete this part for any additional information. (See instructions).

Facts And Circumstances Test

SCHEDULE D (Form 990) (Rev. January 2025) Department of the Treasury Internal Revenue Service

Supplemental Financial Statements

▶ Complete if the organization answered "Yes," on Form 990, Part IV, line 6, 7, 8, 9, 10, 11a, 11b, 11c, 11d, 11e, 11f, 12a, or 12b.
▶ Attach to Form 990.
▶ Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No. 1545-0047

Open to Public Inspection

Name of the organization
WORLD PROF ASSN FOR TRANSGENDER HEALTH

Employer identification number
94-2675140

Part I Organizations Maintaining Donor Advised Funds or Other Similar Funds or Accounts.
Complete if the organization answered "Yes" on Form 990, Part IV, line 6.

		(a) Donor advised funds	(b) Funds and other accounts
1	Total number at end of year		
2	Aggregate value of contributions to (during year)		
3	Aggregate value of grants from (during year)		
4	Aggregate value at end of year		

5 Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organization's property, subject to the organization's exclusive legal control? . . . . ☐ Yes ☐ No

6 Did the organization inform all grantees, donors, and donor advisors in writing that grant funds can be used only for charitable purposes and not for the benefit of the donor or donor advisor, or for any other purpose conferring impermissible private benefit? . . . . ☐ Yes ☐ No

Part II Conservation Easements.
Complete if the organization answered "Yes" on Form 990, Part IV, line 7.

1 Purpose(s) of conservation easements held by the organization (check all that apply).

☐ Preservation of land for public use (e.g., recreation or education) ☐ Preservation of an historically important land area
☐ Protection of natural habitat ☐ Preservation of a certified historic structure
☐ Preservation of open space

2 Complete lines 2a through 2d if the organization held a qualified conservation contribution in the form of a conservation easement on the last day of the tax year.

			Held at the End of the Year
a	Total number of conservation easements	2a	
b	Total acreage restricted by conservation easements	2b	
c	Number of conservation easements on a certified historic structure included in (a)	2c	
d	Number of conservation easements included in (c) acquired after July 25, 2006, and not on a historic structure listed in the National Register . . .	2d	

3 Number of conservation easements modified, transferred, released, extinguished, or terminated by the organization during the tax year ▶ ____________

4 Number of states where property subject to conservation easement is located ▶ ____________

5 Does the organization have a written policy regarding the periodic monitoring, inspection, handling of violations, and enforcement of the conservation easements it holds? . . . . ☐ Yes ☐ No

6 Staff and volunteer hours devoted to monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ ____________

7 Amount of expenses incurred in monitoring, inspecting, handling of violations, and enforcing conservation easements during the year ▶ $ ____________

8 Does each conservation easement reported on line 2(d) above satisfy the requirements of section 170(h)(4)(B)(i) and section 170(h)(4)(B)(ii)? . . . . ☐ Yes ☐ No

9 In Part XIII, describe how the organization reports conservation easements in its revenue and expense statement, and balance sheet, and include, if applicable, the text of the footnote to the organization's financial statements that describes the organization's accounting for conservation easements.

Part III Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets.
Complete if the organization answered "Yes" on Form 990, Part IV, line 8.

1a If the organization elected, as permitted under FASB ASC 958, not to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide, in Part XIII, the text of the footnote to its financial statements that describes these items.

b If the organization elected, as permitted under FASB ASC 958, to report in its revenue statement and balance sheet works of art, historical treasures, or other similar assets held for public exhibition, education, or research in furtherance of public service, provide the following amounts relating to these items:

(i) Revenue included on Form 990, Part VIII, line 1 . . . . ▶ $ ____________

(ii) Assets included in Form 990, Part X . . . . ▶ $ ____________

2 If the organization received or held works of art, historical treasures, or other similar assets for financial gain, provide the following amounts required to be reported under FASB ASC 958 relating to these items:

a Revenue included on Form 990, Part VIII, line 1 . . . . ▶ $ ____________

b Assets included in Form 990, Part X . . . . ▶ $ ____________

Part III **Organizations Maintaining Collections of Art, Historical Treasures, or Other Similar Assets** *(continued)*

3 Using the organization's acquisition, accession, and other records, check any of the following that are a significant use of its collection items (check all that apply):

a ☐ Public exhibition

b ☐ Scholarly research

c ☐ Preservation for future generations

d ☐ Loan or exchange programs

e ☐ Other ....

4 Provide a description of the organization's collections and explain how they further the organization's exempt purpose in Part XIII.

5 During the year, did the organization solicit or receive donations of art, historical treasures or other similar assets to be sold to raise funds rather than to be maintained as part of the organization's collection?. . . ☐ **Yes** ☐ **No**

Part IV **Escrow and Custodial Arrangements.**
Complete if the organization answered "Yes" on Form 990, Part IV, line 9, or reported an amount on Form 990, Part X, line 21.

1a Is the organization an agent, trustee, custodian or other intermediary for contributions or other assets not included on Form 990, Part X? . . . ☐ **Yes** ☐ **No**

b If "Yes," explain the arrangement in Part XIII and complete the following table:

			Amount
c	Beginning balance	**1c**	
d	Additions during the year	**1d**	
e	Distributions during the year	**1e**	
f	Ending balance	**1f**	

2a Did the organization include an amount on Form 990, Part X, line 21, for escrow or custodial account liability? . . . ☐ **Yes** ☐ **No**

b If "Yes," explain the arrangement in Part XIII. Check here if the explanation has been provided in Part XIII . . . . ☐

Part V **Endowment Funds.**
Complete if the organization answered "Yes" on Form 990, Part IV, line 10.

	(a) Current year	**(b)** Prior year	**(c)** Two years back	**(d)** Three years back	**(e)** Four years back
1a Beginning of year balance					
b Contributions					
c Net investment earnings, gains, and losses					
d Grants or scholarships					
e Other expenditures for facilities and programs					
f Administrative expenses					
g End of year balance					

2 Provide the estimated percentage of the current year end balance (line 1g, column (a)) held as:

a Board designated or quasi-endowment ▶ ....

b Permanent endowment ▶ ....

c Term endowment ▶ ....

The percentages on lines 2a, 2b, and 2c should equal 100%.

3a Are there endowment funds not in the possession of the organization that are held and administered for the organization by:

		Yes	No
(i) Unrelated organizations	**3a(i)**		
(ii) Related organizations	**3a(ii)**		
b If "Yes" on 3a(ii), are the related organizations listed as required on Schedule R?	**3b**		

4 Describe in Part XIII the intended uses of the organization's endowment funds.

Part VI **Land, Buildings, and Equipment.**
Complete if the organization answered "Yes" on Form 990, Part IV, line 11a. See Form 990, Part X, line 10.

Description of property	**(a)** Cost or other basis (investment)	**(b)** Cost or other basis (other)	**(c)** Accumulated depreciation	**(d)** Book value
1a Land				
b Buildings				
c Leasehold improvements				
d Equipment				
e Other				

Total. Add lines 1a through 1e. *(Column (d) must equal Form 990, Part X, column (B), line 10(c).)* . . ▶

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Part VII Investments - Other Securities.
Complete if the organization answered "Yes" on Form 990, Part IV, line 11b.See Form 990, Part X, line 12.

(a) Description of security or category (including name of security)	(b) Book value	(c) Method of valuation: Cost or end-of-year market value
(1) Financial derivatives		
(2) Closely-held equity interests		
(3)Other		
(A)		
(B)		
(C)		
(D)		
(E)		
(F)		
(G)		
(H)		
Total. *(Column (b) must equal Form 990, Part X, col. (B) line 12.)* ▶		

Part VIII Investments - Program Related.
Complete if the organization answered 'Yes' on Form 990, Part IV, line 11c. See Form 990, Part X, line 13.

(a) Description of investment	(b) Book value	(c) Method of valuation: Cost or end-of-year market value
(1)		
(2)		
(3)		
(4)		
(5)		
(6)		
(7)		
(8)		
(9)		
(9)		
Total. *(Column (b) must equal Form 990, Part X, col.(B) line 13.)* ▶		

Part IX Other Assets.
Complete if the organization answered 'Yes' on Form 990, Part IV, line 11d. See Form 990, Part X, line 15.

(a) Description	(b) Book value
(1)	
(2)	
(3)	
(4)	
(5)	
(6)	
(7)	
(8)	
(9)	
(9)	
Total. *(Column (b) must equal Form 990, Part X, col.(B) line 15.)* . . . . ▶	

Part X Other Liabilities.
Complete if the organization answered 'Yes' on Form 990, Part IV, line 11e or 11f.See Form 990, Part X, line 25.

1. (a) Description of liability	(b) Book value
(1) Federal income taxes	
Total. *(Column (b) must equal Form 990, Part X, col.(B) line 25.)* ▶	

2. Liability for uncertain tax positions. In Part XIII, provide the text of the footnote to the organization's financial statements that reports the organization's liability for uncertain tax positions under FIN 48 (ASC 740). Check here if the text of the footnote has been provided in Part XIII ☐

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Part XI Reconciliation of Revenue per Audited Financial Statements With Revenue per Return.
Complete if the organization answered 'Yes' on Form 990, Part IV, line 12a.

1	Total revenue, gains, and other support per audited financial statements			1	2,458,305
2	Amounts included on line 1 but not on Form 990, Part VIII, line 12:				
a	Net unrealized gains (losses) on investments	2a	97,918		
b	Donated services and use of facilities	2b			
c	Recoveries of prior year grants	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	97,918
3	Subtract line **2e** from line **1**			3	2,360,387
4	Amounts included on Form 990, Part VIII, line 12, but not on line **1**:				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a			
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	
5	Total revenue. Add lines **3** and **4c.** (This must equal Form 990, Part I, line 12.)			5	2,360,387

Part XII Reconciliation of Expenses per Audited Financial Statements With Expenses per Return.
Complete if the organization answered 'Yes' on Form 990, Part IV, line 12a.

1	Total expenses and losses per audited financial statements			1	2,515,016
2	Amounts included on line 1 but not on Form 990, Part IX, line 25:				
a	Donated services and use of facilities	2a			
b	Prior year adjustments	2b			
c	Other losses	2c			
d	Other (Describe in Part XIII.)	2d			
e	Add lines **2a** through **2d**			2e	
3	Subtract line **2e** from line **1**			3	2,515,016
4	Amounts included on Form 990, Part IX, line 25, but not on line **1:**				
a	Investment expenses not included on Form 990, Part VIII, line 7b	4a	7,074		
b	Other (Describe in Part XIII.)	4b			
c	Add lines **4a** and **4b**			4c	7,074
5	Total expenses. Add lines **3** and **4c.** (This must equal Form 990, Part I, line 18.)			5	2,522,090

Part XIII Supplemental Information

Provide the descriptions required for Part II, lines 3, 5, and 9; Part III, lines 1a and 4; Part IV, lines 1b and 2b; Part V, line 4; Part X, line 2; Part XI, lines 2d and 4b; and Part XII, lines 2d and 4b. Also complete this part to provide any additional information.

Return Reference	Explanation

Case 4:26-cv-00748-O Document 72-1 Filed 08/18/26 Page 38 of 71 PageID 2224

SCHEDULE O (Form 990)
(Rev. January 2025)
Department of the Treasury
Internal Revenue Service

Supplemental Information to Form 990 or 990-EZ

Complete to provide information for responses to specific questions on Form 990 or 990-EZ or to provide any additional information.
Attach to Form 990 or 990-EZ.
Go to *www.irs.gov/Form990* for instructions and the latest information.

OMB No. 1545-0047

Open to Public Inspection

Name of the organization
WORLD PROF ASSN FOR TRANSGENDER HEALTH

Employer identification number
94-2675140

990 Schedule O, Supplemental Information

Return Reference	Explanation
FORM 990 - ORGANIZATION'S MISSION	AS AN INTERNATIONAL MULTIDISCIPLINARY PROFESSIONAL ASSOCIATION, THE MISSION OF THE WORLD P ROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH (WPATH) IS TO PROMOTE EVIDENCE-BASED CARE, EDUCATION, RESEARCH, ADVOCACY, PUBLIC POLICY AND RESPECT IN TRANSGENDER HEALTH.

990 Schedule O, Supplemental Information

Return Reference	Explanation
FORM 990, PAGE 1, PART I, LINE 6	VOLUNTEERS SERVE ON THE BOARD OF DIRECTORS AND HELP RUN THE ORGANIZATION AND SUPPORT THE E FFORTS OF THE ORGANIZATION TO RAISE AWARENESS AND EDUCATION AROUND TRANSGENDER HEALTH.

990 Schedule O, Supplemental Information

Return Reference	Explanation
FORM 990, PAGE 2, PART III, LINE 4B	THE GLOBAL EDUCATION INITIATIVE (GEI) PROVIDES COURSES TO A VARIETY OF AUDIENCES. ATTENDEE S FROM MANY COUNTRIES ARE ENCOURAGED TO PROVIDE CONSTRUCTIVE FEEDBACK, WHICH THE BOARD REV IEWS THOROUGHLY. IN ATTENDANCE AT GEI COURSES ARE PSYCHOLOGISTS, PSYCHIATRISTS, THERAPISTS , SOCIAL WORKERS, FAMILY PRACTICE PROVIDERS, NURSES, NURSE PRACTITIONERS, PHYSICIAN ASSIST ANTS, ENDOCRINOLOGISTS, UROLOGISTS, GYNECOLOGISTS, PLASTIC SURGEONS AND PROFESSIONAL EDUCA TORS. ALSO IN ATTENDANCE ARE SPIRITUAL LEADERS, STUDENTS, ADDICTION COUNSELORS, HIV CASE M ANAGERS, AND RESEARCHERS. ATTENDEES HAVE WORKED AT MILITARY BASES, THE PENTEGON, FEDERAL A ND STATE CORRECTIONAL INSTITUTIONS, MEDICAL SCHOOLS, PRIVATE PRACTICES, PUBLIC HEALTH DEPA RTMENTS, CLINICS AND COMMUNITY HOSPITALS. MORE THAN ANYTHING ELSE, WE HAVE REALIZED THAT T HERE IS MUCH MORE TO BE DONE. WE ARE CURRENTLY FORMING TASK FORCES TO ASSIST IN CREATING T ARGETED TRAINING TO MEET THE VARIED EDUCATIONAL NEEDS OF PROVIDERS AND IMPROVE ACCESS TO C ARE.

990 Schedule O, Supplemental Information

Return Reference	Explanation
FORM 990, PAGE 2, PART III, LINE 4D	THE ORGANIZATION PROVIDES ADDITIONAL BENEFITS TO THE MEMBERSHIP THROUGH DEVELOPMENT EFFORT S, MAINTAINING PROFESSIONAL MEMBERSHIPS WITH OTHER ORGANIZATIONS, PROVIDING RESEARCH GRANT OPPORTUNITIES, AND BY PROVIDING AN EDUCATIONAL JOURNAL TO THE MEMBERSHIP.

990 Schedule O, Supplemental Information

Return Reference	Explanation
FORM 990, PAGE 6, PART VI, LINE 3	MANAGEMENT DUTIES ARE DELEGATED TO VERITAS ASSOCIATION MANAGEMENT, INC.

990 Schedule O, Supplemental Information

Return Reference	Explanation
FORM 990, PAGE 6, PART VI, LINE 11B	A COPY OF FORM 990 WILL BE DISTRIBUTED VIA SECURE ELECTRONIC MEANS PRIOR TO TRANSMITTING FORM 990 TO THE IRS.

990 Schedule O, Supplemental Information

Return Reference	Explanation
FORM 990, PAGE 6, PART VI, LINE 19	THE ORGANIZATION MAKES ITS GOVERNING DOCUMENTATION AND OTHER INFORMATION AVAILABLE VIA THE WEB OR AVAILABLE UPON REQUEST AT THE ORGANIZATION'S OFFICE LOCATION.

990 Schedule O, Supplemental Information

Return Reference	Explanation
FORM 990, PART IX, LINE 11G	HONORARIUM 32,966 0 0 HONORARIUM 79,150 0 0 PUBLIC RELATIONS 0 149,410 0 CONSULTING 17,000 0 0 TOTAL 129,116 149,410 0

ATTACHMENT B

FILED
08/09/2024
Angie Sparks
CLERK
Lewis & Clark County District Court
STATE OF MONTANA
By: Helen Coleman
DV-25-2024-0000261-DK
Menahan, Mike
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* *Pro Hac Vice* Application In Process

IN THE FIRST JUDICIAL DISTRICT COURT
LEWIS & CLARK COUNTY

JESSICA KALARCHIK, an individual, and JANE DOE, an individual, on behalf of themselves and all others similarly situated, *Plaintiffs,* v. STATE OF MONTANA, *et. al.*, *Defendants*, v. WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *Third-Party Defendant.*	Case No. ADV-25-2024-0000261-CR Hon. Mike Menahan **THIRD-PARTY DEFENDANT WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH'S BRIEF IN SUPPORT OF MOTION TO DISMISS**

I. INTRODUCTION

This case is a transparent attempt to force a non-profit organization to incur hundreds of thousands of dollars in legal fees to defend against baseless, bizarre, and legally-unsupportable claims. It is a thinly-veiled effort to chill speech and to extract an economic toll from an organization the Attorney General's political party wishes didn't exist. The Attorney General's

Third-Party Complaint ("TPC"), which flies in the face of well-settled case law, should be dismissed under Montana Rule of Civil Procedure 12(b)(2) and 12(b)(6) for lack of jurisdiction and its failure to meet even the most basic pleading requirements to state a claim upon which relief can be granted. Moreover, the State's indemnification claim infringes the First Amendment speech and association rights of the World Professional Association for Transgender Health ("WPATH"), an international 501(c)(3) non-profit organization that, among other things, maintains the Standards of Care for the Health of Transgender and Gender Diverse People ("Standards of Care"), so failure to dismiss this case would set a dangerous and unconstitutional precedent. For those reasons, and the reasons described herein, the law requires the Attorney General's ludicrous third-party "indemnification" complaint to be dismissed.

WPATH's Standards of Care "were developed by experts in the field, including clinicians and researchers, who used systematic processes for collecting and reviewing scientific evidence." *Brandt v. Rutledge*, 677 F. Supp. 3d 877, 889 (E.D. Ark. 2023). WPATH's Standards of Care "are widely followed by well-trained clinicians," "are used by insurers," and "have been endorsed by the United States Department of Health and Human Services." *Doe v. Ladapo*, No. 4:23CV114-RH-MAF, 2024 WL 2947123, at *5 (N.D. Fla. June 11, 2024).

Despite the science, dozens of state legislatures (including Montana's) have targeted transgender people in recent years. This legislation spawned substantial litigation as legal services organizations representing the rights of those targeted by these bills have challenged them in court. For LGBTQ+ advocates, that "anti-LGBTQ-state-law-then-litigation" story is a familiar one. What is unfamiliar are the dangerous and unlawful tactics employed here by the Attorney General.

For the first time in the recent history of the LGBTQ+ litigation movement, the Montana Attorney General has chosen to use his prosecutorial discretion to punish his ideological opponent. His complaint purports to ask the Court to order WPATH to indemnify him for costs he incurred litigating a case that has nothing to do with WPATH and in which WPATH is not a party. In reality, the Attorney General's third-party complaint has nothing to do with indemnity.

The Attorney General claims WPATH should pay the State's litigation costs in a suit the ACLU brought to challenge state laws about gender-marker changes on government documents. The skeletal third-party complaint does not and cannot actually plead causation. Indeed, all the Attorney General pleads is the conclusory allegation that "WPATH has created the factual basis for the suit" against the State by the plaintiffs in the underlying litigation. *See* TPC ¶ 21. But the Attorney General appears to be suggesting that WPATH invented the concept of "gender dysphoria," and that but-for the scientific consensus that has evolved around gender dysphoria and the treatments for it, the State would not have needed to enact laws on gender-marker changes and thus not bear any litigation costs in suits challenging those laws. To do so, he offensively alleges that WPATH "made misrepresentations to Montana medical providers" about the legitimacy of gender dysphoria and the medical treatments for it, despite the scientific community's consensus around it. While the Attorney General may wish transgender and gender-diverse people (and the healthcare they need) did not exist, his erasure efforts cannot – and will not – succeed.

But the (de)merits of the Attorney General's complaint are an issue for another day. That is because his third-party complaint should be dismissed under Montana Rule of Civil Procedure 12(b)(2) and 12(b)(6) for lack of jurisdiction and its complete failure to state a claim upon which relief can be granted.

II. BACKGROUND

A. The Underlying Litigation

On April 30, 2021, Montana Governor Greg Gianforte signed Senate Bill 280 ("SB 280") into law. It prohibits anyone from changing their sex designation on their birth certificate without first presenting a court order showing that a surgical procedure changed that person's sex. A year later, a state court enjoined SB 280's enforcement and ordered the State to reinstate less restrictive pre-SB 280 procedures for processing applications to change sex designations on Montanans' birth certificates. But while the injunction was in place, the State's Department of Public Health and Human Services ("DPHHS") issued an emergency rule, and later a permanent rule, implementing a total ban on changes to sex designations on birth certificates. *See* Mont. Admin. R. 37.8.311(5) (the "2022 Rule"). On June 26, 2023, a court permanently enjoined the enforcement of SB 280 and found DPHHS in contempt for defying the court's preliminary injunction order.

Based on the 2022 Rule, in February 2024, DPHHS announced it would only amend sex designations on birth certificates if the sex identified on the applicant's birth certificate was a result of a scriveners' error, incorrect data entry, or if the sex was misidentified on the original certification. DPHSS declared it would not amend birth certificates based on "gender transition, gender identity, or change of gender." *See* Mont. Admin. Reg. Notice 37-1002, No. 11 (Jun. 10, 2022). DPHHS announced that its amendment process would be subject to provisions in Senate Bill 458 ("SB 458"), signed into law in May 2023, which provides:

> In human beings there are exactly two sexes, male and female, with two corresponding types of gametes. The sexes are determined by the biological and genetic indication of male and female without regard to an individuals' psychological, behavioral, social, or chosen or subjective experience of gender.

Around the same time, the Motor Vehicle Division ("MVD"), via the Montana Department of Justice, adopted a new policy to only issue an amended driver's license with a sex designation reflecting a person's gender identity if the person provided an amended birth certificate. Such an amended birth certificate was made impossible by the 2022 Rule.

On April 18, 2024, Plaintiffs in the underlying litigation filed a class action in Montana state court seeking to block enforcement of the 2022 Rule, the new MVD policy, and SB 458 as unconstitutional. *See Kalarchik, et al., v. State of Montana, et al.*, Case No. DV-25-2024-

0000261-CR (Lewis & Clark Cnty. Dist. Ct. Apr. 18, 2024) (hereinafter "Underlying Litigation").

B. The Third-Party Complaint

On June 12, 2024, Defendants in the Underlying Litigation (hereinafter "the State") filed an Answer to the Plaintiffs' complaint. Beyond its Answer, the State filed the instant TPC against WPATH. Through its TPC, the State raises a novel (and preposterous) theory that WPATH should indemnify the State for its defense in the Underlying Litigation, including for any "potential liability" to the plaintiffs in the Underlying Litigation "in the form of reimbursement of their attorneys' fees and costs" under the private attorney general doctrine. *See* TPC ¶¶ 17, 20.

III. LEGAL STANDARD

Montana Rule of Civil Procedure 12(b)(2) requires a defendant to be dismissed if the plaintiff does not establish personal jurisdiction over that defendant. Plaintiffs bear the burden to establish personal jurisdiction over non-resident defendants. *Buckles by & through Buckles v. Cont'l Res., Inc.*, 2017 MT 235, ¶ 11, 388 Mont. 517, 520, 402 P.3d 1213, 1216.

Montana Rule of Civil Procedure 12(b)(6) mandates dismissal of a complaint if the plaintiff "fail[s] to state a claim upon which relief can be granted." The plaintiff carries the burden of adequately pleading a cause of action. *See Jones v. Mont. Univ. Sys.*, 2007 MT 82, ¶ 42, 337 Mont. 1, 12, 155 P.3d 1247, 1256. A plaintiff fails to meet this burden if it "either fails to state a cognizable legal theory for relief or states an otherwise valid legal claim but fails to state sufficient facts that, if true, would entitle the claimant to relief under the claim." *In re Estate of Swanberg*, 2020 MT 153, ¶ 6, 400 Mont. 247, 251, 465 P.3d 1165, 1167. The complaint must state more than facts that "would breed only a suspicion" of entitlement to relief. *Lundeen v. Lake Cnty.*, 2024 MT 120, ¶ 11, 416 Mont. 539, 544 (quoting *Jones*, ¶ 42). "Whether a complaint states a cognizable claim for relief is a question of substantive law on the merits." *Id*. "Dismissal is proper under 12(b)(6) if the plaintiff would not be entitled to relief based on any set of facts that could be proven to support the claim." *Id.* ¶ 11 (quoting *Puryer v. HSBC Bank USA, N.A*., 2018 MT 124, ¶ 10, 391 Mont. 361, 366, 419 P.3d 105, 109); *see also Fennessy v. Dorrington*, 2001 MT 204, ¶ 9, 306 Mont. 307, 309, 32 P.3d 1250, 1252. "When considering such a motion, the District Court must consider only the sufficiency of matters raised in the complaint. It must not go beyond the four corners of the complaint, nor may it engage in any fact finding." *Irving v. Sch. Dist. No. 1-1A, Valley Cnty.*, 248 Mont. 460, 464, 813 P.2d 417, 419 (1991) (*quoting Nordlund v. School Distr. No. 14*, 227 Mont. 402, 738 P.2d 1299 (1987)).

IV. ARGUMENT

A. The State Cannot Meet Its Burden on Personal Jurisdiction.

The TPC must be dismissed pursuant to Montana Rule 12(b)(2) because the State cannot meet its burden to show that this Court has personal jurisdiction over WPATH. *See Bunch v. Lancair Int'l, Inc*., No. DV-05-674, 2006 WL 2423267, at *16 (Mont. Dist. July 25, 2006) (explaining "the burden of establishing jurisdiction rests with the Plaintiffs"). In conducting this analysis, the court first determines whether personal jurisdiction (either general or specific) exists pursuant to Rule 4(b)(1) (*Tackett v. Duncan*, 2014 MT 253, ¶ 22, 376 Mont. 348, 354, 334 P.3d 920, 926 (citation omitted)); then, if personal jurisdiction exists, the court applies constitutional due process principles (*id.*), which would require nonresident WPATH to have "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* ¶ 17 (quoting *Walden v. Fiore*, 571 U.S. 277, 282 (2014)). There is no personal jurisdiction in Montana over WPATH, either general or specific, and WPATH has no minimum contacts.

1. No General Personal Jurisdiction Exists Over WPATH.

To be subjected to general personal jurisdiction in Montana courts, a person must be "found" within the state of Montana. *Milky Whey, Inc. v. Dairy Partners, LLC*, 2015 MT 18, ¶ 18, 378 Mont. 75, 80, 342 P.3d 13, 17. "To be 'found' within Montana for general jurisdiction purposes, 'it is necessary that the defendants' activities are 'substantial' or 'systematic and continuous.'" *Id*. at 81 (quoting *Edsall Constr. Co. v. Robinson,* 246 Mont. 378, 382, 804 P.2d 1039, 1042 (Mont. 1991)); *see also Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) ("With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] . . . bases for general jurisdiction.'" (citation omitted)).

The general personal jurisdiction inquiry is simple: WPATH is incorporated in Texas and headquartered in Illinois, not Montana.[1] Moreover, as detailed below, WPATH is not physically present in Montana, nor does the TPC allege it has ever been. Aside from thirteen Montanans being some of WPATH's thousands of nationwide members, WPATH has no connection *at all* to Montana. There is no general personal jurisdiction over WPATH.

2. No Specific Personal Jurisdiction Exists Over WPATH.

There is also no specific jurisdiction over WPATH. A Montana court will not exercise specific personal jurisdiction over an out-of-state defendant unless: (1) "the nonresident defendant purposefully availed itself of the privilege of conducting activities in Montana, thereby invoking Montana's laws"; **and** (2) "the plaintiff's claim arises out of or relates to the defendant's forum-related activities"; **and** (3) "the exercise of personal jurisdiction is reasonable." *Groo v. Montana Eleventh Jud. Dist. Ct.*, 2023 MT 193, ¶ 42, 413 Mont. 415, 428, 537 P.3d 111, 121, *cert. denied sub nom. Groo v. Eddy*, 144 S. Ct. 1062 (2024) (quotation

[1] WPATH is incorporated in Texas and headquartered in Illinois. Texas is not Montana, no general jurisdiction exists.

omitted). This analysis focuses on the "'relationship among the [third-party] defendant, the forum, and the litigation.'" *Tackett*, ¶ 19 (quoting *Daimler*, 571 U.S. at 133).

The Complaint makes no allegations sufficient to establish any, much less all three personal jurisdictional requirements. The State's scant jurisdictional allegations are that WPATH allows Montanans (like citizens of every other state) to become WPATH members or obtain a WPATH certification, that WPATH "contracts with" Montanans to provide gender-affirming services and materials to Montana residents, and that WPATH has "made misrepresentations" (at undisclosed times, in undisclosed places, and via undisclosed means) to Montanan medical providers, patients, and parents. *See* TPC ¶¶ 4–6; 15. Putting the falseness of these allegations aside for now given the procedural posture, none of them can warrant the exercise of jurisdiction.

i. WPATH is Not Subject to Personal Jurisdiction Merely Because Some of Its Members Live in Montana.

WPATH is a global 501(c)(3) non-profit professional and educational organization that promotes evidence-based care, education, research, public policy and respect in transgender health. Under well-settled law, the State's claim that WPATH "transacts business in Montana" because there are "thirteen members of WPATH who are medical providers within Montana" (TPC ¶ 4) simply does not justify the exercise of jurisdiction.

Courts consistently hold that national organizations are not subject to personal jurisdiction simply because a few of their members reside in a specific state. *See O'Handley v. Padilla*, 579 F. Supp. 3d 1163, 1200 (N.D. Cal. 2022) ("National organizations are not subject to jurisdiction in every state where their members live."); *Farrell v. United States Olympic & Paralympic Comm.*, 567 F. Supp. 3d 378, 385 (N.D.N.Y. 2021) (holding that the district court did not have jurisdiction over national nonprofit organization even though the organization maintained dues-paying members and sponsored events in New York); *Mehr v. Fed'n Internationale de Football Ass'n*, 115 F. Supp. 3d 1035, 1052 (N.D. Cal. 2015) (granting motion to dismiss for lack of personal jurisdiction despite the organization having California members); *see also Friends of Animals, Inc. v. Am. Veterinary Med. Ass'n*, 310 F. Supp. 620, 624 (S.D.N.Y. 1970) ("A professional association does not 'transact business' in a judicial district merely because some of its members reside in the district and receive the association's publications there."). To hold otherwise would subject WPATH, and every other membership organization, to personal jurisdiction in every state in the country. That is not the law.

There are other problems with this part of the State's jurisdictional theory. First, the State's claim that "WPATH transacts business in Montana in that it solicits members in Montana" (TPC ¶ 4) does not support the exercise of personal jurisdiction. But "[i]nterstate communication does not, by itself, constitute the transaction of business in Montana." *See Threlkeld v. Colorado*, 2000 MT 369, ¶ 25, 303 Mont. 432, 439, 16 P.3d 359, 364. Montana courts actually hold *the exact opposite* of the State's argument here. *See Edsall*, 246 Mont. at 382 ("[I]nterstate communication is an almost inevitable accompaniment to doing business in the modern world, and cannot by itself be considered a 'contact' for justifying the exercise of personal jurisdiction.").

Second, the State claims WPATH conducts business in Montana via WPATH's thirteen members in Montana, and that via at least one of those members, that WPATH has provided services to Montanans. TPC ¶ 6. However, the State offers no plausible allegation to show that WPATH (a professional organization that publishes standards of care, akin to the American Medical Association) has any control over what types of services any provider has ever provided to any Montanan. Such allegations are required for this type of showing. *See Rhodes v. Tallarico*, 751 F. Supp. 277, 279 (D. Mass. 1990) (finding no personal jurisdiction over an Ohio organization without allegations that it exercised any influence over any member's decision to perform services). Moreover, in a specific jurisdictional analysis, it is the *defendant's* contacts that matter – not the contacts of any other person or entity – so the conduct of non-party medical providers has nothing to do with this case. *See Walden*, 571 U.S. at 291 ("[I]t is *the defendant*, not the plaintiff or third parties, who must create contacts with the forum State.") (emphasis added).

ii. WPATH Does Not Contract with Montanans to Provide Services.

The State claims that through its members (who happen to reside in Montana) and the Montana providers listed on its website, WPATH "contracts with Montanans to provide services and materials to Montana residents." TPC ¶ 6. Not only is the State's claim totally unsupported by allegations of fact in the Complaint, it is also entirely untrue. Naturally, despite its claim of widespread "contracting" practices, the State does not attach, cite, or even reference *any* contract or *any* contract provision. That is because none exist. The State's claim that WPATH – as opposed to a provider who receives educational or training materials from WPATH – "contracts" with Montanans to do anything must be rejected. *See, e.g.*, *Commonwealth Edison Co. v. State*, 189 Mont. 191, 215, 615 P.2d 847, 860 (1980), *aff'd,* 453 U.S. 609 (1981) ("[a] District Court is not required to accept plaintiffs allegations of law and legal conclusions as true."); *see also Grigg v. Coil*, 2022 MT 151, ¶ 11, 513 P.3d 523 (courts are "not required to take as true any allegations in the complaint that are legal conclusions."). But even if the Court determines it must assume that WPATH did "contract" with Montanans, that fact alone, as a matter of law, could not subject WPATH to personal jurisdiction. It is black-letter law in Montana that "a non-resident does not subject himself to the jurisdiction of Montana by merely entering into a contract with a resident of Montana." *Cimmaron Corp. v. Smith*, 2003 MT 73, ¶ 14, 315 Mont. 1, 4, 67 P.3d 258, 261 (quoting *Edsall*, 246 Mont. at 382).

iii. The State Fails to Plausibly Plead that WPATH Made Any Misrepresentation, Much Less Any Misrepresentation in Montana.

The State's claims must also be dismissed because it does not adequately allege that

WPATH acted tortuously in Montana (or, for that matter, outside of Montana). Even read in the light most favorable to the State, the TPC's claim that WPATH has "conspir[ed] to commit misrepresentation and/or negligent misrepresentation with its Montana members and certified providers" is vague and conclusory. TPC ¶ 7. With a complaint that is otherwise devoid of factual allegations, that alone merits dismissal. *Threlkeld*, ¶ 33 ("a court need only take well-pled allegations of fact as true in considering a Rule 12(b) motion to dismiss."); *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (courts "are not bound to accept as true a legal conclusion couched as a factual allegation").

But read more realistically, the State's "misrepresentation" allegations – *i.e.*, that by publishing its Standards of Care for gender dysphoria, WPATH has "made misrepresentations" of some kind (TPC ¶ 15) – is not just patently and obviously false; it is one of the most offensive comments that could be leveled against trans people. The simple fact is the State's complaint does not identify any misrepresentations, because every statement it alleges is a "misrepresentation" ***has already been adjudicated to be true***. For example:

- The State claims WPATH "misrepresented" that minors "can provide informed consent to gender dysphoria treatment" (TPC ¶ 15(a)). But a federal court has already found that WPATH's recommended "informed consent process is adequate to enable minor patients and their parents to make decisions about gender-affirming medical care for adolescents." *Brandt*, 677 F. Supp. 3d at 891.
- The State also claims WPATH "misrepresented" that "gender dysphoria treatment is life-saving treatment for minor/children patients" (TPC ¶ 15(a)). But that same federal court found that "[g]ender dysphoria is a serious condition that, if left untreated, can result in other psychological conditions including depression, anxiety, self-harm, suicidality, and impairment in functioning." *Brandt*, 677 F. Supp. 3d at 888; *see also Doe*, 2024 WL

2947123, at *28 ("[G]ender-affirming care for minors … produces great benefit and avoids unnecessary suffering. Denying this care will cause needless suffering for a substantial number of patients and will increase anxiety, depression, and the risk of suicide.").

It is black-letter law that "for a representation to be actionable[] it must … have been ***untrue*** when made." *See WLW Realty Partners, LLC v. Cont'l Partners VIII, LLC*, 2015 MT 312, ¶ 15, 381 Mont. 333, 338, 360 P.3d 1112, 1115 (emphasis added). Nothing in WPATH's Standards of Care is untrue. On the contrary, they are "widely-accepted clinical practice guidelines for the treatment of gender dysphoria" that "were developed by experts in the field, including clinicians and researchers, who used systematic processes for collecting and reviewing scientific evidence." *Brandt*, 677 F. Supp. at 888–90; *see also Doe*, 2024 WL 2947123, at *28 (describing them as "well-established professional standards of care embraced by all reputable medical associations with relevant expertise.").

The State does not meet its burden to establish personal jurisdiction, either general or specific. Nor can the State, because there is no colorable argument with any actual facts that would show that WPATH has any jurisdictional contacts with Montana. The State's third-party complaint against WPATH should therefore be dismissed for lack of personal jurisdiction.

B. The State of Montana's Third-Party Complaint Fails to State a Claim for Indemnification.

The State fails to plead a common-law indemnification claim under Montana law. Instead, it merely sets forth conclusory statements untethered to facts or law. To plead a Montana common-law indemnification claim, a plaintiff must "prove that the defendant [was] negligent and that their negligence was a proximate cause of plaintiff's injury." *Rogers v. W. Airline*, 184 Mont. 170, 176, 602 P.2d 171, 174 (Mont. 1979) (quoting *Panasuk v. Seaton*, 277 F. Supp. 979, 985 (D. Mont. 1968)). And if the indemnification plaintiff contributed in any way to the alleged injury (say, by enacting a law that is the subject of litigation for which that plaintiff then seeks attorney fees), that action by the plaintiff will completely bar recovery. *See Metro Aviation, Inc. v. U.S.*, 2013 MT 193, ¶ 25, 371 Mont. 64, 72, 305 P.3d 832, 837 (Montana courts have "prohibited claims for indemnity between or among joint tortfeasors"). For the reasons set forth below, WPATH respectfully moves to dismiss the Complaint for failure to state a claim upon which relief can be granted.

1. The State Lacks Standing to Bring a Claim of Indemnification (or Any Claim) because It Does Not Plead It Has Suffered an Injury in Fact.

Both the U.S. and Montana Constitution impose a threshold justiciability requirement similar to that of federal Article III standing, which requires, at minimum, that there be a true case or controversy at issue between the plaintiff and defendant. *See J.C. v. Eleventh Jud. Dist. Ct.*, 2008 MT 358, ¶ 15, 346 Mont. 357, 361, 197 P.3d 907, 910, *as amended on reh'g* (Dec. 2, 2008); *Schoof v. Nesbit*, 2014 MT 6, ¶ 15, 373 Mont. 226, 230, 316 P.3d 831, 835. The U.S. Supreme Court has observed that:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L.Ed.2d 450 (1976).

Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982). Courts in this state have held that it is "not enough" to "allege an injury which others may have suffered." *Helena Parents Comm'n v. Lewis and Clark Cnty. Comm'rs.*, 277 Mont. 367, 371, 922 P.2d 1140, 1143 (1996). Ultimately, the plaintiff "must allege some past, present or threatened injury which would be alleviated by successfully maintaining the action." *Matter of Paternity of Vainio*, 284 Mont. 229, 235, 943 P.2d 1282, 1286 (1997). The State's TPC does not do so; it fails to plead how or when it has been injured by WPATH's research or evidence-backed publications, or what that injury actually is. The State's only allegation is that may incur liability to the First-Party Plaintiffs as its only individual injury (TPC ¶¶ 19–20), which is not a cognizable injury-in-fact under the governing legal standards. *See Helena Parents*, 277 Mont. at 372–73. The State's allegations that "medical providers and their patients and/or parents have suffered injuries" due to alleged "misrepresentations" (TPC ¶ 15(a, f)) do not and cannot establish a case or controversy or an injury-in-fact suffered by the State that are resolvable through this litigation. The State's lack of standing is grounds enough for dismissal.

2. The State's Indemnification Claim Fails Because WPATH Is Unrelated to the Issues in the Underlying Litigation and Was Not the Proximate Cause of Any Alleged Injury.

Under Montana law, "[c]ommon law indemnity arises from the equitable principle that one compelled to pay for damages *caused by another* should be able to seek recovery from the responsible party." *State v. Butte-Silver Bow Cnty.*, 2009 MT 414, ¶ 32, 353 Mont. 497, 504, 220 P.3d 1115, 1120 (citing *Poulsen v. Treasure State Indus., Inc.*, 192 Mont. 69, 81, 626 P.2d 822, 829 (1981)) (emphasis added). The State fails entirely to allege any facts indicating that WPATH caused the State harm, let alone that WPATH *caused* the Underlying Litigation in any way.

The claims against the State in the Underlying Litigation arise from the State's own legislative action prohibiting any alteration to sexual designation on government-issued documents. Through SB 458, the State narrowly defined male, female, and sex, and prohibited updating gender markers on government documents. In the TPC, the State entirely fails to establish how the State's own actions—which form the basis of the Underlying Litigation—are in any way related to WPATH, let alone *caused by* WPATH. The TPC fails to even tangentially connect WPATH to the State's challenged policies reflected in SB 458, the 2022 Rule, and the MVD Policy. Although the State argues that WPATH created the "factual basis" for the claims against it in the Underlying Litigation, it makes no allegations of fact to support this theory of liability. Such an allegation cannot support a common law indemnity claim. *See Cape v.*

Crossroads Corr. Ctr., 2004 MT 265, ¶ 30, 323 Mont. 140, 147, 99 P.3d 171, 177 ("unsupported, conclusory allegations are insufficient").

To establish causation, a party must show that the "conduct at issue was the cause-in-fact of that injury and/or harm." *Breuer v. State*, 2023 MT 242, ¶ 20, 414 Mont. 256, 274, 539 P.3d 1147, 1160 (citing *Kipfinger v. Great Falls Obstetrical & Gynecological Assocs.*, 2023 MT 44, ¶¶ 16, 20, 411 Mont. 269, 286, 290, 525 P.3d 1183, 1194, 1196). To show that a party's conduct is a cause-in-fact of an event, the State must plead facts supporting allegations that the "injury/harm/damages 'would not have occurred without it.'" *Id.* ¶ 20. Given the lack of any tenable connection between any WPATH conduct and the State laws challenged in the Underlying Litigation, the State fails to establish that WPATH's conduct has any causal link – much less in the *cause-in-fact* – of the Underlying Litigation. Thus, the State is unable to plead facts demonstrating proximate cause and cannot prove its indemnification claim. The failure to plead causation, standing alone, warrants dismissal of the State's third-party complaint.

3. The State's Indemnification Claim Fails Because WPATH Did Not Act Negligently.

To prove a claim for indemnification under Montana law, the Attorney General must establish "that the defendant [was] negligent." *Rogers*, 180 Mont. at 176 (citation omitted). The State's TPC fails to allege that WPATH acted negligently, so for this additional reason, the State's indemnification claim should be dismissed.

To plead negligence under Montana law, "the plaintiff must prove four essential elements: (1) the defendant owed the plaintiff a legal duty, (2) the defendant breached that duty, (3) the breach was the actual and proximate cause of an injury to the plaintiff, and (4) damages resulted." *Florea v. Werner Enters., Inc.*, 681 F. Supp. 2d 1241, 1247 (D. Mont. 2010) (quoting *Peterson v. Eichorn*, 2008 MT 250, ¶ 23, 344 Mont. 540, 546, 189 P.3d 615, 621). The State does not attempt to plead, even in a conclusory fashion, that WPATH owed the State of Montana a legal duty, nor that WPATH breached that duty, nor that such a breach injured the State or resulted in damages.

All the State alleges is that WPATH "made misrepresentations to Montana medical providers, Montana patients, and parents of Montana patients through the medical providers" about gender-affirming care. TPC ¶ 15. To establish negligent misrepresentation under Montana law, a plaintiff must establish that "(1) the defendant made a representation as to a past or existing material fact; (2) the representation must have been untrue; (3) regardless of its actual belief, the defendant must have made the[] representation without any reasonable ground for believing it to be true; (4) the representation must have been made with the intent to induce the plaintiff to rely on it; (5) the plaintiff must have been unaware of the falsity of the representation; it must have acted in reliance upon the truth of the representation and it must have been justified in relying on the representation; [***and***] (6) the plaintiff, as a result [o]f his or her reliance, sustained damage." *Am. Trucking & Transp. Ins. Co. v. Nelson*, No. CV 16-160-M-DLC, 2017 WL 3218097, at *7 (D. Mont. July 28, 2017) (citing *Deichl v. Savage*, 2009 MT 293, ¶ 19, 352 Mont. 282, 289, 216 P.3d 749, 753). The State altogether fails to adequately plead elements two, three, four, five, and six of that long-established legal standard.

As outlined above, WPATH's Standards of Care are not misrepresentations. But even accepting *arguendo* that the State's provably false allegation that WPATH's Standards of Care were somehow true, WPATH had more-than-reasonable grounds for believing in the validity of its research and findings. *See, e.g.*, *Brandt*, 677 F. Supp. 3d at 888 (these Standards "were developed by experts in the field, including clinicians and researchers, who used systematic processes for collecting and reviewing scientific evidence."); *Doe*, 2024 WL 2947123, at *5 (these Standards "are widely followed by well-trained clinicians," "are used by insurers," and "have been endorsed by the United States Department of Health and Human Services.").

Furthermore, the State does not plead – because it cannot – that WPATH established its Standards of Care with the intent that the State would rely upon them in any way. Nor can the State plausibly plead that it relied upon WPATH's Standards of Care in enacting the challenged laws, as those laws *directly contradict* WPATH's recommendations. Finally, the TPC makes no effort to allege how the State, its medical providers, or its patients were injured by WPATH; such an effort would be futile since WPATH did not cause any injury. Failing to meet the foregoing elements, the State's misrepresentation claim fails as the basis for a claim of indemnification. Accordingly, the TPC should be dismissed for failure to state an indemnification claim.

C. The State's Indemnification Claim Infringes WPATH's First Amendment Speech and Association Rights and Sets a Dangerous and Unconstitutional Precedent.

This Court should also dismiss the State's third-party complaint because its request for indemnification infringes WPATH's First Amendment speech and association rights. Allowing the State's request for indemnification to proceed would set a dangerous precedent.

All of WPATH's activities are constitutionally-protected. It is a bedrock constitutional principle that individuals are free to "engage in association for the advancement of beliefs and ideas." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). The First Amendment "necessarily protects the right of those who join together to advance shared beliefs, goals, and ideas, which, if pursued individually, would be protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 22 (1976). Such shared beliefs, goals, and ideas, are often advanced by non-profit organizations,[2] and need not be political in nature to be constitutionally-protected. *See Boy*

[2] *See e.g., Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595 (2021); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Robert v. U.S. Jaycees*, 468 U.S. 609 (1984); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987); *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1 (1988).

Scouts of Am., 530 U.S. at 648. The right of expressive association extends to groups, like WPATH, that take an "official stance on a subject." *See Sullivan v. Univ. of Washington*, 60 F.4th 574, 580 (9th Cir. 2023) (citing *In Grand Jury Subpoena, No. 16-03-217*, 875 F.3d 1179, 1184 n.3 (9th Cir. 2017)). "In sum, the 'Supreme Court's expressive-association jurisprudence' applies when individuals 'have associated to advance shared views,' or engaged in 'collective effort on behalf of shared goals.'" *Id*. (citing 875 F.3d at 1184).

WPATH is a 501(c)(3) non-profit professional and educational organization that promotes evidence-based care, education, research, public policy, and respect in transgender health. WPATH maintains a peer-reviewed medical journal and publishes the Standards of Care and Ethical Guidelines that "articulate a professional consensus about psychiatric, psychological, medical, and surgical management of gender dysphoria to help professionals understand the parameters within which they may offer assistance to those with these conditions."[3] WPATH's mission and activities are squarely protected by the First Amendment's rights of free speech and free expression. *See, e.g*., *Miller v. California*, 413 U.S. 15, 34 (1973) ("The First Amendment protects works which, taken as a whole, have serious literary, artistic, political, *or scientific* value.") (emphasis added); *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 446–47 (2d Cir. 2001) ("It is settled that the First Amendment protects scientific expression and debate just as it protects political and artistic expression.") (cleaned up) (quoting *Bd. of Trs. of Leland Stanford Junior Univ. v. Sullivan*, 773 F.Supp. 472, 474 (D.D.C. 1991)). The law clearly prevents the state from imposing tort liability for statements or other conduct that is constitutionally-protected. *See, e.g.*, *New York Times v. Sullivan*, 376 U.S. 254, 283 (1964).

The State's request sets a very dangerous precedent. Even though WPATH is not connected

[3] *See* "WPATH Mission and Vision," *available at* https://www.wpath.org/about/mission-and-vision (last visited August 9, 2024).

to the Underlying Litigation in any way, the State attempts to make WPATH pay for the defense of its laws simply because WPATH compiles scientific research and sets professional standards for the treatment and care of gender dysphoria, a mission the Attorney General does not support. This is exactly the kind of expression the First Amendment exists to protect. *See Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); *see also Texas v. Johnson*, 491 U.S. 397, 414 (1989). The Court should not allow the State's indemnification claim to proceed because doing so would open the floodgates to other politically-motivated retributive actions to chill disfavored non-profit organizations' constitutionally-protected speech and activities. In light of the significant First Amendment interests at stake, the State's third-party complaint should be dismissed.

D. The State's Allegations on the Montana Consumer Protection Act Also Fail.

The State's bizarre tag-along allegations about the Montana Consumer Protection Act ("MCPA") – that WPATH violated the MCPA by "deceptively providing services to consumers of Montana" (TPC ¶ 16) – fail to adequately plead the elements of an MCPA claim. Specifically, the State fails to plead that WPATH made deceptive statements to consumers in connection with trade or commerce, or that Montana consumers have suffered an ascertainable loss of money or property in relation to WPATH's activities – both of which are required to state an MCPA claim. *Fink v. Meadow Lake Ests. Homeowners' Ass'n*, 2016 MT 108N, ¶ 14, 384 Mont. 552; Section 30-14-102(1), 30-14-103, MCA; *Young v. Era Advantage Realty*, 2022 MT 138, ¶ 26, 409 Mont. 234, 246, 513 P.3d 505, 513 (citing *Anderson v. ReconTrust Co., N.A.*, 2017 MT 313, ¶ 22, 390 Mont. 12, 23, 407 P.3d 692, 700).

For other reasons, the State's MCPA "claim" fails. First, the MCPA requires a transaction with a "consumer" (*see* Section 30-14-102(1), MCA), but WPATH is a non-profit, interdisciplinary professional and educational organization that does not engage in consumer transactions. Second, WPATH's statements related to the treatment of gender dysphoria concern the practice of medicine, rather than commercial transactions, and therefore cannot give rise to an action under the MCPA. *See Brookins v. Mote*, 2012 MT 283, ¶ 54, 367 Mont. 193, 210, 292 P.3d 347, 359 ("We also agree with the near unanimous line of authority that has exempted from the CPA conduct by health-care providers in the 'actual practice' of the profession."). The State has failed to plead a cognizable claim under the MCPA and thus the claim should be dismissed.

IV. CONCLUSION

For the reasons set forth above, WPATH repsectfully request that the Court dismiss the State's frivolous and bad-faith third-party complaint in its entirety.[4]

DATED this 9th day of August, 2024.

[4] In the event the Court grants WPATH's motion, WPATH intends to file a motion to recover the reasonable expenses incurred in preparing the instant motion pursuant to Sections 25-10-102, 25-10-201, 25-10-711, and/or any other appropriate provisions of the Montana Code.

Respectfully submitted,

By: __/s/Robert Farris-Olsen______________________

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* *Pro Hac Vice* Application Forthcoming

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I hereby certified that on the 9th day of August, 2024, a true copy of the foregoing document was served via U.S. Mail, postage prepaid, and email upon the following:

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Dated: 08-09-2024

Appendix

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Opinions

Case Filings

2003 WL 21003711
United States District Court,
N.D. Illinois, Eastern Division.

FEDERAL TRADE COMMISSION, Plaintiff,
v.
BAY AREA BUSINESS COUNCIL, INC., a Florida corporation; Bay Area Business Council Customer Service Corp., a Florida corporation; American Leisure Card Corp., a Florida corporation; Peter J. Porcelli, II, individually and as an officer or director of the corporate defendants; Christopher Tomasulo, individually and as an officer or director of the corporate defendants; Bonnie Harris, individually and as an officer or director of the corporate defendants; Bay Memberships, Inc., a Florida corporation; Bay Vacations, Inc., a Florida corporation; Sr. Marketing Consultants, Inc., a Florida corporation; Special Technologies, Inc., a Florida corporation, Defendants.
BAY AREA BUSINESS COUNCIL, INC., a Florida corporation; Bay Area Business Council Customer Service Corp., a Florida corporation; American Leisure Card Corp., a Florida corporation; Peter J. Porcelli, II, individually and as an officer or director of the corporate defendants; Bonnie Harris, individually and as an officer or director of the corporate defendants, Counter–Plaintiffs,
v.
FEDERAL TRADE COMMISSION, Counter–Defendant.

No. 02 C 5762.
|
May 1, 2003.

MEMORANDUM OPINION AND ORDER

DARRAH, J.

***1** The Federal Trade Commission ("FTC") filed a three-count complaint for injunctive and equitable relief against Defendants, Bay Area Business Council, Inc.; Bay Area Business Council Customer Service Corp.; American Leisure Card Corp.; Peter Porcelli, II; Christopher Tomasulo; and Bonnie Harris (collectively "the Initial Defendants"), alleging violations of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45(a), and the FTC's Trade Regulation Rule entitled, "The Telemarketing Sales Rule," 16 C.F.R. Pt. 310. Subsequently, the FTC filed an amended complaint for injunctive and equitable relief, adding the following Defendants, Bay Memberships, Inc.; Bay Vacations, Inc.; Sr. Marketing Consultants, Inc.; and Special Technologies, Inc. (collectively "the Added Defendants").

The Initial and Added Defendants filed answers, pleading several affirmative defenses. The Initial Defendants also pled a counterclaim against the FTC, seeking a declaratory judgment. The FTC moves to strike the Initial Defendants' and Added Defendants' affirmative defenses and to dismiss the Initial Defendants' counterclaim. For the reasons that follow, the FTC's Motion to Dismiss Counterclaim and to Strike Affirmative Defenses is granted.

A party must set forth affirmative defenses in a responsive pleading. Fed.R.Civ.P. 8(c). "[T]he court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed.R.Civ.P. 12(f). Motions to strike affirmative defenses are generally disfavored because they potentially serve only to cause delay. *Heller Fin., Inc. v. Midwhey Powder Co.,* 883 F.2d 1286, 1294 (7th Cir.1989). However, an affirmative defense should be stricken when it is clearly mistitled or redundant. *Renalds v. S.R.G. Rest. Group,* 119 F.Supp.2d 800, 802 (N.D.Ill.2000).

Affirmative defenses must comply with the pleading requirements of Rule 8. *Heller Fin., Inc.,* 883 F.2d at 1294. Thus, affirmative defenses must set forth "a short plain statement". Fed .R.Civ.P. 8(a). "[A]n allegation must include either direct or inferential allegations respecting all material elements of the claim asserted.... Bare legal conclusions attached to narrated facts will not suffice." *Renalds,* 119 F.Supp.2d at 802 (internal citations omitted).

Affirmative defenses must also comply with the requirements of Rule 12(b)(6). *See Renalds,* 119 F.Supp.2d at 802. The court will accept all factual allegations as true and draw all reasonable inferences in favor of the pleader. *Renalds,* 119 F.Supp.2d at 802. However, an affirmative defense must be dismissed if it appears beyond a doubt that the pleader can prove no set of facts in support of its claim that would entitle it to relief. *See Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984).

The FTC moves to strike the Initial Defendants' and Added Defendants' first affirmative defenses, which state that "Plaintiff fails to state a claim upon which relief can be granted." This defense merely recites that standard for dismissal under Rule 12(b)(6) and fails to indicate how that standard is connected to the present case. Such bare conclusory allegations are insufficient to establish that the Initial and Added Defendants are entitled to relief. *Murphy v. White Hen Pantry Co.,* 691 F.2d 350, 353 (7th Cir.1982). Therefore, the Initial Defendants' and Added Defendants first affirmative defenses are stricken.

***2** The FTC moves to strike the Initial Defendants' second affirmative defense of improper venue and their third affirmative defense of lack of personal jurisdiction. On October 2, 2002, the Initial Defendants stipulated that this Court had jurisdiction over the parties and that venue was proper in the Northern District of Illinois. (*See* Stipulated Order for Prelim. Inj. Asset Freeze & Other Relief as to Defs. Bay Area Bus. Council, Inc.; Bay Area Bus. Council Customer Serv. Corp.; Am. Leisure Card Corp.; Peter J. Porcelli, II; and Bonnie Harris, Findings 1, 2.) Therefore, the Initial Defendants' second and third affirmative defenses are stricken.

The FTC also moves to strike the Added Defendants' second affirmative defense of improper venue and their third affirmative defense of lack of personal jurisdiction. The Added Defendants can prove no set of facts that would entitle them to relief on these grounds. The FTC Act provides, in pertinent part, that:

> Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

15 U.S.C. § 53(b). Section 53(b) provides for nationwide service of process, which means that this Court will have personal jurisdiction over the Added Defendants if there is a nexus between them and the United States. *See Fitzsimmons v. Barton,* 589 F.2d 330, 332 (7th Cir.1979). In their Answer, the Added Defendants admit that they are corporations located in Florida. Thus, there is a nexus between the Added Defendants and the United States, and this Court has personal jurisdiction over them. Under § 1391(c), corporate defendants are deemed to reside wherever they are subject to personal jurisdiction. Section 1391(b) provides that venue is proper where any defendant resides if all defendants reside in the same state. Here, since the Added Defendants are subject to personal jurisdiction in the Northern District of Illinois, they are deemed to reside in the Northern District of Illinois; and venue is proper in this district. Therefore, the Added Defendants' second and third affirmative defenses are stricken.

The Initial Defendants' fourth affirmative defense is that the FTC's claim for permanent injunctive relief is barred because Bay Area Business Council is no longer engaged in sales of stored value MasterCards. The Initial Defendants' fifth affirmative defense is that the relief requested by the FTC is overly broad and unauthorized by the FTC Act and the Telemarketing Sales Rule. These defenses contain impermissible conclusory statements. "Moreover, [the Initial Defendants] ha[ve] already put these matters in issue by denying certain allegations in [their] answer, and [they] not only need not but cannot raise these matters again via an affirmative defense." *Renalds,* 119 F.Supp.2d at 804. Therefore, the Initial Defendants' fourth and fifth affirmative defenses are stricken.

***3** Similarly, the Added Defendants' fifth, sixth and seventh affirmative defenses are stricken because they are pled elsewhere in their Answer. Their fifth affirmative defense states that the Court lacks jurisdiction over Bay Memberships because it was not incorporated until July 2002 and, therefore, could not have performed the acts which are alleged to have brought it within the Court's jurisdiction. Their sixth affirmative defense states that the FTC's claim for permanent injunctive relief against Bay Memberships is barred because Bay Memberships was incorporated in July 2002 and, therefore, could not have performed the acts alleged in the amended complaint. Their seventh affirmative defense states that the relief requested by the FTC is overly broad and unauthorized by the FTC Act and the Telemarketing Sales Rule. The Added Defendants have already put these matters in issue by denying certain allegations of the complaint; and, thus, these matters cannot be pled as affirmative defenses. *Renalds,* 119 F.Supp.2d at 804. Therefore, the Added Defendants' fifth, sixth, and seventh affirmative defenses are stricken.

The Added Defendants' fourth affirmative defense states, “This Court lacks jurisdiction over ... Defendants to the extent that the FTC's claims for relief are barred by the automatic stay of the U.S. Bankruptcy Code.” In addition to enumerating possible affirmative defenses, Rule 8(c) also provides that an affirmative defense is “any other matter constituting an avoidance....” If true, the Added Defendants' fourth affirmative defense states “matter constituting an avoidance” of the action and, therefore, would state a proper affirmative defense under Rule 8(c). However, the filing of a bankruptcy petition does not stay “an action or proceeding by a governmental unit ... to enforce such governmental unit's ... police or regulatory power,” 11 U.S.C. § 362(b)(4); and the Added Defendant' fourth affirmative defense is stricken on that basis.

As an unnumbered affirmative defense, the Initial Defendants' and Added Defendants' Answers state, “Defendants reserve the right to add other affirmative defenses as this matter continues.” This is an improper affirmative defense. It is not listed in Rule 8(c) as an affirmative defense; and, pursuant to Rule 15(a), only the Court may grant leave to amend pleadings. Therefore, this affirmative defense is also stricken.

Similarly, the Added Defendants' “preliminary statement” that the FTC's action is barred by the automatic stay provisions of the Bankruptcy Code is stricken as an incorrect statement of the law. *Renalds,* 119 F.Supp.2d at 806. As was noted above, filing a bankruptcy petition does not stay actions or proceedings by governmental units to enforce their police or regulatory power. § 362(b)(4). The Added Defendants assert in their response that, while the Bankruptcy Code may not stay the FTC's action, the Bankruptcy Code does limit the type of relief that may be sought. However, that is not what is pled in the “preliminary statement”. Therefore, the “preliminary statement” is stricken.

***4** The FTC also moves to dismiss the Initial Defendants' Counterclaim (“the Counterclaim”) because it merely restates issues already before the Court. The Counterclaim seeks a declaration that (1) Bay Area Business Council and Bay Area Business Council Customer Service did not engage in deceptive acts or practices in violation of the FTC Act or the Telemarketing Sales Rule and that injunctive relief is inappropriate because Bay Area Business Council is no longer engaging in the marketing of stored value MasterCards (Count I); (2) American Leisure Card did not engage in deceptive acts or practices in violation of the FTC Act or the Telemarketing Sales Rule (Count II); and (3) Porcelli and Harris cannot be found individually liable for violating the FTC Act or the Telemarketing Sales Rule because Bay Area Business Council, Bay Area Business Council Customer Service, and American Leisure Card cannot be found liable for violating the FTC Act or the Telemarketing Sales Rule (Count III).

The Declaratory Judgment Act provides that “[i]n a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201 (2001). A declaratory judgment is appropriate when it “will clarify and settle the disputed legal relationships and afford relief from the uncertainty and controversy that created the issues”. *Nucor Corp. v. Aceros y Maquilas de Occidente, S.A. de C.V.,* 28 F.3d 572, 578 (7th Cir.1994) (citing *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.,* 819 F.2d 746, 749 (7th Cir1987)). A court should address the following five considerations:

(1) whether the judgment would settle the controversy;

(2) whether the declaratory judgment action would serve a useful purpose in clarifying the legal relations at issue;

(3) whether the declaratory remedy is being used merely for the purpose of “procedural fencing” or “to provide an arena for a race for *res judicata”;*

(4) whether the use of a declaratory judgment action would increase friction between our federal and state courts and improperly encroach on state jurisdiction; and

(5) whether there is an alternative remedy that is better or more effective.

Nucor Corp., 28 F.3d at 579 (citing *Nationwide Mut. Fire Ins. Co. v. Willenbrink,* 924 F.2d 104, 105 (6th Cir.1991) (citations omitted)). However, “federal courts have discretion to decline to hear a declaratory judgment action, even though it is within their jurisdiction." *Tempco Elec. Heater Corp.,* 819 F.2d at 747.

> "The purposes of declaratory judgments are to 'clarify[ ] and settl[e] the legal relations at issue' and to 'terminate and afford relief from uncertainty, insecurity, and controversy giving rise to the proceeding." ' ... Where the substantive suit would resolve the issues raised by the declaratory judgment action, the declaratory judgment action "serve[s] no useful purpose" because the controversy has "ripened" and the uncertainty and anticipation of litigation are alleviated.

***5** *Amari v. Radio Spirits, Inc.,* 219 F.Supp.2d 942, 944 (N.D.Ill.2002) (quoting *Tempco Elec. Heater Corp.,* 819 F.2d at 749).

Here, the substantive suit would resolve the issues raised by the Initial Defendants' Counterclaim. Whether Bay Area Business Council, Bay Area Business Council Customer Service, or American Leisure Card engaged in deceptive acts or practices which violated the FTC Act or the Telemarketing Sales Rule will be resolved in the litigation of the FTC's complaint. Whether injunctive relief is appropriate will be resolved in the substantive litigation. Finally, whether Porcelli and Harris are individually liable will also be resolved in the substantive litigation. The controversy has "ripened", and there is no uncertainty. Furthermore, the substantive litigation clarifies and settles the legal relations among the parties. Thus, the declaratory judgment action serves no useful purpose. *Amari,* 219 F.Supp.2d at 944. The Initial Defendants will not be inconvenienced by the dismissal of their Counterclaim because they will be defending, rather than prosecuting, the claims. Therefore, the Counterclaim is dismissed.

CONCLUSION

For the reasons stated above, the FTC's Motion to Dismiss Counterclaim and to Strike Affirmative Defenses is granted.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2003 WL 21003711, 2003-1 Trade Cases P 74,020

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2016 WL 5391391
United States District Court, N.D. Illinois, Eastern Division.

FEDERAL TRADE COMMISSION, and Office of the Attorney General, State of Florida, Department of Legal Affairs, Plaintiffs,
v.
BIG DOG SOLUTIONS LLC, also d/b/a Help Desk National and Help Desk Global, a Florida limited liability company, et al., Defendants.

Case No. 16-cv-6607
|
Signed 09/27/2016

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MEMORANDUM OPINION AND ORDER

John Robert Blakey, United States District Judge

***1** Defendants Big Dog Solutions LLC, Inbound Call Specialists LLC, PC Help Desk US LLC, Christopher Costanza and Suzanne Harris (collectively, the "Florida Defendants") have moved to transfer this case to the United States District Court for the Southern District of Florida. [55] at 1-5. Defendants BlackOptek CE Inc., 9138242 Canada Corporation, Digital Growth Properties, LLC, Muzzafar Abbas, Gary Olberman, Donald Dolphin and Justin Powers (collectively, the "Agreed Defendants") have moved to join the Florida Defendants' motion to transfer. [58] at 1. The Federal Trade Commission ("FTC") and the Office of the Attorney General, State of Florida ("Florida Attorney General") (collectively, "Plaintiffs") oppose the Florida Defendants' motion to transfer [66], but Receiver Jeffrey Schneider does not. [65] at 1. As explained below, the Florida Defendants' motion to transfer is denied, and the Agreed Defendants' motion to join is denied as moot.

I. Background

Plaintiffs allege that Defendants, doing business as Help Desk National, misled customers throughout the United States into paying hundreds of dollars for worthless computer "repairs" and software. [17] at 1-5. Plaintiffs claim that this scheme precipitated violations of the Federal Trade Commission Act, 15 U.S.C. § 45(a) ("FTC Act"), the Telemarking Sales Rule, 16 C.F.R. § 310.3(a)(4) ("TSR"), and the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204 ("FDUTPA"). *Id.* at 15-20.

The Florida Defendants are individual defendants from Florida and corporate entities in Florida they either owned or operated. *Id.* at 1-15. The call center used during Defendants' scheme is also located in Florida. *Id.* The Agreed Defendants are individual defendants from Iowa, Toronto, and Montreal, along with the businesses they owned or operated in Iowa, Montreal, and Nevada. *Id.*

The FTC investigated this case out of its office in this district and it has secured the cooperation of numerous witnesses to appear before this Court. [66] at 3. Plaintiffs have also adduced evidence suggesting that over 1,000 customers in this district were harmed by Defendants' scheme. [27] at 11.

II. Analysis

The Florida Defendants' motion is brought pursuant to 28 U.S.C. § 1404(a), which provides that "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The decision to transfer venue under Section 1404(a) requires a weighing of multiple factors. This weighing "necessarily involves a large degree of subtlety and latitude," and, therefore, is committed to the sound discretion of the Court. *Nagle v. The Hartford Life & Accident Ins. Co.*, No. 15-cv-6072, 2015 WL 9268420, at *2 (N.D. Ill. Dec. 21, 2014) (quoting *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986)). As the moving party, the Florida Defendants bear the burden of demonstrating that the Southern District of Florida is "clearly more convenient." *Id.* (internal citation omitted).

***2** Several factors must be met for an action to be transferred to another venue: (1) venue must be proper in this district; (2) venue and jurisdiction must be proper in the transferee district; (3) the transferee district must be more convenient for both the parties and witnesses; and (4) transfer must serve the interest of justice. *See Delta Air Lines, Inc. v. Perfekt Mktg.,*

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Inc., 861 F. Supp. 2d 919, 920 (N.D. Ill. 2012). The parties concede that the first and second factors are met, so this Court considers only the convenience of the parties and witnesses and the interest of justice.

A. Convenience of the Parties and Witnesses

To evaluate the relative convenience of the venues, this Court must consider four factors: (1) Plaintiffs' choice of forum; (2) the situs of the material events; (3) the relative ease of access to sources of proof; and (4) the convenience of the parties and witnesses. *See Amoco Oil Co. v. Mobil Oil Corp.*, 90 F. Supp. 2d 958, 960 (N.D. Ill. 2000).

1. Plaintiffs' Choice of Forum

Plaintiffs' choice of forum is "entitled to substantial weight" when considering a motion to transfer. *Id.* The Seventh Circuit has repeatedly explained that unless "the balance is strongly in favor the defendant, the plaintiff's choice of forum should rarely be disturbed." *In re Nat'l Presto Indus.*, 347 F.3d 662, 664 (7th Cir. 2003). This principle is particularly forceful where, as here, the Plaintiffs' chosen forum was selected pursuant to a special venue statute which "represents an affirmative congressional policy choice to allow...the widest possible choice of forums in which to sue." *SEC v. Electronics Warehouse, Inc.*, 689 F. Supp. 53, 75 (D. Conn. 1988).

Defendants argue that this factor should not be given much weight, as "most of the improper business activity...allegedly occurred in South Florida." [55] at 6. Defendants' argument is misplaced. The putative scheme at issue was executed all across the United States and parts of Canada. [17] at 1-5. The record also reflects that over 1,000 customers in this district were specifically targeted by Defendants' scheme. [27] at 11.

Given the broad nature of the alleged scheme and the fact that this district was selected pursuant to a special venue statute, the Court finds that Plaintiffs' choice of forum should be afforded its usual "substantial" weight in the Section 1404(a) calculus.

2. Situs of the Material Events

In order to identify the "situs" of material events, this Court must first resolve the parties' dispute regarding which events qualify as "material." Plaintiffs would have us determine that "the situs of material events is wherever consumer injury occurred." [66] at 8 (citing *FTC v. Phoenix Avatar, LLC*, No. 04-cv-2897, 2004 WL 1746698, at *1 (N.D. Ill. July 30, 2004) (transfer motion denied because defendants "transacted business here" by sending emails to consumers in this district)). Defendants conversely suggest that "the situs of material events should be were [sic] the defendant's conduct occurred." [55] at 7 (citing *Rosen v. Spirit Airlines, Inc.*, 152 F. Supp. 3d 1055, 1060 (N.D. Ill. 2015) (finding that the situs of material events was located where the "relevant decisions likely were made by Defendant's employees")).

***3** The Court declines the parties' unnecessary invitation to announce any bright-line rule. The "situs of material events" inquiry is, like all facets of the transfer analysis, fact-intensive and contextual. Depending upon the facts of the particular case, "the situs of material events" can be the place where the Defendants hatched their scheme, the place where Defendants executed their scheme, the place where the injured parties reside, all of the above, or none of the above.

In this case, Defendants' putative scheme was perpetuated by individuals and corporations across the country. *See supra* at 2. These diverse Defendants, in turn, targeted consumers all across the country. *Id.* Given the broad scope of the alleged scheme and the geographic disparity among the coordinating Defendants, the Court finds that this factor weighs in favor of transfer (even though it carries less weight here than it traditionally receives).

3. Access to Sources of Proof

The location of records has no impact on the transfer analysis unless the records are extraordinarily voluminous or otherwise difficult to ship. *Rosen*, 152 F. Supp. 3d at 1060. That is not the case here. Accordingly, the Court finds that this factor is essentially neutral.

4. Convenience of the Parties and Witnesses

The Florida Defendants make multiple broad assertions concerning the putative inconvenience of litigating in this forum, but as explained below, they have failed to support their arguments with the requisite degree of particularity.

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a) The Parties

The Court is persuaded that the convenience of the parties is essentially a neutral factor. Only two of the six individual defendants reside in Florida. The remaining four individual defendants live hundreds of miles away; in fact, these other defendants live closer to this district. And while the Florida Defendants have claimed that they would be inconvenienced by having to litigate in this forum, their arguments on this point largely focus upon the fact that their counsel is located in Florida. Convenience to counsel, however, is not relevant to the balancing test implicated by a motion to transfer.

From Plaintiffs' perspective, the Florida Attorney General would obviously not be inconvenienced by the prospect of litigating in the Southern District of Florida. The FTC, however, has reasonably set forth the heavy financial and logistical burdens transfer would impose upon it, given that its investigation was conducted in this district. *See supra* at 2.

b) The Witnesses

Given the record as whole, the Court is similarly unpersuaded that transfer would serve the convenience of potential witnesses. In lieu of naming their specific prospective witnesses and the subject matter of their testimony, the Florida Defendants initially identified a full roster of their former employees and reminded the Court of its limited subpoena power. [55] at 8-9. This generalized invocation remains insufficient to carry movants' burden at this stage, as "the party seeking transfer bears the burden of specifying the key witnesses to be called and summarizing their expected testimony." *Nat'l Tech., Inc. v. Repcentric Sols.*, No. 13-cv-1819, 2013 WL 3755052, at *7 (N.D. Ill. July 16, 2013).

On reply, the Florida Defendants attempted to rectify their previous failing by identifying twelve potential witnesses located in Florida. [69-1] at 4. Each of these witnesses is a former employee of the Florida Defendants, and they would each apparently be testifying regarding the same general topics: "the overall operation of the call center, training procedures and practices, sales techniques and sales script, customer service procedures, interactions with customers and the validity of the tech support services at issue." *Id.*

***4** Nevertheless, this Court's analysis is not substantially altered by the belated identification of these specific witnesses. As the FTC explained at oral argument, the proposed testimony of these witnesses would be cumulative of both one another and the other evidence in this case. The information reflected in this proposed testimony is also available to the parties via other means, including but not limited to the testimony of the Florida Defendants themselves or potential expert testimony. Finally, these proposed low-level employee witnesses are a far cry from the "key" individuals who are typically the focus of this inquiry.

The FTC, on the other hand, has identified numerous third party witnesses who have already contributed to their investigation and are located in, or willing to come to, this district. [66] at 12-14. Given the foregoing, the Court finds that this factor is essentially neutral.

B. Interest of Justice

In considering the interest of justice, courts analyze such factors as: (1) ensuring the efficient administration of justice; (2) having the trial before a judge who is familiar with the applicable law; and (3) the relative desire of communities to adjudicate matters that affect them directly. *See Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 221 (7th Cir. 1986).

1. Efficient Administration of Justice

Defendants suggest that the efficient administration of justice counsels in favor of transfer, given the discrepancy between the "time-to-trial" statistics available for this district and the Southern District of Florida. [55] at 12. The Court is unpersuaded by this argument. As a preliminary matter, such statistics are inherently imprecise. *See Lang v. NeoGenomics Labs., Inc.*, No. 11-cv-7158, 2012 WL 588963, at *2 (N.D. Ill. Feb. 22, 2012) ("General statistics of this sort are, in this Court's view, relatively meaningless in the section 1404(a) analysis. They consist of averages for cases of all types and tell the reader nothing about cases of the particular type at issue."). More importantly, this Court is happy to set an early and firm trial date for the parties, and to do so well-within any average "time-to-trial" in the Southern District of Florida. *See Rosman Adjustment Corp. v. Bernay*, No. 12-cv-8239, 2013 WL 453197, at *4 (N.D. Ill. Feb. 6, 2013) ("time-to-trial statistics are not a significant factor" because court was "ready and willing to set a trial date" in line with the average of the proposed transfee venue). If anything, the efficient administration of justice counsels against transfer, given this Court's familiarity with the record.

2. Familiarity With Applicable Law

As mentioned previously, Plaintiffs' claims are brought pursuant to the FTC Act, the TSR and the FDUTPA. Federal courts are presumed to be similarly familiar with federal law, and the only state law at issue here specifically notes that courts interpreting it should give "due consideration and great weight...to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a)(1) of the Federal Trade Commission Act." Fla. Stat. § 501.204(2). Accordingly, the Court finds that this factor is neutral.

3. Relation of the Community to the Occurrence

The Court finds that this factor is also neutral. While Florida residents certainly have an interest in the pending litigation, the Defendants ostensibly targeted over 1,000 residents in this district as well. *See supra* at 2.

III. Conclusion

Because transfer would serve neither the convenience of the parties nor the interest of justice, the Court declines to disturb Plaintiffs' choice of forum. The Florida Defendants' motion to transfer [55] is denied, and the Agreed Defendants' motion to join [58] is denied as moot.

Dated: September 27, 2016.

All Citations

Not Reported in Fed. Supp., 2016 WL 5391391, 2016-2 Trade Cases P 79,768

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2006 WL 1735276
United States District Court,
N.D. Illinois,
Eastern Division.

FEDERAL TRADE COMMISSION, Plaintiff,
v.
CLEVERLINK TRADING LIMITED, et al., Defendants,
v.
Oceanic Telecommunications Services,
LLC, and Colin Sholes, Relief Defendants.

No. 05 C 2889.
|
June 19, 2006.

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MEMORANDUM OPINION AND ORDER

VIRGINIA M. KENDALL, District Judge.

***1** The Federal Trade Commission ("FTC") brought an action under Sections 13(b) and 19 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b, and under Section 7(a) of the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM"), 15 U.S.C. § 7706, to obtain injunctive and other equitable relief for Defendants' violations of CAN-SPAM, 15 U.S.C. § 7701, *et seq.,* and the FTC's Adult Labeling Rule, 16 C.F.R. Part 316.4. On June 29, 2005, this Court entered a Stipulated Preliminary Injunction. One provision of the injunction applied to a then third party, Oceanic Telecommunications Services, LLC ("Oceanic"). The provision directed that upon being served with the order, Oceanic "shall hold and retain ... any account or asset of, or held on behalf of, any Defendant, including Cleverlink Trading Limited." The FTC asserts that Oceanic and its primary officer, Colin Sholes, violated this provision, and urges that they be required to show cause why they should not be held in contempt of court. In defense, Oceanic and Colin Sholes argue that (I) they cannot be held in contempt of court because they never violated the provision in question; (ii) this Court lacks jurisdiction over the subject matter in controversy-the funds allegedly held on behalf of Cleverlink; and (iii) they are not subject to personal jurisdiction in the State of Illinois.

This Court has jurisdiction over the persons of Oceanic and Colin Sholes and the subject matter in controversy. Because the nationwide service provision in § 13(b) of the FTC Act creates personal jurisdiction over any person, corporation or partnership, this Court had personal jurisdiction over both Oceanic and Colin Sholes at that time the preliminary injunction was entered. As to the subject matter-the funds in Oceanic's bank account that allegedly were held on Cleverlink's behalf-this Court has jurisdiction to determine the legitimacy of claims to any such asset alleged to be proceeds from a violation of federal law. Finding that jurisdiction exists, the Court reserves its decision on whether Oceanic or Colin Sholes violated the injunction until after further discovery can be completed, including the deposition of Colin Sholes.

Background

The original Defendants in this action sent commercial email messages promoting sexually-oriented internet websites and collected payment for access to the material on these sites. One of the Defendants is Cleverlink Trading Limited ("Cleverlink"). On March 14, 2005, Cleverlink signed a Merchant Payment Processing Services Agreement with Oceanic. (Relief Defendants' Response to FTC's Supplemental Submission Regarding the Court's Jurisdiction Over Oceanic and Sholes, Ex. B.) The terms of the agreement called for Oceanic to provide "online payment processing" and "processing services" to Cleverlink. (*Id.* at 2.)

According to the Declaration of Colin Sholes, Oceanic's primary officer, "Oceanic does not process credit card transactions."[1] (Declaration of Colin Sholes Regarding Jurisdiction Proffer and Evidentiary Submission on Rule to Show Cause Pursuant to 28 U.S.C. § 1746 ("Sholes Decl.")

¶ 37.) Instead, he explains that Oceanic acts only as a sub-account holder in the payment process between customer and merchant. (*Id.* ¶ 5.) As a sub-account holder, Oceanic develops contractual relationships with merchants that want to accept credit card payments from customers. (*Id.* ¶ 8.) Oceanic then serves as an intermediary, a transmittal agent, from the master merchant account holder to the merchant. (*Id.* ¶ 37.)

***2** As described by Colin Sholes, the payment process begins when a customer fills out an order and credit card information on a merchant's website. (*Id.*) That information gets forwarded to a gateway processor, who writes software that collects and processes credit card information. (*Id.*) From there, the information is passed on to a merchant bank, who provides initial approval of the transaction, and credits the merchant account. (*Id.*) A master account holder manages the merchant account where the merchant bank deposits the funds. (*Id.* ¶ 6.) A master account holder may issue sub-accounts from which the funds pass to the merchant. (*Id* . at ¶¶ 7-8.) Oceanic held one of these sub-accounts. (*Id.*) In summary, the credit card funds flow downstream from the merchant bank to the master merchant account holder to the sub-account holder (Oceanic) to the merchant (Cleverlink). (*Id.* ¶ 9.) When a charge or fee is assessed on the account it flows in the same manner with each party/agent in the chain being responsible to reimburse the party above it. (*Id.* ¶¶ 11-12.) Oceanic's recourse being against Cleverlink for any fees or charges imposed on Oceanic by the master account holder for Cleverlink's account. (*Id.*)

In three separate disbursements, a total of $517,168.80 were deposited in Oceanic's account as the sub-account holder for Cleverlink. (Oceanic's Opposition to the FTC's Motion to Show Cause, Ex. 3.) Of those total receipts, Oceanic transmitted only $136,539.54 to Cleverlink pursuant to the Merchant Payment Processing Services Agreement. (*Id.*) Oceanic alleges that during April, May and June of 2005, Cleverlink incurred a number of fees and charges against its funds held by Oceanic-fees and fines totaling $364,022.28. (*Id.*)

The FTC served Oceanic with the Stipulated Preliminary Injunction on June 30, 2005. (FTC's Motion To Preserve Assets and For Rule To Show Cause As To Why Third Party Oceanic Should Not Be Held In Contempt Of Court, Att. B.) The preliminary injunction directed that upon being served with the order, Oceanic "shall hold and retain within its control and prohibit the withdrawal, removal, assignment, transfer, pledge, encumbrance, disbursement, dissipation, conversion, sale, or other disposal of any account or asset of, or held on behalf of, any Defendant, including Cleverlink Trading Limited, unless authorized in writing by the Court or counsel for the FTC." (*Id.*) The stipulated injunction replaced an earlier *ex parte* TRO that was served on Oceanic on June 28. (*Id.,* Att. A.) The TRO did not reference Oceanic specifically, but it did order the retention of funds owned, controlled or held by or for the benefit of Cleverlink. (*Id.*) When served with the preliminary injunction, Oceanic's bank account contained more than $300,000. (FTC's Reply Memo in Support of its Motion To Preserve Assets and For Rule To Show Cause As To Why Third Party Oceanic Should Not Be Held In Contempt Of Court, Att. D, Bresnahan Declaration ("Bresnahan Decl.") ¶ 5©, Ex. 1 at WCB0054). Cleverlink was Oceanic's first client. (Sholes Decl. ¶ 20.) Oceanic alleges that it "had one other customer located in St. Petersburg, Florida," but presents no other evidence regarding this client and admits that it currently has no business. (*Id.*) From July 22, 2005 through September 30, 2005, $245,000 was withdrawn or transferred from the account containing Cleverlink's funds. (Bresnahan Decl. ¶ 5(c), Ex .1 at WCB0057-58.) Colin Sholes personally withdrew $85,000 in cash increments of $9,000 or $9,500. (*Id.* at WCB0060-68.) No evidence has been presented as to where these monies were disbursed after being withdrawn or transferred from Oceanic's account.

DISCUSSION

***3** Section 13(b) of the FTC Act permits the FTC to seek an injunction whenever it believes a corporation is violating or about to violate the Act. 15 U.S.C. § 53(b).[2] Rule 65 empowers this Court to enter a binding injunction "upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise."[3] Fed.R.Civ.P. 65(d). Oceanic and Colin Sholes challenge this Court's jurisdiction, both personal and subject matter, to have entered a preliminary injunction prohibiting them from withdrawing or transferring the funds in Oceanic's account that allegedly were held on behalf of Cleverlink.

I. Personal Jurisdiction

While the FTC Act and Rule 65 prescribe certain remedial or equitable measures, a court still must have jurisdiction over any person against which that power is exercised. *See Insur. Corp. of Ireland, Ltd. v. Compagnie des Bauxities de Guinee,* 456 U.S. 694, 711 n. 1 (1982) ("A district court must have personal jurisdiction over a party before it can enjoin its actions"); *U.S. v. Kirschenbaum,* 156 F.3d 784, 795 (7th Cir.1998) ("The district court's attempt to enjoin Mrs. Kirschenbaum and other third-parties over whom the court had no personal jurisdiction is void and so binding on no one"). This limit on a court's equitable reach applies even to assets that are alleged to be proceeds of unlawful acts. *See Kirschenbaum,* 156 F.3d at 795 ("However convenient it might be for the government to violate the due process rights of some citizens in an effort to seize property that it contends is forfeitable, we see no way that it could do so [absent personal jurisdiction]").

The FTC bears the burden of establishing that personal jurisdiction is proper; satisfying that burden, however, requires only a prima facie showing. *See RAR, Inc. v. Turner Diesel, Ltd.,* 107 F.3d 1272, 1276 (7th Cir.1997). In determining whether the FTC has met this burden, this Court accepts as true all uncontroverted allegations made by both the FTC and Oceanic but resolves all factual disputes in the FTC's favor. *See Hyatt v. Int'l Corp. v. Coco,* 302 F.3d 707, 713 (7th Cir.2002); *Saylor v.. Dyniewski,* 836 F.2d 341, 342 (7th Cir.1988). The FTC offers two alternative bases for the Court's personal jurisdiction over Oceanic and Colin Sholes. One, the nationwide service of process clause in § 13(b) of the FTC Act and, two, Oceanic's contacts with the state of Illinois stemming from both its role as an intermediary for the transmission of consumer credit card charges that originated with Illinois customers and from Oceanic's operation of a website accessible by Illinois residents. *See Swaim v. Moltan Co.,* 73 F .3d 711, 719-20 (7th Cir.1996) ("[A] federal court normally looks either to a federal statute or to the long-arm statute of the State in which it sits to determine whether a defendant is amendable to service").

***4** The FTC brought this action against Cleverlink and other Defendants under § 13(b) for alleged violations of the FTC Act. In cases involving a federal question, the scope of a district court's personal jurisdiction extends as far as the jurisdiction of the courts of general jurisdiction of the State in which it sits or as far as its power to enforce process. *See Janmark, Inc. v. Reidy,* 132 F.3d 1200, 1201-02 (7th Cir.1997); *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.,* 484 U.S. 97, 104 (1987) (stating that for personal jurisdiction to be exercised over a party "there must be authorization for service"); Fed.R.Civ.P. 4(k)(1)(D) ("[S]ervice is effective to establish jurisdiction over the person of a defendant when authorized by a statute of the United States"). [4]

Section 13(b) provides that "[i]n any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found." 15 U.S.C. § 53(b). This language, and similar language from other federal statutes, has been interpreted to permit nationwide service of process. [5] *See F.T.C. v. Bay Area Business Council, Inc.,* 2003 WL 21003711, *2 (N.D.Ill.2003); *see also Fitzsimmons v. Barton,* 589 F.2d 330, 332 (holding that Securities Exchange Act provides for nationwide service of process). Because a statute "creates personal jurisdiction by authorizing service," the nationwide service provision in § 13(b) effectively "creates personal jurisdiction over anyone within the United States ." *Lisak v. Mercantile Bancorp., Inc.,* 834 F.2d 668, 671-72 (7th Cir.1987); *see Mississippi Publishing Corp. v. Murphree,* 326 U.S. 438, 444-45 (1946) ("[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served"). Absent such as a nationwide service of process provision, due process requires that a person or corporation have minimum contacts with the forum state before a court may exercise personal jurisdiction. *See Waeltz v. Delta Pilots Retirement Plan,* 301 F.3d 804, 808 n. 3 ("Ordinarily, such service establishes a district court's personal jurisdiction only if a court of the state in which the district court sits would have personal jurisdiction"). But where nationwide service is authorized by federal law the relevant question becomes whether the person or corporation has minimum contacts with the United States. *See Fitzsimmons,* 589 F.2d at 332; *Zurich Capital Markets v. Conlianese,* 388 F.Supp.2d 847, 857 (N.D.Ill.2004).

Oceanic and Colin Sholes do not challenge the fact that they have minimum contacts with the United States. Rather, they argue that the nationwide service provision only authorizes service on violators or potential violators of the Act. While true that the FTC has never contended that either Oceanic nor Colin Sholes was violating or was about to violate the FTC Act, § 13(b) authorizes service of process on "any person, partnership, or corporation." Thus, by its plain language, nationwide service of process is not restricted to alleged violators or parties to the suit. *See Bob Jones University v. Simon,* 416 U.S. 725, 732 n. 6 (1974) (interpreting language "any person" to include third parties who were not themselves subject to tax liability); *Mullane v. Chambers,* 333 F.3d 322, 331 (1st Cir.2003) (holding that in using the term "any person" in recording statute Congress intended the broadest possible inclusion); *U.S. v. Shear,* 962 F.2d 488, 495 (5th Cir.1992) (stating that "any person" under OSHA included independent third parties). Section 13(b)'s inclusive language contrasts with other nationwide service provisions that state that "process in such cases may be served in any other district of which the *defendant* is an inhabitant or wherever the *defendant* may be found." 7 U.S.C. § 13a-1(e) (emphasis added); 15 U.S.C. § 77v(a); 15 U.S.C. § 78aa. Reading the plain language of the statute, Congress granted district courts the power to enforce process against any person, partnership, or corporation in suits brought pursuant to § 13(b) of the FTC Act. Oceanic and Colin Sholes being amenable to service of process in this suit, the Court had personal jurisdiction to enjoin their actions and may punish them with contempt for any violations of that injunction. *See Omni Capital,* 484 U.S. at 104 (stating that for personal jurisdiction to be exercised "there must be a basis for the defendant's amenability to service").

***5** Given the finding of personal jurisdiction over Oceanic and Colin Sholes under § 13(b), the Court will not address the FTC's alternative argument that minimum contacts exist based on Oceanic's role in processing Cleverlink's credit card transactions and operating a website accessible to Illinois residents.

II. Subject Matter Jurisdiction

"Courts have jurisdiction to decide the legitimacy of ownership claims made by non-parties to assets alleged to be proceeds of securities laws violations." *S.E.C. v. Cherif,* 933 F.2d 403, 414 n. 11 (7th Cir.1991). The funds held in Oceanic's account are alleged to be proceeds of FTC Act violations. As such, this Court has subject matter jurisdiction to decide the legitimacy of Oceanic's claim to those assets. *Id.; see also F.T.C. v. Productive Marketing, Inc.,* 136 F.Supp.2d 1096, 1103 n. 7 (C.D.Cal.2001) ("Even if the court did not have *in personam* jurisdiction over [third party corporation], it could nonetheless exercise *in rem* jurisdiction over the receivership assets in [third party corporation]'s possession").

Conclusion and Order

Having found jurisdiction over the persons of Oceanic and Colin Sholes and the subject matter funds, the matter is hereby referred to the magistrate judge for further discovery and any hearing regarding whether Oceanic or Colin Sholes should be held in contempt of court for violating the preliminary injunction.

So ordered.

All Citations

Not Reported in F.Supp.2d, 2006 WL 1735276, 2006-2 Trade Cases P 75,356

Footnotes

1 Given the Court's interpretation of the nationwide service provision, the admissibility or weight of each party's allegations and evidence need not be resolved for purposes of determining jurisdiction.

2 Temporary restraining orders; preliminary injunctions

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, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public-

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however,* That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further,* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of Title 28. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

15 U.S.C. § 53(b)

3 In its role as a sub-account holder, Oceanic acted as an agent for Cleverlink. (Sholes Decl. ¶¶ 8-13.); *see Reliable Personnel Inc v. Custom Cartage, Inc.,* 1994 WL 406405, *3 (N.D.Ill.1994) ("Under Rule 65(d) an agent is bound by an order granting an injunction against its principal regardless of whether the agent is joined as a party"), citing *Pasco Int'l (London) Ltd. v. Stenograph Corp.,* 637 F.2d 496, 503 (7th Cir.1980).

4 Although often cited as such, Rule 4(k)(1)(D) is not a necessary compliment to a nationwide service of process provision in creating personal jurisdiction, but instead "merely calls attention to federal legislation that may provide for nationwide or even world-wide service of process in cases arising under particular federal laws." Advisory Committee Notes, 1993.

5 Although not relevant here, the language "wherever it may be found" also can be read to authorize worldwide service of process. *See Central States, Southeast and Southwest Areas Pension Fund v. Reimer,* 230 F.3d 934, 941 (7th Cir.2000).

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2010 WL 743899
United States District Court,
W.D. New York.

FEDERAL TRADE COMMISSION, Plaintiff,
v.
Paul NAVESTAD aka Paul Richard individually and doing business as the Cash Grant Institute, Global AD Agency, Global Advertising Agency, Domain Leasing Company and/or Cash Grant Search, and Chintana Maspakorn aka Christina Maspakorn individually and doing business as the Cash Grant Institute, Global AD Agency, Global Advertising Agency, Domain Leasing Company and/or Cash Grant Search, Defendants.

No. 09–CV–6329T.
|
Feb. 25, 2010.

Attorneys and Law Firms

Janis C. Kestenbaum, Russell Scott Deitch, Federal Trade Commission, Washington, DC, for Plaintiff.

Philip B. Abramowitz, Williamsville, NY, for Defendants.

ORDER

MICHAEL A. TELESCA, District Judge.

INTRODUCTION

***1** Plaintiff Federal Trade Commission ("FTC") brings this action pursuant to the Federal Trade Commission Act ("FTC Act" or "the Act") claiming that the defendants have violated that Act by engaging in unlawful telemarketing and internet-marketing schemes. Specifically, plaintiff claims that the defendants have engaged in unfair and deceptive practices by advertising the availability of private and/or governmental cash grants to individuals for almost any purpose, and then charging fees for information related to the alleged grants. According to the plaintiff, the cash grants are deceptively advertised as being widely available and instantly or quickly available to individuals, when in fact, such grants are not widely available, often require extensive application processes, and take months to receive.

Defendant Chintana Maspakorn ("Maspakorn") now moves to dismiss the Complaint pursuant to Rules 12(b)(2) and 12(b)(5) of the Federal Rules of Civil Procedure on grounds that this court lacks personal jurisdiction over her and that service of the Complaint upon her was insufficient. Defendant moves in the alternative for an order transferring this action to the Central District of California on grounds that venue in the Western District of New York is inconvenient. For the reasons set forth below, I deny defendant's motions.

DISCUSSION

Defendant claims that this court lacks personal jurisdiction over her because she is not subject to jurisdiction under New York State's long arm jurisdictional statutes. Specifically, she claims that she has no contacts with the state of New York, has not transacted business in New York, and has not in any manner availed herself to jurisdiction by a court in New York State.

Regardless of whether or not Maspakorn is subject to jurisdiction under New York's long arm statutes, the defendant is subject to the personal jurisdiction of this court pursuant to the Federal Trade Commission Act. Section 13(b) of the Federal Trade Commission Act authorizes the FTC to file suit in any federal district court when the agency has reason to believe that a person, partnership, or corporation has violated or will violate any provision of law enforced by the FTC. 15 U.S.C. § 53(b) That section also provides that process may be served on any person, partnership, or corporation wherever it may be found. *Id.* Because the Federal Trade Commission Act authorizes service of process to be effectuated on any defendant wherever that defendant may be found, this court may exercise personal jurisdiction over such a defendant pursuant to Rule 4 of the Federal Rules of Civil Procedure, which provides in relevant part that this court has personal jurisdiction over parties which may be lawfully served pursuant to federal law.

Accordingly, because federal law authorizes service of process on Maspakorn, the court need only determine whether or not exercise of jurisdiction over the defendant comports with the requirements of Due Process. I find that jurisdiction over the defendant satisfies the requirements of Due Process. Because the instant case is brought pursuant to federal-question jurisdiction, and nationwide service of process is authorized by statute, the Due Process Clause of the Fifth Amendment to the United States Constitution governs this court's analysis of whether or not personal jurisdiction over the defendant is constitutional. To pass constitutional muster, the defendant over which the court purports to have jurisdiction must have "minimum contacts" with the United States as a whole, and assertion of jurisdiction over the defendant must be reasonable and comport with traditional notions of fair play and justice. *See Reese Bros., Inc. v. U.S. Postal Service,* 477 F.Supp.2d 31, (D.D.C., 2007) (where action is brought pursuant to federal law and nationwide service of process is established by statute, court must determine whether or not the defendant has minimum contacts with the United States and that jurisdiction is consistent with traditional notions of fair play and justice.)

***2** The allegations set forth in the Complaint establish that Maspakorn has sufficient contacts with the United States. For example, the Complaint alleges that the target of the alleged telemarketing scams were United States citizens residing in the various States of the United States. The evidence contained in the record submitted with plaintiff's request for injunctive relief suggests that Maspakorn is the Director of the defendant Global Ad Agency, a company registered in the State of Wyoming. These allegations, and several others, establish that Maspakorn has sufficient contacts with the United States for jurisdictional purposes. Although the defendant denies that her activities violate the FTC Act, and alleges that the plaintiff's claims are wholly without merit, such allegations fail to establish that she lacks minimum contacts with the United States.

Nor does jurisdiction in this court violate any traditional notions of fair play or justice. This court has a strong interest in adjudicating this case, and there has been no showing that venue in this district would be so odious to the defendant that it would result in any disadvantage to her. I therefore find that this court has personal jurisdiction over defendant Maspakorn.

Defendant further alleges that the plaintiff improperly served the Complaint in this matter, and therefore the Complaint should be dismissed. Specifically, defendant alleges that the plaintiff failed to comply with California's substitute service provisions, and therefore service by hand delivery and certified mail to an address in West Hollywood, (which she claims is not hers) was ineffective. I deny defendant's motion. This court has previously found that because the plaintiff was unable, after diligent effort, to effectuate personal service on the defendant, substitute service was appropriate. Despite defendant's claim that the West Hollywood address was not valid, it was the address defendant used when she applied for a private mailbox, and is also the mailing address for several of her credit cards. It is the mailing address for her company Global Ad Agency, for which the defendant is a director. I therefore find that the address used by the plaintiff for service was valid for purposes of California's substitute service provisions, and that the service of process was valid.

Finally, defendant moves to transfer this action to the Central District of California on grounds that venue in that District would be more convenient. The moving party in a motion to transfer venue generally bears the burden of showing that the forum should be changed. *Factors Etc., Inc. v. Pro Arts, Inc.,* 579 F.2d 215, 218 (2nd Cir.1978) *cert. denied* 440 U.S. 908, 99 S.Ct. 1215, 59 L.Ed.2d 455 (1979). In fact, the moving party must "make a clear-cut showing that [transfer] is warranted." *Lencco Racing Co., Inc. v. Artco, Inc.,* 953 F.Supp. 69, 71 (W.D.N.Y.1997) (Larimer, Chief Judge).

A motion to transfer venue is within the sound discretion of the court. *Nieves v. American Airlines,* 700 F.Supp. 769, 772 (S.D.N.Y.1992). Courts generally consider several factors to determine whether transfer is appropriate, including

> ***3** the plaintiff's initial choice of forum; the relative convenience to parties and witnesses; the relative ease of access to sources of proof; the availability of compulsory process for attendance of unwilling witnesses, and the cost of obtaining attendance of willing witnesses; location of relevant documents and other tangible evidence ... and 'all other practical problems that make trial of a case easy, expeditious and inexpensive'.

Bonerb v. Richard J. Caron Foundation, 1995 WL 818657 *1 (W.D.N.Y.1995) (citations omitted).

Applying these factors to this case, I find that defendant has failed to make a "clear cut showing" that transfer of this case to the Central District of California is appropriate.

A. *Plaintiff's Choice of Forum*

The plaintiff's initial choice of forum must be given substantial weight and should not be changed lightly. *Air–Flo M.G. Co. v. Louis Berkman Co.,* 933 F.Supp. 229 (W.D.N.Y.1996). In the instant case, plaintiff has chosen to litigate this case in this district, where harm from the defendants' conduct is alleged to have occurred. Moreover, one of the defendants, Paul Navestad, is the subject of a consent order issued by this court restricting him from engaging in fraudulent conduct. Accordingly, plaintiff's choice of forum is entitled to substantial deference.

B. *Convenience of the Parties and Witnesses*

The defendant claims that California is a more convenient venue for her. She has failed, however, to establish that this district is so inconvenient to her that proceedings here would prejudice her. In light of the deference given to plaintiff's choice of forum, defendant's claim of inconvenience does not persuade this court that transfer to the Central District of California is appropriate.

C. *Non-party witnesses*

Ordinarily availability of process to compel the attendance of unwilling non-party witnesses and the cost of attaining the attendance of willing non-party witnesses is a consideration in determining a motion to transfer. However, neither factor is relevant because neither party has specifically identified any nonparty witness.

D. *Ease of access to sources of proof; Location of documents and evidence.*

I find that the ease of access to the sources of proof and the location of relevant documents militates neither for or against transfer to the Central District of California.

E. *Interests of Justice*

There is no dispute that the substantive law to be applied is federal law. Thus, either forum is equally capable of applying the substantive law involved. Additionally, there are no state-law claims asserted, so there are no issues regarding familiarity with state law. As stated above, this district has a strong interest in presiding over this matter, particularly in light of the fact that defendant Paul Navestad is subject to a previous order of this court enjoining him from violating the FTC Act.

Because the factors set forth above do not establish that transfer of this case to the Central District of California is warranted, I deny defendant's motion to transfer.

CONCLUSION

***4** For the reasons set forth above, I deny defendant Chintana Maspakorn's motion to dismiss.

ALL OF THE ABOVE IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2010 WL 743899, 2010-1 Trade Cases P 76,920

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2023 WL 8446166
Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.

FEDERAL TRADE COMMISSION, Plaintiff,
v.
NEORA LLC, et al., Defendants.

Civil Action No. 3:20-cv-01979-M
|
Signed September 28, 2023.

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FINDINGS OF FACT AND CONCLUSIONS OF LAW

BARBARA M. G. LYNN, SENIOR UNITED STATES DISTRICT JUDGE

***1** On October 17–24, 2022, the Court commenced a non-jury trial in the above-entitled matter. During the proceeding, the Court received evidence and heard sworn testimony. Having considered the evidence, testimony, and oral arguments presented during the trial, along with post-trial submissions and the applicable law, the Court now enters the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a). Any finding of fact that should be construed as a conclusion of law is hereby adopted as such. Any conclusion of law that should be construed as a finding of fact is hereby adopted as such.

I. BACKGROUND

On November 1, 2019, Plaintiff Federal Trade Commission ("FTC") filed a Complaint against Signum Biosciences, Inc., Signum Nutralogics, Neora, LLC, and Jeffrey Olson, in the United States District Court for the District of New Jersey. The case was then transferred to this District, where Neora, LLC ("Neora") is headquartered. ECF No. 25.

The FTC brought suit under § 13(b) of the FTC Act, alleging violations of §§ 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52, in connection with Neora's health supplement multi-level marketing business. Compl. (ECF No. 1) ¶¶ 1, 4. Shortly after filing the Complaint, the FTC settled with Signum Biosciences, Inc. and Signum Nutralogics (collectively, "Signum"), which stipulated to a permanent injunction prohibiting them from making misleading statements regarding the health benefits of eicosanoyl-5-hydroxytryptamide ("EHT"). Accordingly, the two remaining defendants are Neora and Jeffrey Olson, individually and in his capacity as Chief Executive Officer of Neora (together, "Defendants").

The FTC seeks a permanent injunction under § 15 of the FTC Act, which requires proof that Defendants are violating or are about to violate the Act.[1] The FTC asserts five violations of the FTC Act: (1) operation of an illegal pyramid scheme; (2) false earning claims, by misrepresenting the potential income Brand Partners could earn; (3) false or unsubstantiated efficacy, by misrepresenting the efficacy of EHT and/or Neora EHT; (4) false establishment, by misrepresenting that the effectiveness of EHT and/or Neora EHT has been scientifically established; (5) means and instrumentalities, by furnishing Brand Partners with the means and instrumentalities to mislead others.

II. FINDINGS OF FACT

The following facts have been established by a preponderance of the evidence.

A. The Neora Model

Defendant Neora, LLC is a direct selling, multi-level marketing company ("MLM") based in Farmers Branch, Texas. ECF No. 297 at 7. Prior to January 2019, Neora was known as Nerium International, LLC ("Nerium"), which was founded in 2011. Defendant Jeffrey Olson is Neora's founder and CEO.

***2** Neora sells beauty and wellness products in the categories of skin care, hair care, wellness, and weight management through independent distributors called "Brand Partners" or "BPs."[2] Once enrolled with Neora, a BP is entitled to a product discount, as well as the opportunity to sell Neora's products, and recruit, train, and mentor other "downline" BPs.[3] The ability of BPs to sell Neora's products to consumers is also referred to by the parties as the "business opportunity." In contrast to BPs, "Preferred Customers" or "PCs" and "retail customers" or are customers who purchase Neora products and do not participate in Neora's business opportunity.[4] A Retail Customer pays full retail price for Neora's products; in contrast, a PC can buy product at a discounted price, either at a slightly reduced "one-time" price, or at a more substantial discount if the PC signs up for a monthly recurring delivery, referred to as a "SmartShop Order," or "SSO."[5] In addition, there are incentive programs available to PCs for product discounts on future purchases.[6]

1. BP Enrollment

To enroll as a BP, an applicant must fill out the Independent Brand Partner Application and Agreement (the "Agreement"), pay a fee, and identify his or her "Sponsor," *i.e.*, the BP who introduced the applicant to Neora.[7] The minimum amount an applicant must pay to participate in the business opportunity is a one-time fee of $20 to purchase an "Enrollment Kit," which contains various training, marketing, and other business tools to "help share Neora's products and grow your business."[8] Applicants may also elect to purchase a "Product Pack," through which prospective BPs can purchase Neora products in various bundles, ranging in price from $199 to $1000. The Agreement states that Product Packs are "exclusive to new Brand Partners at up to 50% retail prices," and the applicant "can select one pack, multiple packs, or no packs—this is your business, your way!"[9] In completing the Agreement, the applicant agrees to be bound by the Neora Terms and Conditions, Policies and Procedures Manual ("P&Ps"), Spam Policy, and Brand Partner Compensation Plan.[10]

2. Policies and Procedures

***3** The P&Ps sets forth rules, regulations, policies, and procedures with which BPs must comply. Section One of the P&Ps, "Brand Partner Status," explains that the only requirements to becoming a BP are the completion of the Agreement and purchase of a "Brand Partner Launch Kit," *i.e.* the Enrollment Kit; no other purchases are required.[11] Section 1.11 of the P&Ps describe the status of BPs as independent contractors as follows:

> A Brand Partner is an Independent Contractor. A Brand Partner is not a franchisee, joint venture partner, business partner, employee, or agent of Neora, and Brand Partner is prohibited from stating or implying, either orally or in writing, otherwise. A Brand Partner has no authority to bind Neora to any obligation. Neora is not responsible for payment or co-payment of any employee benefits. A Brand Partner is fully responsible for their own liability, health, disability, and workmen's compensation insurance. Brand Partner sets Brand Partner's own hours and determines how to conduct Brand Partner's business, subject to the Agreement and the Procedures & Policy Manual.

Ex. 1423 § 1.11.

The P&Ps provide that a BP may sponsor other BPs who apply to join Neora's business opportunity. Generally, the sponsoring BP is referred to as the applicant BP's "upline"; conversely, the applicant BP is the sponsor's "downline."[12] Upline BPs are responsible for ongoing training of any downline BPs they sponsor, and are to ensure that each new BP receives, has access to, and understands the Agreement, Neora's P&Ps, and the Compensation Plan.[13] The P&Ps specify that "[a] Brand Partner will be compensated only for the generation of sales volume, not for sponsoring new Brand Partners into the Company."[14]

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Section 9 of the P&Ps contains policies governing the purchase and sale of products, including, *inter alia*, a restriction on stockpiling, including for the purpose of qualifying for additional compensation [15]; the "70% Rule," requiring that to qualify for commissions or bonuses, a BP must certify that he or she "has sold to non-Brand Partner consumers or used at least 70% of all products previously purchased" [16]; the "Retail Sales Rule," requiring that BPs must make sales to non-BP customers to maintain active BP status [17]; a prohibition on the use of e-commerce sales platforms, such as Amazon or eBay, to sell products [18]; and rules relating to PCs, including a requirement that PCs must personally opt-in to recurring orders, and disciplinary action, including termination, may result if a BP submits a PC order without the customer's consent. [19] The P&Ps state that no product purchase is required for an applicant to become a BP, "although purchases or sales of products may be required to advance in the Compensation Plan." [20]

***4** The P&Ps also include restrictions on claims or statements that BPs may make, which fall into two general categories. First, the P&Ps prohibit BPs from making any claims regarding the Compensation Plan or potential income that BPs may expect to make by participating in the business opportunity, as follows:

> **3.04 Income Claims.**
>
> Brand Partner shall truthfully and fairly describe and present the Compensation Plan. Brand Partner shall not guarantee or estimate compensation, draws, expenses or deductions attributable to the business prospects. No income projections, including those based solely on mathematical projections or "ideal projections" of Neora Compensation Plan may be made to prospective Brand Partners. Brand Partners shall not represent Brand Partner's income as an indication of the success assured to others, since income success depends upon many variables. Commission checks may not be used as marketing materials. No past, potential or actual income claims may be made to prospective Brand Partners. Brand partner may not guarantee commissions or estimate expenses to prospects.

2021 P&Ps § 3.04.

Second, the P&Ps restrict the type of statements that BPs may make about Neora's products, as follow:

> **9.24 Product/Services Claims.**
>
> Brand Partner shall make no claim, representation or warranty concerning any product or service of Neora, except for those contained in the official Neora materials. Brand Partner can only promote benefits of Neora products using language contained in the official Neora materials. Brand Partners may not make any medical, therapeutic, curative or treatment claims regarding any Neora product. Brand Partners may only use "Before" and "After" photos provided by Neora. The use of any unauthorized "Before" and "After" photos is prohibited.

2021 P&Ps § 9.24 (emphasis omitted).

These restrictions are likewise incorporated into the BP "Code of Professional Ethics," recited at the end of the P&Ps. [21] The P&Ps further provide that only Neora-produced or approved promotional and advertising materials may be used to advertise or promote a BP's business, or sell products or services of Neora in any print or electronic media, including on the Internet, and BPs are required to remove any non-compliant profiles and/or websites immediately; failure to follow these social media guidelines may result in disciplinary actions, including termination. [22]

***5** A BP may be suspended or terminated for violating the terms of the Agreement, the P&Ps, the Compensation Plan, and other documents produced by Neora. [23] A BP who voluntarily terminates his or her business relationship with Neora has the right "to return for repurchase on commercially reasonable terms currently marketable inventory," including promotional materials, sales tools, and kits in the possession of and purchased by the BP. [24]

3. Compensation Plan

The terms of the business opportunity that Neora offers to BPs, including the framework for BPs to earn income and rewards, are set forth in the Compensation Plan. [25] The Compensation Plan explains that Neora BPs earn income in two ways: first, by building a customer base and earning commissions on sales to those customers, and second, by building a team of BPs and earning "commissions and bonuses based on their product sales to customers and their volume." [26]

Under the Compensation Plan, eligibility for certain commissions and bonuses is evaluated through consideration of product "volume." "Volume" refers to "[t]he value assigned to a product that is used to determine a Brand Partner's rank qualifications in the Compensation Plan (Qualifying Volume or QV), or to determine the amount of commissions being paid on a product purchase (Commissionable Volume or CV)."[27] Each product sold by Neora has an associated QV and CV figure; for example, the 2022 Neora U.S. Product Price List provides that a BP will earn 80 QV and 69 CV for a sale or purchase of Neora's Age IQ Night Cream.[28]

***6** To be eligible to earn income under the Neora Compensation Plan, a BP must remain "active" each calendar month, which can be achieved in two different ways. First, a BP can remain active by maintaining at least 120 in Personal Qualifying Volume ("PQV") in product sales to personal customers, where PQV refers to qualifying volume generated through a BP's personal product purchases, and any volume from product purchases made directly from Neora by a BP's Retail and Preferred Customers. Second, a BP can remain active by maintaining at least 80 PQV in personal product "SmartShop Volume" ("SSV"), *i.e.*, volume from the BP's own SmartShop recurring orders.

The Compensation Plan organizes the means through which an active BP may earn income or rewards into the following four categories: Rewards for Selling, Product Rewards, Rewards for Team Building, and Rewards for Leadership. The Plan also describes the "1-2-3 Bonus," which a BP is eligible to earn within his or her first sixty days; if BP enrolls two new BPs and three new PCs, each with at least 80 QV, the BP is entitled to a bonus of $50.[29] With one exception,[30] the remainder of the rewards and bonuses described in the Compensation Plan may be earned at any time during a BP's tenure, and each will be described in turn.

a. Rewards for Selling

The Compensation describes five types of "rewards," or income opportunities, that BPs may earn in connection with selling Neora products. First, BPs can earn a retail profit by selling Neora products either in person or through the BP's personalized Neora website. If someone buys product through the BP's retail website, the BP earns the difference between the price paid by the customer and the BP one-time price for that item, as listed in the Neora Product Price List.[31] BPs may also sell Neora products at retail value from the BP's own personal inventory, and earn the difference between the price the BP paid and the suggested retail price.[32]

***7** Second, a BP may earn commissions on retail customer sales and PC enrollment, one-time, and SmartShop orders after meeting a sales threshold, starting at 5% commissions on all sales once the total number of sales exceeds $300.[33] Third, any active BP may earn a PC First Order Bonus ("FOB") for each new, personally enrolled PC who purchases product in their enrollment order; the BP may earn up to 20% of the PC's first order.[34] Fourth, the BP may earn a Personal PC Bonus ("PPC") depending on the number of PCs the BP has enrolled or maintained for a given month, with a minimum of at least three personally enrolled PCs to receive any rewards or bonuses.[35] And fifth, the BP may earn the Team PC Bonus based on rewards and bonuses earned by their downline "team" of BPs.[36] With the exception of the Team PC Bonus, all of the "Rewards for Selling" can be earned without recruiting any BPs.

b. Products Rewards

The Compensation Plan describes two "Product Rewards": the 3UR Free program, and the Neora Gives Back points program. Under the 3UR Free program, a BP can receive up to $140 in product credit per month if he or she has a recurring SmartShop order and enrolls at least three PCs purchasing at a certain level.[37] In the Neora Gives Back program, by enrolling a new PC or BP with a recurring SmartShop order, a BP accumulates points that may be redeemed for free product samples.[38]

c. Rewards for Team Building

***8** The Compensation Plan describes several "Rewards for Team Building," which are based, in part, on a BP's downline "team" of BPs, as well as the BP's "rank." "Rank" refers to a BP's level of achievement in the Compensation Plan, and is determined by personal and group sales volume, as well as the personal and group volume of BPs in the BP's group.[39] The Compensation Plan establishes 18 ranks that a BP can achieve.

The first reward based on team building is the BP First Order Bonus; if a newly enrolled BP purchases product at the time of their enrollment, a percentage of that product purchase amount is paid to both the enroller and the first upline enroller, if they are eligible. [40] Next, a BP may earn a one-time Director Bonus for advancing to the rank of Director within his or her first three months; the bonus size varies depends on the speed of advancement. [41]

Upon reaching the rank of Elite Brand Partner, which requires at least three active enrolled downline BPs, a BP is eligible to earn Team Commissions, which are based on the commissionable volume generated from product sales made by the BP's team. [42] If a BP reaches the rank of Premier Director, he or she is entitled to a monthly Lifestyle Bonus, paid in addition to monthly commissions; the bonus starts at $150 per month and increases with rank. [43] If a BP reaches the rank of Elite Director with at least 15,000 in Group Qualifying Volume, he or she is further entitled to the Luxury Car Bonus, a monthly payment toward a luxury car or the option to take a cash bonus instead. [44]

***9** Even if a BP recruits multiple levels of downline BPs, if there are no purchases by any BPs or PCs in the BP's organization, there will be no compensation or rewards paid to that BP. [45]

d. Rewards for Leadership

Finally, the Compensation Plan describes rewards based on leadership. BPs ranked Elite Director and above are entitled to the "Check Match" bonus, which the Compensation Plan states "is designed to reward you for developing leaders in your organization and working with them to accomplish their goals." [46] Through Check Match, a BP may earn a percentage of the team commissions paid to BPs in his or her enrollment tree with the rank Team Director or higher. Finally, under the Leadership Bonus, BPs who reach Silver National Marketing Director can earn a percentage of the commissionable volume of his or her entire organization, and under the NMD Generation Bonus, BPs who reach the rank of Platinum National Marketing Director are entitled to a percentage of the commissionable volume based on the number of BPs below them who have reached the National Marketing Director rank. [47]

4. Neora Materials & Compliance

Neora creates various types of materials associated with Neora's products and the BP business opportunity, including product guides and brochures, price lists, [48] guides and trackers for organizing selling efforts, [49] approved marketing materials, [50] compliance documents, [51] and videos. [52] These types of documents are made available to BPs on the "Back Office," a portion of Neora's website that is accessible to BPs, and includes, in addition to the materials prepared by Neora, personalized reports and business information for each BP. [53] In addition to published materials, trainings, and videos on the Back Office, Neora offers BPs weekly training, leadership training calls for higher-ranked BPs, specialized training, and the Get Real Conferences, held at least annually. [54]

***10** The main product training documents are the product guides, which are updated whenever Neora launches a new product, or at least annually. [55] The product training guides contain information and details about each product, including what BPs can communicate that the product does, relevant disclaimers that BPs should use, for whom the product is appropriate, and descriptions of each of the key ingredients. [56] For example, the 2021 product guide contains product features, instructions for use, results from clinical trials (for certain products), and ingredient descriptions. [57] In addition, Neora publishes shorter product brochures, which are intended for BPs to hand to prospective customers to learn more about the products; in addition to product information, brochures contain before-and-after photos and client testimonials. [58]

Neora also publishes the "Field Compliance Guide," which is "designed to help [BPs] understand how to properly share Neora's products, business opportunity and demonstrate how to appropriately market your business." [59] For example, for income claims, the 2022 Field Compliance Guide defines what an income claim is, provides best practices regarding making income claims, gives examples of prohibited and acceptable claims, and provides directions on how and when BPs should include mandatory income disclosures when making statements about income that can be earned through the Neora business opportunity. [60] The Field Compliance Guide contains similar guidance for product claims, *i.e.*, guidance on approved claims, mandatory disclosure statements to accompany any testimonials or product statements made by BPs, and examples of proper and improper product claims.

The Field Compliance Guide references various disclosure statements, including the Neora "Full Income Disclosure Statement" and the "Wellness Product Disclosure Statement." These disclosures are recited in the Field Compliance Guide and also in the "Income & Product Disclaimers" document, and consist of Neora-approved language for BPs to use in conjunction with income and product claims. [61] For example, the Income & Product Disclaimers document recites the following "Full General Income Disclosure Statement":

> ***11** From January 2021–December 2021, Neora had 34,408 Active US Brand Partners. An Active Brand Partner is defined as a Brand Partner who: (A)(i) made a sale to a customer, or (ii) had a personal purchase in the prior 18 months and (B) was registered as a Brand Partner during the entire period January 2021–December 2021.
>
> From January 2021–December 2021, 40.1 % of Active US Brand Partners earned cash commissions and 59.9% did not earn any cash commissions. The average annual gross cash earnings of Active US Brand Partners was $1,358. These figures do not include the value of bonuses and commissions paid in free product, which were received by 20% of Active [US] Brand Partners. The calculation of gross cash earnings does not reflect any expenses paid or the value of any time expended by the Brand Partners in making the underlying sales to customers.
>
> Neora^{TM}, LLC does not guarantee any level of income for any Brand Partner. The actual income of Neora Brand Partners varies depending on each Brand Partner's individual goals, expectations, skill, effort, and time commitment as well as market forces beyond the Brand Partner's and/or Neora's control.

Ex. 1463.

The document also includes an Abbreviated General Income Disclosure Statement, [62] a Car Bonus Disclosure Statement, [63] a Trip Disclosure Statement, [64] and Neora Wellness Product Disclosure Statements. [65] The Field Compliance Guide instructs BPs to include the relevant disclosure statement whenever making an income or product claim. [66] Neora also maintains a website, in which it posts earnings information and copies of the P&Ps. [67]

***12** Neora has an in-house Compliance Department that addresses violations of Neora's P&Ps, including violations of the policies relating to income and product/services claims. [68] Neora will also monitor orders of a certain size to determine the purpose of the order, *i.e.*, for consumption or to manipulate the Compensation Plan, and whether multiple BPs are shipping to the same address. [69] BPs are invited to contact the Compliance Department support team for guidance on making compliant statements. [70]

The Compliance Department uses a program named FieldWatch, an Internet-wide monitoring service that constantly searches the Internet, including social media sites such as Facebook and Twitter, for terms relating to Neora's products and brand. [71] FieldWatch will identify potential violations for the Compliance Department to review; if a violation is discovered, FieldWatch will send at least two notices to the BP, including by text message, requesting that the violation be removed. [72] If the BP fails to remove the violative claim after the second notice, the violation is escalated and flagged "Neora Review," which will result in the Compliance Department personally reaching out to the BP and the BP's upline to resolve the violation, and delete the improper claim. [73] In addition to FieldWatch, the Compliance Department will do manual Internet searches to try to find and resolve violations. [74] The record contains numerous examples of the Compliance Department communicating with BPs to address noncompliant posts and representations since at least 2013. [75] Neora also tracks repeat offenders; although Neora typically gives a BP an opportunity to correct noncompliant behavior, a BP is eligible for suspension or termination for repeated violations of the P&Ps. [76]

B. Neora in Practice

Neora currently has approximately 30,000 to 35,000 active BPs. [77] The number of active BPs has remained relatively stable since 2018. [78] As of trial, Neora has approximately 163,000 PCs. [79] Over the life of the company, there have been approximately 400,000 BPs and 1.7 million PCs. [80] Evidence was presented indicating that median tenure for BPs and PCs may be approximately 8 months and 2 months, respectively. [81]

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***13** BPs join the Neora business opportunity for a variety of reasons, including: love of Neora products, [82] the ability to earn free product through the 3UR Free program, [83] product discounts, [84] personal development, [85] and additional income. [86] In April 2022, current and former BPs were surveyed by a third party to understand why BPs joined Neora. [87] The results indicated that, among current BPs, the top reason for being a BP is to get discounts on product, either by getting a discount on products for personal use, or to earn free product. [88] In addition, a 2015 BP experience study asked BPs to identify the single reason that best represents why BPs decided to join Nerium; in descending order of response rate, the responses were: extra income, belief in Nerium, entrepreneurial, potential to earn, free product, primary income, and other. [89]

BPs who enroll only for access to product discounts are occasionally referred to as "savings seekers." [90] Because of the discount, if a BP buys only the $20 Enrollment Kit and then buys $300 worth of Neora products, the BP has saved about $30 in product discounts, enough to recoup the cost of the Enrollment Kit. [91] In addition, some BPs are prior PCs, who convert to BPs to access the bigger discount available to BPs. [92] In 2021, 3,298 PCs switched to be a BP, representing 30% of all newly enrolled BPs that year. [93]

***14** Consistently, over 90% of Neora's revenues come from product sales; the remaining 10% of revenues come from sales of starter enrollment Product Packs to BPs and upgrades, and non-product sales. [94] An estimated less than 1% of Neora's product sales are made to Retail Customers. [95] The majority of Neora's product sales—somewhere between 75 and 80% of sales—are made to PCs. [96] Sales to PCs are considered ultimate end-user sales, *i.e.*, purchased for personal use without the intent to resell to anyone else. [97] The data indicates that, as a percentage of total product sales, sales to PCs have been increasing and sales to BPs have been decreasing since 2017. [98]

Approximately 19 to 25% of non-enrollment product sales are made to BPs. [99] For 2021, using PC purchases as a guide, it can be estimated that 65% of BPs' purchases are for personal use; under that same model, 90% of total product sales in 2021—including BPs, PCs, and retail customers—can be estimated to be for personal use. [100] Approximately 70% of Neora BPs do not sell product or build an organization through recruitment. [101] From February 2019 to January 2020, 69.4% of all BPs earned no commissions at all. [102] For that same period, there were seven BPs with the highest rank —Platinum National Marketing Director—who on average earned substantially more in gross rewards. [103]

C. EHT and Signum

***15** EHT, a proprietary coffee extract, was developed in the laboratory of Dr. Jeffry Stock, a professor at Princeton University. [104] Lay evidence was presented indicating that, based on testing, EHT may reduce inflammation in the brains of rats and mice. [105] Neither EHT nor any product containing it has ever been clinically tested for efficacy in humans. [106]

Princeton owns the patent covering EHT, and licenses it to Signum Biosciences, Inc., the parent company of Signum Nutralogix, Inc. [107] Dr. Stock's son, Max Stock, is the CEO of Signum Biosciences, Inc., and Signum Nutralogix, Inc. In 2014, Signum sold and marketed a product containing EHT called "ME Sports," and advertised that EHT could help with chronic traumatic encephalopathy ("CTE"), Alzheimer's disease, and Parkinson's disease. [108]

In February of 2015, Nerium and Signum Nutralogix, Inc. entered into a Sublicense Agreement, through which Nerium obtained the right to develop, manufacture, commercialize, and sell products containing EHT. [109] Nerium launched its Nerium EHT product—sold as EHT Brain Formula—at the April 11, 2015 "Get Real" Conference. Max Stock introduced EHT at the conference; during his comments, he referenced former NFL player Junior Seau, who suffered from CTE. [110]

The day after the Stocks' statements at the Get Real Conference, all Neora BPs received an email from Nerium International, with the subject line "Important Note from CEO Jeff Olson." The email stated, in part:

> We are thrilled to have introduced everyone to Signum Biosciences at Get Real!
>
> Signum Biosciences works with prestigious universities, such as Princeton, to research new technology. Princeton even owns the patent to the EHT molecule we just released.

> However, it is VERY important to respect this partnership we have created with Signum Biosciences and use ONLY approved messaging around this relationship and the related discoveries.
>
> ...
>
> If you have anything posted on social media that does not follow these guidelines, please remove them immediately.
>
> Anyone not following these guidelines will experience immediate disciplinary consequences.

Ex. 1141.

The email linked a document providing approved messaging for Signum Biosciences, SIG-1273, and EHT, including instructions that BPs should not say that EHT "Cures sports repetitive trauma, Cures Alzheimer's disease, Cures Parkinson's disease, [or] Treats ADD, OCD or any other disease." [111]

Max Stock spoke again during the September 12, 2015, Get Real Conference, and was joined by his father, Dr. Stock. During their presentation, Dr. Stock referenced CTE, Alzheimer's disease, and Parkinson's disease, and stated that EHT was shown to be "beneficial" in model systems used to study neurodegenerative disease, including for Parkinson's disease. [112]

III. CONCLUSIONS OF LAW

Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a). Under § 13(b) of the FTC Act, "after proper proof, the court may issue a permanent injunction" against "any person, partnership, or corporation ... violating, or ... about to violate, any provision of law enforced" by the FTC. 15 U.S.C. § 53(b); *AMG Cap. Mgmt.*, 141 S. Ct. at 1348–49. Section 13(b) "focuses upon relief that is prospective, not retrospective" *AMG Cap. Mgmt.*, 141 S. Ct. at 1348.

***16** The FTC alleges that Defendants violated the FTC Act by making deceptive or misleading product claims in connection with EHT, making false claims about the potential income BPs could earn by enrolling in Nerium, operating as an illegal pyramid scheme, and providing BPs with the means and instrumentalities to violate the FTC Act. Pursuant to § 13(b) of the FTC Act, the FTC seeks injunctive relief as necessary to prevent consumer injury and violations of the FTC Act. The Court will address each Count in turn.

A. Count 1: Pyramid Scheme

"The operation of a pyramid scheme constitutes an unfair or deceptive act or practice in or affecting commerce for the purposes of § 5(a)." *FTC v. BurnLounge, Inc.*, 753 F.3d 878, 880 (9th Cir. 2014). The FTC maintains that Neora is actively violating or is about to violate § 5 of the FTC Act by operating an illegal pyramid scheme, and asks the Court to enjoin Neora from operating as a multi-level marketing company.

1. Legal Standard

In *In re Koscot Interplanetary, Inc., et al.*, 86 F.T.C. 1106, 1975 WL 173318 (1975), the Federal Trade Commission established the *Koscot* test for determining what constitutes a pyramid scheme:

> Such schemes are characterized by the payment by participants of money to the company in return for which they receive (1) the right to sell a product *and* (2) the right to receive in return for recruiting other participants into the program rewards which are unrelated to sale of the product to ultimate users.

Id. at *60 (emphasis in original).

The second element of the *Koscot* test has been characterized as the *sine qua non* of a pyramid scheme. *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 781–82 (9th Cir. 1996) (adopting the *Koscot* standard). "[T]he presence of this second element, recruitment with rewards unrelated to product sales, is nothing more than an elaborate chain letter device in which individuals who pay a valuable consideration with the expectation of recouping it to some degree via recruitment are bound to be disappointed." *Koscot*, 1975 WL 173318 at *60.

Unlike other courts, the Fifth Circuit has never expressly adopted the *Koscot* test to determine the existence of a pyramid scheme. *Cf. Omnitrition*, 79 F.3d at 781 ("We adopt the *Koscot* standard here ...."). Instead, the Fifth Circuit has acknowledged the two-part *Koscot* test only twice, in a pair of recent, related decisions. [113] *See Torres v. S.G.E. Mgmt.*, 805 F.3d 145, 153–54 (5th Cir. 2015) (*Torres I*) (citing *Omnitrition*, 79 F.3d at 781–82), *rev'd on other grounds*, 838 F.3d 629 (5th Cir. 2016) (en banc) (*Torres II*).

In *Torres I*, the Fifth Circuit panel vacated the district court's decision certifying a class action for victims of an alleged pyramid scheme, brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–68. 805 F.3d at 158–59. The panel held that decertification was appropriate because the plaintiffs would have to rely upon individualized proof of reliance as to the fraudulent conduct causing the plaintiffs' injuries, *i.e.*, that the plaintiffs relied on representations that the scheme was not, in fact, a pyramid scheme. *Id.* In doing so, the panel acknowledged the *Koscot* test, as explained by the Ninth Circuit in the earlier *Webster v. Omnitrition International* case. *Id.* at 153–54.

***17** The Fifth Circuit subsequently vacated the panel decision and heard the case en banc on a narrow issue: "whether the Plaintiffs may prove RICO causation through common proof such that individualized issues will not predominate at trial." *Torres II*, 838 F.3d at 635. The en banc Fifth Circuit subsequently affirmed the district court's certification decision, concluding that individual issues did not predominate because if it was proven at trial that defendants operated a fraudulent pyramid scheme, a jury may reasonably infer that the plaintiffs relied on the defendant's implicit representation of legitimacy. *Id.* at 647.

In reaching this conclusion, the majority admitted that "[n]o clear line separates illegal pyramid schemes from legitimate multilevel marketing programs." *Id.* at 639 (quoting *United States v. Gold Unlimited, Inc.*, 177 F.3d 472, 475 (6th Cir. 1999)); *cf. Torres II*, 838 F.3d at 653–54 (Jones, J., dissenting) (criticizing the majority for not providing additional guidance as to the meaning of "illegal pyramid scheme" beyond the *Koscot* definition). It did, however, discuss the FTC's *Koscot* test, while providing some additional observations:

> By definition, a pyramid scheme operates by taking money from downline recruits ... who will never recoup their payments, and funneling the money to those at the top of the pyramid. Such schemes depend on "there [being] Peters ... to rob for the purpose of paying Paul." Those who lose money in a pyramid scheme necessarily do so "by reason of" the fraud because the fraud is necessary to temporarily sustain the scheme, and ultimately causes the scheme's collapse. And, those who profit from a fraudulent pyramid scheme make money only by virtue of the participation of downline investors ... who lose money.

Torres II, 838 F.3d at 640.

Moreover, the majority observed that "[w]hether a multi-level marketing program is fraudulent or legitimate depends on its internal structure." *Torres II*, 838 F.3d at 643; *see also BurnLounge*, 753 F.3d at 883 ("To determine whether a MLM business is a pyramid, a court must look at how the MLM business operates in practice.").

The panel decision in *Torres I* was vacated on certification grounds, and the en banc decision did not address the panel's characterization of a pyramid scheme; the Court thus finds the *Torres I* commentary about pyramid schemes to be relevant persuasive authority. In *Torres I*, the panel stated that "the primary factor in deciding whether a business is a pyramid scheme is whether the business focuses exclusively or almost exclusively on *recruiting* as opposed to *sales*." 805 F.3d at 153 (emphasis in original). The panel also noted that a pyramid scheme can be distinguished from "the many types of businesses organized in a 'pyramid-shaped' hierarchical structure," and that "[a] true pyramid scheme, as that term is used here, refers to a type of illegal and fraudulent activity, structured in a fashion that it 'must eventually collapse.' " *Id.*

Also relevant to the pyramid scheme inquiry are the FTC's own published guidance regarding multi-level marketing companies. In January of 2004, the FTC issued an Advisory Opinion discussing, in part, the FTC's "analysis of compensation based on personal consumption by members of a multi-level company's sales force." Ex. 114 ("2004 FTC Advisory Op.") at 1. The FTC provided the following guidance:

> Much has been made of the personal or internal consumption issue in recent years. In fact, the amount of internal consumption in any multi-level compensation business does not determine whether or not the FTC will consider the plan a pyramid scheme. **The critical question for the FTC is whether the revenues that primarily support the commissions paid to all participants are generated from purchases of goods and services that are not simply incidental to the purchase of the right to participate in a money-making venture.**
>
> ***18** A multi-level compensation system funded primarily by such non-incidental revenues does not depend on

> continual recruitment of new participants, and therefore, does not guarantee financial failure for the majority of participants. **In contrast, a multi-level compensation system funded primarily by payments made for the right to participate in the venture is an illegal pyramid scheme.**

Id. (emphasis added).

The 2004 Advisory Opinion further distinguished an illegal pyramid scheme from a legitimate buyers club, which "confers the right to purchase goods and services at a discount" and is distinguishable from a pyramid scheme, in part, because "the purchase of goods and services is not merely incidentally to the right to participate in a money-making venture, but rather the very reason participants join the program." *Id.* at 2.

In January 2018, the FTC released a staff business guidance document, "Business Guidance Concerning Multi-Level Marketing." Ex. 115 ("2018 FTC Guidance"). Although not legally binding, the guidance purported to "assist multi-level marketers" in applying core consumer protection principles to their businesses. *Id.* at 1. In the guidance, the FTC noted that "[p]roduct that is purchased and consumed by participants to satisfy their own genuine product demand—as distinct from all product purchased by participants that is not resold—is not in itself indicative of a problematic MLM compensation structure," and instead the analysis "involves a comprehensive analysis of a variety of factors." *Id.* at 2. In doing so, the FTC affirmed its prior 2004 Advisory Opinion, noting that "when evaluating the issue of participants' internal consumption, the FTC staff is likely to consider, among other factors, both (i) whether features of the MLM's compensation structure incentivize or encourage participants to purchase product for reasons other than satisfying genuine demand; and (ii) information bearing on whether purchases were in fact made to satisfy personal demand to consume the product." *Id.* at 2–3.

2. Analysis

The first element of the *Koscot* test, whether BPs pay money in exchange for the right to sell a product, is clearly met here; to enroll as a Neora BP and receive the right to sell Neora's products, one must pay a minimum of $20 for an Enrollment Kit. Accordingly, the Court's discussion will focus on the second element of the *Koscot* test—whether Neora BPs receive rewards for recruiting other participants, unrelated to the sale of product to ultimate users—interpreted through the lens the Fifth Circuit's guidance in *Torres I* and *Torres II*, and other relevant authority.

The Court begins with the Compensation Plan. The first four rewards or bonuses described in the Compensation Plan—Retail Sales, Personal Sales Commissions, PC First Order Bonus, and Personal PC Bonus—are based entirely on sales to PCs, and thus are unproblematic for *Koscot* purposes; the parties agree that PCs are considered ultimate end users, who purchase Neora product for personal use without the intent to resell. Likewise, the 3UR Free program requires only that the BP has at least three PCs with a minimum volume to earn the reward of free product credit for the subsequent month; eligibility for this reward is also based solely on the sale of product to ultimate users. Eligibility for the Neora Gives Back program requires enrolling a PC *or* a BP, but at least on paper could feasibly be obtained solely by product sales to ultimate users.

***19** The remaining rewards under the Compensation Plan all require some recruitment element. Specifically, with the exception of the BP First Order Bonus, all rewards require that the BP reach or surpass the rank of Elite Brand Partner, which requires a minimum of three "active legs" on his or her team, *i.e.*, three recruited BPs. The Court assumes, for purposes of this analysis, that the right to receive these remaining rewards—the Team PC Bonus, the BP First Order Bonus, the Director Bonus, Team Commissions, the Lifestyle Bonus, the Luxury Car Bonus, Check Match, Leadership Bonus, and the NMD Generation Bonus—are earned by BPs in exchange for recruiting other participants into the program. *See Koscot*, 1975 WL 173318, at *60. The question thus becomes whether those rewards "are unrelated to sale of the product to ultimate users," so as to make Neora's Compensation Plan problematic under *Koscot. Id.*

In concluding that Neora is operating as a pyramid scheme, Dr. Bosley—the FTC's witness, and the only witness to testify in support of the FTC's pyramid scheme claim—testified that these rewards are unrelated to ultimate user sales, relying on the rewards structure as defined by the Compensation Plan, Neora's operational practices, including training materials, and an analysis of operational data. In the words of Dr. Bosley, these rewards are "locked" behind a recruitment threshold, such that no matter how many sales the BP makes, if he or she cannot make it past that recruitment threshold, the BP is not likely to earn any money through Neora. [114] Dr. Bosley further testified, based on review of operational data, that the vast majority of participants will lose money; she found 96% of the approximately 400,000 BPs that have been part of Neora have lost money. [115]

Dr. Bosley testified that the FTC provided her with two legal assumptions for her work in this case, both taken from the Ninth Circuit's decision in *BurnLounge*: first, that an ultimate user is limited to a person who would have purchased the product even if not for the business opportunity; and second, that rewards don't have to be completely unrelated to ultimate user sales in order for something to be a pyramid scheme, *i.e.*, that the existence of some sales to ultimate users for consumption does not prevent the plan from being an illegal pyramid scheme. [116] Dr. Bosley also relied on her own third, uniform assumption: that BPs mainly purchase product in pursuit of the business opportunity, and thus none of BPs' purchases for personal consumption qualify as sales to an ultimate end user. [117] Put differently, Dr. Bosley—and, by extension, the FTC—assumes that purchases by BPs are never ultimate user sales.

The Court finds that Dr. Bosley's third assumption is not supported by the evidence, and the FTC provides no other evidence to show that BP purchases should be uniformly treated not as sales to ultimate users. In addition, the Court finds that the FTC improperly discounts the significance of the large volume of sales to PCs when evaluating whether the recruitment-based rewards, discussed previously, are "unrelated to" sale of Neora product to ultimate users. For these reasons, the Court finds that the FTC has not established the second prong of the *Koscot* test, and concludes that Neora is not operating as an illegal pyramid scheme.

***20** Regarding the first issue—that Dr. Bosley's third assumption that BP purchases are not end user sales is unsupported by the evidence—the Court will use the BP First Order Bonus as an example. For this bonus, if a newly enrolled BP purchases product at enrollment, a percentage of that product purchase amount is paid to both the enrolling BP and the enrolling BP's upline. For *Koscot* purposes, the relevant inquiry is whether this reward is "unrelated to the sale of the product to [an] ultimate user[ ]," *i.e.*, whether the purchaser of the product (here, the newly enrolled BP) is an ultimate user. *See* 1975 WL 173318, at *60. Under Dr. Bosley's assumption, the newly enrolled BP is assumed *not* to be an ultimate user; instead, the purchase is assumed to be for the business opportunity and not for personal consumption. Put differently, the FTC asks the Court to simply assume that an element of the *Koscot* test is met.

However, the Court finds that Dr. Bosley's assumption is not supported by the evidence. At trial, Defendants presented evidence that some BPs enroll without ever intending to pursue the business opportunity, and are instead savings seekers, looking to take advantage of the biggest product discounts that are available only to BPs. Defendants provided the LRW Survey, which reported that—for the admittedly small number of BPs who responded—the top reason for being a BP is to get discounts on product, either by getting a discount on products for personal use, or to earn free product. Evidence was also provided that PCs will convert to BPs in order to access the bigger discount; Dr. Vandaele, Defendants' expert, calculated that in 2021, 30% of newly enrolled BPs had converted from being a PC. In addition, testimony was provided indicating that there are BPs who consistently buy product at levels below the threshold necessary to qualify for compensation, and thus their purchases cannot be made in pursuit of rewards under the Compensation Plan. [118] Thus, returning to the BP First Order Bonus, the evidence suggests that a newly enrolled BP may be joining to pursue the business opportunity (as Dr. Bosley assumes), or may, for example, be joining as a savings seeker, to purchase Neora products for his or her own personal consumption with no intention of reselling the product.

The distinction is material. For the purposes of the *Koscot* analysis in this case, the only relevant sales are purchases by BPs; sales to PCs and retail customers qualify as sales to ultimate users. Thus, the question of whether Neora is operating as a pyramid scheme hinges on whether sales to BPs are sales to ultimate users, and the FTC simply assumes that they are not. The Court by no means suggests that Defendants' evidence is sufficient to predict or speak on the motivations of *all* BPs purchasing product from Neora; it is, however, sufficient to rebut Dr. Bosley's assumption that no BPs purchase product for personal consumption.

The FTC asks the Court to follow the district court's decision in *Vemma*, which found that there was "no way to unbundle the [distributors'] intent to consume Vemma products as ultimate users from their desire to remain qualified for bonuses," and adopted an assumption, also from Dr. Bosley, similar to the one presented here. *See* *Fed. Trade Comm'n v. Vemma Nutrition Co.*, No. CV-15-01578-PHX-JJT, 2015 WL 11118111, at *4 (D. Ariz. Sept. 18, 2015) ("In all likelihood, Affiliates' purchases of Vemma products are incidental to the right to qualify for and obtain bonuses.”). The district court further observed that a participant's “intent in purchasing Vemma products must be viewed in light of Vemma's program design as well as its training and marketing materials.” *Id.*

The Court agrees with this general premise, but concludes it would be error to disregard or discount other relevant evidence as to BPs' intent in purchasing Neora product, including their own self-reported motivations for being a BP through the LRW survey, anecdotal reports from Neora employees regarding “savings seekers” and BPs motivated by product discounts, and motivations that can be inferred from the behavior of PCs converting to BPs and their associated spending habits. This evidence potentially lacks the statistical rigor necessary to speak confidently as to the purchase motivations for all, or even a majority, of Neora BPs, but besides Dr. Bosley's assumption that all BP purchases are in pursuit of the business opportunity, the FTC provide no tangible evidence to the contrary. The failure to provide such evidence is contrary to the FTC's own 2018 guidance, which observed that, when considering the issue of multi-level marketing participants' internal consumption, the FTC is likely to consider “information bearing on whether purchases were in fact made to satisfy personal demand to consume the product.” *See* 2018 FTC Guidance at 2–3.

***21** Moreover, the Court notes that there is evidence the FTC could have provided, but did not, which could have supported its position. For example, the court in *Vemma* observed that “evidence that distributors purchase and consume product for the purpose of qualifying for recruitment incentives is evidence of a pyramid scheme.” 2015 WL 11118111, at *3. The FTC speculated that Neora BPs *could* be making such purchases, but provided no evidence to suggest that is the case for the majority of BPs so as to support Dr. Bosley's assumption. [119] Instead, the FTC provided no evidence from actual BPs or participants, and made no effort to show that Dr. Bosley's rigid theoretical opinions regarding BP purchasing motivations based on the Compensation Plan are borne out in reality. [120]

The FTC criticizes as unreliable Defendants' evidence that BPs enroll for access to discounts or to earn free product, particularly the LRW Survey. But the FTC makes no attempt of its own to unbundle BPs' intent to consume Neora products as ultimate users from their motivation to participate in the business opportunity. The Court finds that there is a particularly compelling reason to do so here, given the evidence that there exists a legitimate and substantial consumer demand for Neora's products, namely the fact that the vast majority of Neora's product sales—between 75 to 80% of sales—are to PCs, who purchase Neora's products with no incentives tethered to the Compensation Plan.

The magnitude of sales of Neora's products to non-BP consumers distinguishes this case from two cases relied on by the FTC, *Vemma* and the Ninth Circuit's decision in *BurnLounge.* In *Vemma*, the “great majority of Vemma product sales”—in one year, 86% of sales—were to participants in the company's business opportunity. 2015 WL 11118111, at *2–3. Here, the numbers are reversed; roughly 80% of sales are undisputedly to end users, while the remainder—roughly 20% of sales—are to BPs.

Similarly, the Ninth Circuit in *BurnLounge* emphasized the “sharp difference” in purchasing patterns between distributors and non-distributors as supporting evidence that the distributors in that case were motivated by rewards for recruitment, as opposed to product sales. 753 F.3d at 884–85. There, distributors—called “Moguls”—maintained eligibility for cash rewards through sales of packages, and data showed that Moguls bought packages at much higher rates than non-Moguls. *Id.* at 885 (“If package purchases were driven by the value of the merchandise included in the packages rather than by the opportunity to earn cash rewards, one would expect to see comparable numbers of Moguls and non-Moguls buying the same packages.”). That is not the case here, where sales of Neora's product are primarily to PCs. In addition, once the company in *BurnLounge* stopped offering the ability to earn cash rewards, revenues plummeted, decreasing from approximately $475,000 to $11,000 from June to August of the same year; the Ninth Circuit found that the “dramatic decline in revenue ... provides further evidence that the sale of BurnLounge packages was primarily directed at participants who were interested in the Mogul program, where it was possible to earn cash rewards.” *Id.* Here, where most Neora consumers do not participate in the Compensation Plan and are not eligible to earn rewards, there is no suggestion that eliminating the rewards program would result in a similar decline of revenues at such a precipitous rate.

***22** The FTC carries the burden to establish the *Koscot* test, and thus it is the FTC's obligation to show that Dr. Bosley's assumption applies, not Defendants' burden to show it does not. Defendants have presented some evidence that BPs purchases are ultimate user sales, whereas the FTC provides only an assumption to the contrary and its cited cases are inapposite. Given that this second element of the *Koscot*

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analysis hinges on the determination of whether BP purchases are or are not ultimate user sales, the Court declines to adopt a claim-dispositive assumption in light of the evidentiary record to the contrary. Accordingly, the Court concludes that Dr. Bosley's assumption that BP purchases never qualify as ultimate user sales to be unsupported by the evidence, and rejects it. [121]

The FTC's position is far less tenable in the absence of this assumption. In support of its claim that Neora operates as a pyramid scheme, the FTC points to Dr. Bosley's calculation that 96% of Neora BPs lose money and "walk away poorer than they started, having paid more into the company than they ever got out." [122] However, that statistic becomes less significant if one acknowledges that many BPs enroll in Neora without any intention of pursuing the business opportunity, and instead are only purchasing product for personal consumption at discount. Put differently, we may "walk away poorer than we started" after a trip to the grocery store, but because we obtained valuable goods or services in return for our money, that exchange is not characterized as a loss. Moreover, evidence was presented that, given the discounts, a BP may recoup the cost of the initial $20 Enrollment Kit after ordering at least $300 worth of product; for savings-seeker BPs, who would be purchasing the product regardless of the business opportunity, they recouped their payments through discounts, and thus suffered no loss. [123]

The existence of these types of BPs weigh against the finding of a pyramid scheme, at least as it was characterized by the Fifth Circuit in *Torres II*. 838 F.3d at 640 (characterizing pyramid schemes as, by definition, "operat[ing] by taking money from downline recruits ... who will never recoup their payments"). On this evidentiary record, it cannot simply be assumed that the 70% of Neora BPs who never made a sale or earned a commission are disappointed victims of an illegal pyramid scheme, simply because he or she never made a sale, recruited another BP, or earned a commission.

As stated, the FTC made no attempt to estimate or separate BPs' purchases for personal consumption versus those in pursuit of the business opportunity, which would be necessary to determine the magnitude of the rewards that implicate *Koscot*: those unrelated to the sale of the product to ultimate users, *i.e.*, purchases by BPs in pursuit of the business opportunity, either to resell or to maintain eligibility for rewards. Using PC purchases as a basis for comparison, Dr. Vandaele estimated that 90% of total product sales and 65% of BPs' purchases in 2021 were for personal consumption, *i.e.*, ultimate user sales. Thus, under Dr. Vandaele's calculations, of sales to BPs in 2021—consisting of 19% of Neora's total product sales—only approximately 35% constitute non-ultimate user sales that implicate the second *Koscot* factor.

***23** In its FTC's 2004 Advisory Opinion, the FTC acknowledged that internal product consumption by participants in a multi-level marketing business is not dispositive of whether the plan is a pyramid scheme; instead, the FTC stated that the "critical question" is whether revenues paying the commission to participants are generated from purchases of product "that are not simply incidental" to the purchase of the right to participate. *See* 2004 FTC Advisory Op. at 1. Here, no evidence was provided indicating that rewards or bonuses to BPs paid under the Compensation Plan are funded primarily by payments made by BPs for the right to participate in the venture, *i.e.*, by the $20 Enrollment Kit fee paid to enroll as a BP, or starter Product Pack purchases by BPs in pursuit of the business opportunity. Nor did the FTC provide evidence suggesting that Neora is funded primarily by those payments. *See id.* ("[A] multi-level compensation system *funded primarily* by payments made for the right to participate in the venture is an illegal pyramid scheme." (emphasis added)). As such, this is not the case where "[a]bsent sufficient sales of goods and services, the profits ... hinge on nothing more than recruitment of new participants (i.e., fee payers) into the system." *Id.* at 2. On the contrary, the evidence established that the vast majority of Neora's revenues come from sales to PCs, *i.e.*, end users, suggesting there *are* sufficient sales of goods such that Neora's profits do not hinge on the recruitment of new participants. [124]

The magnitude of sales to PCs goes to the second fundamental issue with the FTC's pyramid scheme theory, namely that it disregards the evidence that ultimate user sales are necessarily funding and driving the majority of rewards earned by BPs. Under the Compensation Plan, a BP earns no rewards or bonuses absent purchases by BPs or PCs in his or her downline, and because purchases by PCs constitute approximately 80% of Neora's sales, it is a reasonable inference, supported by the evidence, that those ultimate user sales are the primary source of sales that contribute to reward eligibility. [125] Put differently, because there are a significant number of legitimate paying customers outside of the Compensation Plan's incentives, the business does not depend on there being Peters to rob for the purpose of paying Paul, and there are not *solely* profits simply "by virtue of the participation of downline investors ... who lose money." *See* *Torres II*, 838 F.3d at 640.

In addition, although many of the rewards in the Compensation Plan are "locked behind" a wall that requires recruitment to unlock, many of those bonuses can—and the evidence suggests, do—rely at least partially on PC purchases. For instance, for August 2022, of the BPs who qualified for commissions (and thus were participating in the business opportunity), 8% had 9PCs, 5 to 6% of them had at least 6 PCs, and 32% of them received the 3UR Free bonus, which requires at least three PCs.[126] In addition, each of the BP ranks contains a personal volume requirement that must be met to achieve that rank, but that requirement may be met solely through sales to PCs.[127] Similarly, Dr. Vandaele calculated that in 2021, of the BPs who received commissions, 76% of them qualified as "active" with PC volume alone.[128] Thus, although eligibility for those rewards is predicated on recruitment, it is simplistic to say that those rewards are wholly "unrelated" to ultimate user sales in practice, particularly here where PC sales vastly outnumber purchases made by BPs in pursuit of the business opportunity. *See* *Whole Living, Inc. v. Tolman*, 344 F. Supp. 2d 739, 745 (D. Utah 2004) ("[T]he fact that the right to receive a commission originates from sponsorship does not necessarily mean that all subsequent commissions are based primarily on recruitment."). Instead, the consumer demand for Neora's products, as evidenced by the high percentage of revenue from PC purchases, indicates that Neora is largely paying rewards and compensation to participating BPs based on ultimate user sales. *See* 2018 FTC Guidance at 2 ("[T]he law requires that an MLM pay compensation that is based on actual sales to real customers ....").

***24** The FTC does not meaningfully address the magnitude of purchases by PCs, arguing instead that the Court should disregard PC purchases because *Koscot* does not discuss revenues. ECF No. 331 at 13–14. For the same reason, the FTC contends that the Court need not consider the potential for the scheme's "eventual collapse." *Id.* But such an approach would effectively end the pyramid scheme inquiry with a reading of the Compensation Plan and an evaluation of whether it is theoretically possible for a BP to earn recruitment-based rewards without individually making a single sale to an ultimate user. The Court refuses to slavishly look only to the Compensation Plan in isolation, with blinders on to the actual operational data and internal structure of Neora's business. *See* *Torres II*, 838 F.3d at 643.

Instead, the Court must look to how the business operates in practice. *See* *BurnLounge*, 753 F.3d at 883; 2018 FTC Guidance at 2. The fact that 80% of revenues come from ultimate user sales weighs heavily against a finding that Neora focuses exclusively or almost exclusively on recruiting as opposed to sales. *See* *Torres I*, 805 F.3d at 153. It also suggests that Neora is not in danger of eventual collapse, because it does not appear to sustain itself entirely on BP purchases and thus does not depend on the continual recruitment of new BPs for its continued existence. *See* 2004 FTC Advisory Op. at 1.

Moreover, Neora's training materials and publications do not reveal that Neora is emphasizing recruiting at the expense of sales or BP development.[129] In making this conclusion, the Court is not blindly counting documents or words, but instead evaluating the materials before it holistically to see whether Neora primarily encourages its BPs to pursue recruitment of BPs in lieu of sales. Review of the representative materials available to the Court—including Neora's trainings, product guides and brochures, marketing materials, and selling guidance—reveals that, although Neora does reference recruitment and provide training on its Compensation Plan and how to advance within it, recruitment of new BPs is not overemphasized in such a way so as to suggest that it is the business's primary focus.[130]

***25** In sum, the Court concludes that the FTC has not established the second element of the *Koscot* test. As a result, Neora is not operating as an illegal pyramid scheme, and accordingly, Defendants are not violating § 5 of the FTC Act on this basis.

B. Counts 2–4: Income and Product Claims

The FTC argues that Defendants are violating § 5(a) of the FTC Act by making deceptive representations that Neora BPs are likely to earn a substantial income (Count Two), and making misleading or unsubstantiated health claims about EHT (Counts Three and Four). The FTC contends that, for purposes of both the income and product claims, Defendants are legally responsible for misrepresentations by BPs, on the grounds that BPs are Defendants' agents. ECF No. 331. Thus, a threshold issue for Counts Two, Three, and Four is whether BPs are Defendants' agents, such that Defendants are liable for BPs' representations.

1. Preliminary Issue: Agency

The FTC argues that BPs should be considered Defendants' agents as a matter of law. However, the existence of an agency relationship is a question of fact. *See, e.g.*, *Exela Enter. Sols., Inc. v. Nat'l Lab. Rels. Bd.*, 32 F.4th 436, 446 (5th Cir. 2022); *Equilease Corp. v. M/V Sampson*, 756 F.2d 357, 363 (5th Cir. 1985), *on reh'g*, 793 F.2d 598 (5th Cir. 1986). As the party asserting an agency relationship, the FTC has the burden of proving it exists. *Wood v. Holiday Inns, Inc.*, 508 F.2d 167, 173 (5th Cir. 1975).

An agency relationship exists when an individual has either actual authority or apparent authority to act on behalf of another. Under federal common law, to determine whether actual authority exists, courts examine "the principal's control over the agent" and the "parties' consent to the agent's acting on the principal's behalf." *Christiana Trust v. Riddle*, 911 F.3d 799, 803 (5th Cir. 2018) (citing Restatement (3d) of Agency § 1.01 (2006)). "An essential element of agency is the principal's right to control the agent's actions," and "[t]he power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents." Restatement (Third) of Agency § 1.01.

In addition, "[a]pparent authority holds a principal accountable for the results of third-party beliefs about an actor's authority to act as an agent when the belief is reasonable and is traceable to a manifestation of the principal." *Id.* § 2.03. Whether a reasonable third party would believe the agent had authority to do a particular act, and whether that belief is traceable to a manifestation of the principal, are questions of fact. *Id.* Statements by the agent alone do not create apparent authority unless the agent's conduct has been directed by the principal. *Id.*

The Court concludes that there is insufficient evidence of an agency relationship between BPs and Defendants—whether actual or apparent agency—to hold Defendants responsible for any representations Neora's BPs are alleged to have made.

The FTC argues that Defendants control BPs by approving applications, disciplining and terminating BPs, prohibiting BPs from selling competing products, and restricting BPs to using only approved marketing materials. However, evidence was presented that Neora does not control and has no right to control how much BPs work (if at all), how much they spend on their pursuit of the business opportunity, or how they exercise their choice of work activities. [131] Indeed, the Court finds that the fact BPs may elect to completely forgo the business opportunity and not participate at all is significant; Neora has no ability to enforce performance, let alone mandate how and when BPs conduct sales. Thus, although Neora provides guidelines and instructions to BPs on how to conduct their businesses in a legally compliant manner, it cannot control whether, how, or when BPs choose to conduct business, weighing against a finding of control. *See Cardinal Health Sols., Inc. v. Valley Baptist Med. Ctr.*, 643 F. Supp. 2d 883, 889 (S.D. Tex. 2008) ("[T]he right of control ... includes the power *to set tasks* and to dictate the means and details of the agent's work to accomplish those tasks ...." (emphasis added)); Restatement (Third) of Agency § 1.01 ("[S]etting standards in an agreement for acceptable service quality does not of itself create a right of control.").

***26** In addition, the FTC does not discuss the consent element, and thus has not established that Defendants consented to BPs acting as their agents, or vice versa; the P&Ps specify that a BP is not an agent of Neora and has no authority to bind Neora to any obligation. *Id.* § 1.02 ("An agreement between or among parties may positively characterize their relationship as one of agency or assert a negation of agency."). BPs must agree to the P&Ps to enroll with Neora, and must agree to any updates or amendments to Neora's policies to continue being BPs. [132]

In support of its theory that BPs have apparent authority, the FTC argues that Defendants hold BPs out publicly as their sales force and require consumers to make purchases through them, and thus "[a]ny reasonable customer interacting with a Brand Partner would believe that the Brand Partner was speaking as a representative of Neora." [133] However, the FTC relies solely on attorney argument for support of this position, and as a result, there is not sufficient evidence in the record from which the Court could conclude what BPs' *customers* believe about BPs' authority vis-à-vis Neora, and whether that belief is based solely on the statements or conduct of BPs, or if it is traceable to a manifestation of Neora. *See id.* § 2.03. For Defendant Olson individually, the record is particularly thin; there is no evidence indicating that a customer would reasonably believe that any given Neora BP has the apparent authority to bind Olson personally, either individually or in his capacity as CEO, let alone any manifestation by him traceable to that belief.

The record contains numerous examples of statements by BPs—in the form of video trainings and social media posts—but as statements by the purported agents, this evidence alone cannot support a finding of apparent agency. Moreover, the fact that BPs sold Neora product does not qualify as a manifestation of Neora's intent. *Id.* § 3.03 ("The fact that one party performs a service that facilitates the other's business does not constitute such a manifestation.").

And although the FTC points to numerous cases finding an agency relationship in circumstances partially resembling these, the issue is a question of fact, and the FTC cannot sidestep its evidentiary burden simply by asking the Court to follow other cases. Moreover, as discussed, Neora permits its BPs considerable flexibility in conducting their businesses, if they choose to do so at all; the record does not contain sufficient evidence suggesting that all BPs conduct their business in similar enough ways as to support the Court making a global pronouncement of apparent authority. [134]

For the foregoing reasons, the Court concludes that the FTC has not carried its burden in establishing that Neora BPs acted with actual or apparent authority on behalf of Neora, and thus has not shown that BPs are not Neora's agents. As a result, the Court will consider only Defendants' statements for purposes of the FTC's income and product claims.

2. Income Claim

The FTC argues that Defendants are violating § 5(a) of the FTC Act by making deceptive representations that consumers who become BPs are likely to earn substantial income.

***27** A representation is "deceptive" under Section 5(a) when: (1) there was a representation, omission or practice (2) that was likely to mislead customers acting reasonably under the circumstances, and (3) the representation, omission or practice was material. *See* *FTC v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001); *see also* *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 164-65 (1984). Such representations may be express or implied. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 604 (9th Cir. 1993).

A representation, omission or practice is material if it "involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product." *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1201 (9th Cir. 2006). "Misrepresentations concerning anticipated income from a business opportunity generally are material and likely to mislead consumers because such misrepresentations strike at the heart of a consumer's purchasing decision." *FTC v. Freecom Comm'cns, Inc.*, 401 F.3d 1192, 1203 (10th Cir. 2005). This includes "ma[king] deceptive use of unusual earnings realized only by a few." *Nat'l Dynamics Corp. v. FTC*, 492 F.2d 1333, 1335 (2d Cir. 1974).

Courts examine the overall "net impression" created by the challenged representation. *FTC v. E.M.A. Nationwide, Inc.*,767 F.3d 611, 631–32 (6th Cir. 2014); *Vemma*, 2015 WL 11118111, at *6. The use of a disclaimer may not inoculate the harm of a misrepresentation if, despite the disclaimer, the consumer may reasonably believe that a statement of unusual earning potential represents typical earnings. *See* *Vemma*, 2015 WL 11118111, at *6; *see also* *Removatron Int'l Corp. v. F.T.C.*, 884 F.2d 1489, 1497 (1st Cir. 1989) ("Disclaimers or qualifications ... are not adequate to avoid liability unless they are sufficiently prominent and unambiguous to change the apparent meaning of the claims and to leave an accurate impression.").

The FTC argues that Defendants have previously represented and are representing that consumers can make a substantial income by joining the Neora business opportunity. For support, the FTC points to various Neora videos, audio recordings, magazines, live presentations, and social media posts, including videos and photos with high-earning BPs holding oversized checks, showing off luxury cars earned through the business opportunity, emphasizing the potential to earn multi-thousand-dollar "Live Better Bonuses," and celebrating the lifestyles of high-earning BPs through videos and publications like the *Success from Home* magazine. [135] Because it is undisputed that most Neora BPs earn nothing, the FTC contends that these representations about potential business income are both misleading and material, and thus violate § 5.

***28** The Court agrees with the FTC that some of its examples of income-based statements by Neora are problematic and misleading as to the amount of money typically earned by a Neora BP, and lack any curative disclaimers or qualifiers. However, in arguing that Defendants are making misleading income statements, the FTC primarily relies on evidence that is, in the Court's view, somewhat stale in light of other evidence reflective of Neora's recent operational practices. Such evidence includes exhibits that reflect the Nerium brand, and thus predate the 2019 rebranding to Neora, [136] or reference discontinued programs or rewards. [137]

The FTC does point to examples of alleged misrepresentations made by Defendants from 2019 and 2020, including two marketing videos, including one named "Better with Neora," Olson's *Neora Rhythm* book, a 2020 "Jumpstart Roadshow" training presentation for BPs, and a 2019 Neora blog post on the "Million Dollar Club" of top earners. In contrast to the earlier examples, however, statements regarding earning potential in these marketing videos are accompanied by a prominent disclaimer stating, in part, that Neora "does not guarantee any level of income for any Brand Partner," and "[t]he actual income of Neora Brand Partners varies," and directing the viewer to a URL to access Neora's full Income Disclosure Statement. [138]

The fact that the FTC relies primarily on older examples of alleged misrepresentations is significant. Earlier in this case, the Court observed that "allegations of past conduct can give rise to a reasonable inference of current or future violations, either in conjunction with other circumstances or where the past violations are extensive." *Fed. Trade Comm'n v. Neora LLC*, 552 F. Supp. 3d 628, 637 (N.D. Tex. 2021). In addition, the Court recognized the following factors to consider when deciding whether to issue an injunction based on past violations of the law:

> [T]he egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations.

Id. at 637–38 (quoting *United States v. Cornerstone Wealth Corp.*, 549 F. Supp. 2d 811, 816 (N.D. Tex. 2008)).

Thus, although proof of past violations can be relevant to whether an actor "is violating, or is about to violate" the FTC Act, for purposes of awarding injunctive relief, the probative value of these older Neora statements decreases in light of other evidence presented at trial indicating that Neora has updated and revised its policies regarding permissible income and income-related representations in its messaging. For example, Neora employees testified that Neora no longer describes BPs earning full-time income, and avoids using dollar amounts or terms such as "millionaires' club," "financial freedom," "residual" or "dream" income, or "dream lifestyle." [139] Instead, Neora now advertises earnings potential through the business opportunity as "modest supplemental income," and consistently uses income disclaimers on its materials. [140] Since 2016, Neora has stopped using oversized checks to recognize high-earning BPs, and has stopped using testimonials, lifestyle claims, and success stories, including those promulgated in the *Success from Home* magazines. [141]

***29** Moreover, Neora employees and Olson testified that these changes were adopted to align Neora's practices to signals and suggestions from the FTC regarding permissible and impermissible income claims, and to conform with guidance and suggestions from the Direct Selling Self-Regulatory Council, a self-regulatory body. [142] The Court notes the FTC has not yet promulgated a formal rulemaking providing guidelines as to how direct selling companies may describe earnings or income opportunities without running afoul of § 5.

With that context, the Court concludes that the FTC has not established that Defendants are violating or are about to violate § 5(a) of the FTC Act by making deceptive income claims, and the *Cornerstone Wealth* factors do not justify issuing an injunction based on Defendants' past violations of the law. *See* 549 F. Supp. 2d at 816. Specifically, the Court finds that the passage of time, coupled with Defendants' recognition of and explanation for the prior infractions and associated changes to Neora's practices—namely, lack of FTC guidance on permissible income statements, and prompt adjustments to Neora's practices when "tea leaves" from the FTC materialize—renders any Nerium-era misrepresentations largely irrelevant when assessing whether Neora is *currently* violating the Act. Instead, the evidence at trial establishes that Defendants aspire to abide by the law regarding permissible income claims, and in the absence of clear guidelines on what the law is, have revisited and revised their practices over time.

The more recent alleged misrepresentations pointed to by the FTC are lesser in number and do not justify an injunction. The FTC takes issue with Olson's description of his nickname "The Millionaire Maker" in his *Neora Rhythm* book, but the net impression of the cited passage admits that those types of results are atypical; indeed, Olson states in the same paragraph that "the great majority of people [he has worked with]—who have been offered exactly the same opportunities

—have gone nowhere."[143] Moreover, the more recent 2020 marketing videos contain more tempered descriptions of potential earnings—namely, descriptions like "successful business," "added security," and "extra income for your kids' activities," rather than specific dollar amounts—accompanied by large, clear disclaimers. No evidence was provided that, despite those disclaimers, a consumer might reasonably believe that those marketing videos promise the potential for significant earnings or a lavish lifestyle. *See* *Vemma*, 2015 WL 11118111, at *6.

The Court concludes that there is insufficient evidence that Neora or Olson are making or recently made extensive and routine misrepresentations about the likelihood that a BP would make substantial income. In the absence of any violations of § 5, the FTC's requested injunction on these grounds is unnecessary.

3. Counts 3 and 4: Product Claims (EHT)

In Count 3, the FTC asserts that Neora violated §§ 5(a) and 12 of the FTC Act by making misrepresentations about the efficacy of EHT—namely, claiming that EHT and/or Neora EHT prevent, reduce the risk of, or treat CTE, concussions, Alzheimer's disease, or Parkinson's disease. In Count 4, the FTC maintains that Defendants violated §§ 5(a) and 12 of the FTC Act by making claims misrepresenting that the effectiveness of EHT and/or Neora EHT has been scientifically established. Count 3's efficacy claim and Count 4's establishment claim are both evaluated under the same "net impression" standard applicable to Count 2. *POM Wonderful, LLC, v. FTC*, 777 F.3d 478, 490 (D.C. Cir. 2015).

***30** The FTC contends that Defendants claim EHT is scientifically proven to prevent and treat concussions, CTE, Alzheimer's disease, and Parkinson's disease. As evidence of recent violations, the FTC relies exclusively on statements posted on social media by Neora BPs, associating EHT with CTE, Alzheimer's, and other diseases.[144] However, as discussed, the FTC has not established that Defendants are liable for BPs' misrepresentations.

The FTC's remaining evidence consists of misrepresentations made by Signum in connection with the ME Sports product, including on the ME Sports website, and the Stocks' problematic statements at the April and September 2015 Get Real Conferences. However, none of the ME Sports materials have been used since 2015, no one at Nerium helped or contributed to the ME Sports websites or marketing materials, and the FTC concedes that the Stocks are not Defendants' agents.[145] Admittedly, the Stocks made improper efficacy claims at the April and September 2015 Get Real Conferences, but the evidence presented at trial indicates that, prior to the conferences, Defendants instructed the Stocks not to make medical claims on stage, responded with appropriate compliance messaging regarding appropriate statements to make about EHT after the fact, and took steps to avoid such statements happening again, including by preventing Dr. Stock from making any other live presentations sponsored by Neora.[146] Moreover, the FTC does not point to anything objectionable in Neora's current materials regarding EHT, including the packaging, messaging, or training to BPs on appropriate product claims.

In sum, the FTC seeks an order preventing Defendants from claiming that their products cure, treat, or prevent human disease. There is no evidence before the Court that Defendants are currently making such claims, or are likely to do so in the future. *AMG Cap. Mgmt.*, 141 S. Ct. at 1348 (§ 13(b) "focuses upon relief that is prospective, not retrospective"). Accordingly, the FTC's request for an injunction on these grounds is denied.

C. Means and Instrumentalities Claim

The FTC asserts that the defendants violated sections 5(a) and 12 of the Act through furnishing consumers with the "means and instrumentalities" to mislead others—namely, by disseminating materials misrepresenting: (a) BPs' ability to earn substantial income from participating in Neora's business opportunity (Count II); or (b) the efficacy and scientific basis of EHT and/or Neora EHT (Counts III and IV).

"Those who put into the hands of others the means by which they mislead the public, are themselves guilty of a violation of Section 5 of the [FTC] Act." *Waltham Watch Co. v. FTC*, 318 F.2d 28, 32 (7th Cir. 1963); *Vemma*, 2015 WL 11118111, at *7 (evidence presented that Vemma "provides the 'means and instrumentalities' for Affiliates to deceive consumers by providing them with promotional, recruiting and training materials containing false or misleading income representations").

The FTC contends that Defendants have created and promulgated deceptive marketing and training materials about the earnings potential of Neora's business opportunity and about EHT and EHT products, and has provided BPs with those alleged deceptive materials, who could use them to mislead.

***31** First, regarding EHT and Neora's EHT products, the FTC has identified no deceptive marketing and training materials created or promulgated by Defendants that are misleading or misrepresent the efficacy or scientific basis for statements made in connection with EHT. The FTC identifies nothing problematic with the EHT Brain Formula packaging, marketing, product guides, or brochures created by Neora, nor the product disclosures that Neora trains its BPs to use on social media posts when discussing wellness products. Accordingly, Defendants do not provide BPs with the "means and instrumentalities" to deceive consumers about EHT.

So too for the earnings potential of Neora's business opportunity. As with EHT, the P&Ps provide clear guardrails regarding permissible income statements that BPs must abide by or face discipline and termination, and Defendants provide training, guides, approved marketing, disclosure statements, and suggested language to BPs—including in publications like the Field Compliance Guide—that give BPs direction on how to discuss income and earnings compliantly. These materials are comprehensive; the Field Compliance Guide, as discussed, contains sample social media posts showing how disclaimer language must feature prominently and in close proximity to the income statement. The record also reflects that this training is continually reinforced and circulated to BPs, including through *Compliance Corner* updates and when the Neora Compliance Department contacts BPs to address noncompliant posts.

The FTC does not appear to challenge Neora's income disclosure statements, or its requirement that BPs include such disclaimers in statements purporting to make an income claim. Nor does the FTC quibble with Defendants compliance materials giving guidance on what constitutes an income claim. Instead, the FTC focuses on three pieces of evidence: a 2020 JumpStart Roadshow training for BPs, Olson's *Neora Rhythm* book, and the 2020 Better with Neora marketing video. ECF No. 331 at 10. However, as discussed, the Court has evaluated *Neora Rhythm* and the Better with Neora marketing video, and concludes that the net impression gleaned from those materials is not misrepresentative and does not violate § 5; thus, encouraging BPs to use such materials in pursuing their business likewise does not violate § 5. Regarding the JumpStart Roadshow presentation, testimony was provided that this presentation was an internal training for already-enrolled BPs hoping to expand their teams. [147] Although the FTC correctly points out that the presentation recites statements about $100 to $10,000 monthly income, that slide is accompanied by an income disclaimer statement and recitation of typical BP earnings. [148] The presentation does not encourage or direct BPs to advertise or recruit the Neora business opportunity based on such income figures, and the overall context of the presentation suggests that the reference to supplemental income is part of an overall goal-setting exercise. [149] Indeed, the presentation later reminds the audience not to make income claims or overpromise. [150]

Overall, the evidence at trial does not establish that Defendants provided BPs with the means and instrumentalities to deceive consumers. On the contrary, the record reflects a concerted and consistent effort for Defendants to inform and train BPs with the tools and knowledge to sell Neora products without making misleading income or product statements, and to find and correct missteps as they happened. Accordingly, the Court finds no violation of § 5 of the FTC on a means and instrumentalities theory.

IV. CONCLUSION

***32** For the foregoing reasons, the Court **ORDERS** that all of Plaintiff Federal Trade Commission's requests for relief in this case, including its request for injunctive relief, are **DENIED**. Judgment for Defendants Neora, LLC and Jeffrey Olson is **GRANTED**. The Court will issue a separate Final Judgment.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2023 WL 8446166

Footnotes

1 In August 2021, the Court granted Defendants' Motion for Judgment on the Pleadings as to the FTC's § 13(b) claim for monetary relief and the recovery of sums for individual consumers, on the grounds that such relief is foreclosed by the Supreme Court's decision in *AMG Capital Management, LLC v. Federal Trade Commission*, 141 S. Ct. 1341 (2021). ECF No. 82. Accordingly, the only remaining relief sought by the FTC is a permanent injunction.

2 *See* ECF No. 297 at 7; Ex. 1445; Tr. 5-B (ECF No. 322) at 60–68. Specifically, Neora's products consists of skincare, including the Age IQ line and Neora's bestselling product, the Age IQ Night Cream; "wellness" products, including EHT Brain Formula, Youth Factor Complete Vitality Complex, and Energy+ and Sleep+ Wellness Chews; the ProLuxe haircare line; and NeoraFit, a line of supplements and protein powders directed towards weight management. *See* Tr. 5-B at 60–68.

3 *See, e.g.*, Ex. 1423 § 1.03 (2021 Policies and Procedures) ("Brand Partner Obligations and Rights. A Brand Partner is authorized as an independent contractor to sell Neora's products and services and to participate in Neora's Compensation Plan. A Brand Partner may sponsor new Brand Partners into Neora.").

4 *See* Ex. 1338 (PC and retail customer Applications).

5 *See* Ex. 1338; Tr. 1-A (ECF No. 314) at 62–63; Ex. 1442 at 15 ("SmartShop Order (SSO): A pre-selected product order that is scheduled to be created, paid and shipped at a specific time each month. SmartShop Orders allow products to be purchased at a discounted price."). SSOs were previously referred to as an "Auto-Delivery Order" or "ADO." *See, e.g.*, Tr. 5-A (ECF No. 321) at 62–63. On average, a PC will receive about a 30% discount on product as opposed to a retail customer. Tr. 4-A (ECF No. 319) at 58.

6 *See, e.g.*, Tr. 4-A at 57-58; Tr. 5-B at 78–80; Ex. 1036 ("Neora Preferred Customers Reward Program" flyer).

7 Ex. 1050 ("2021 Agreement"); Tr. 4-A at 74. The record contains additional older versions of the Brand Partner Application and Agreement form. *See* Exs. 663, 687, 1137, 1341. The Court will rely primarily on the 2021 version of the Application and Agreement; the Court will note any differences with prior versions to the extent they are relevant.

8 *See* 2021 Agreement at 1. The Enrollment Kit includes a personal e-commerce website, an online business center, a copy of *The Slight Edge*, by Olson, a Neora Success Planner, product brochures, digital marketing materials and training, social media training, and a 30-day free trial to Neora Edge, a "social media digital marketing tools, product sampling system," which afterwards costs $29.95 per month. *Id.* The Policies and Procedures Manual states that the $20 fee "is not a service or franchise fee, but rather is strictly to offset costs incurred by Neora for educational and business materials required for a Brand Partner of Neora." Ex. 1423 at 2; *see also* Tr. 4-A at 62 ("Q. Okay. Why does the company charge $20? A. To cover the costs of that, of what they get. Q. Do you make money on that? A. No, we do not."). Neora's Policies and Procedures also refer to the Enrollment Kit as a "Brand Partner Launch Kit." *See, e.g.*, Ex. 1423 at 2.

9 *See* 2021 Agreement. The parties and witnesses also occasionally use the term "Starter Pack," which the record indicates can refer to both the $20 Enrollment Kit, or the more expensive Product Packs. *E.g.*, Tr. Vol. 1-B (ECF No. 315) at 109 ("Q. And according to this table, what percentage of Brand Partners purchased Starter Packs that cost $199 and up? A. Eighty-seven percent."); Tr. 3-A (ECF No. 317) at 10 ("Q. To become a Brand Partner, a person has to buy either a Starter Kit or an Enrollment Packs right? A. The only requirement is to -- the Starter Kit. Q. And that cost $20? A. Yes."); *id.* at 29 ("Q. And the Starter Kit is the $20 one we talked about earlier. A. Now, yes.").

10 *See* 2021 Agreement. The record contains the 2021 versions of the Policies and Procedures Manual (Ex. 1423) and the Compensation Plan (Ex. 1442), as well as prior versions of both documents. *See* Ex. 1419 (2011 P&Ps); Ex. 1420 (2015 P&Ps); Ex. 1421 (2017 P&Ps); Ex. 2 (2019 P&P); Ex. 1422 (2019 P&Ps); Exs.

604, 1285 (2011 Compensation Plan); Exs. 603, 1286 (2012 Compensation Plan); Exs. 602, 1287 (2014 Compensation Plan); Ex. 1288 (2015 Compensation Plan); Exs. 601, 700, 1289 (2016 Compensation Plan); Exs. 533, 1290, 1291 (versions of the 2017 Compensation Plan); Exs. 600, 1291 (2019 Compensation Plan); Exs. 1, 437 (2020 Compensation Plan). The record also contains multiple versions of the 2021 Plan. *See* Exs. 245, 1069, 1442, 1444. The Court will primarily rely on the 2021 versions of the P&Ps and Compensation Plan contained in Ex. 1423 ("2021 P&Ps") and Ex. 1442 ("2021 Comp. Plan"), respectively; the Court will note any differences with prior versions to the extent they are relevant.

11 2021 P&Ps §§ 1.01–.02.

12 The Compensation Plan refers to the "Genealogy Tree" in describing Neora's overall structure of how and where BPs are placed relative to one another. *See, e.g.*, 2021 Comp. Plan at 15–16. In this structure, "Downline ... refers to the Brand Partner(s) below another Brand Partner in the genealogy," and "Upline ... refers to the Brand Partner(s) above a new or existing Brand Partner in the genealogy." *Id.*; *see also* Tr. 1-A at 62 ("So if I recruit people under me and those people recruit people under them, that would be my downline. The person who recruited me is my upline. And, of course, they might have people above them as well, and that would be upline to them.").

13 2021 P&Ps §§ 3.01, 3.03.

14 2021 P&Ps § 3.01.

15 2021 P&Ps § 9.03 ("Stockpiling Prohibited. The success of Neora depends on sales to the ultimate consumer and all forms of stockpiling are strictly prohibited including, but not limited to, purchases of products primarily for purposes of qualifying for additional compensation. Neora recognizes that Brand Partner will purchase products for Brand Partner's own use, however, Neora strictly prohibits the purchase of products in unreasonable amounts to attempt to qualify for advancement in the Compensation Plan.").

16 2021 P&Ps § 9.04 ("70% Rule. To qualify for commissions and bonuses, Brand Partner shall certify on the product order form that the Brand Partner has sold to non-Brand Partner consumers or used at least 70% of all products previously purchased. Brand Partners placing telephone orders to Neora are also required to comply with this rule and may be requested by Neora to verify compliance. In its effort to support and enforce the 70% Rule, Neora, on a quarterly basis, will conduct random audit verification follow-ups. Representatives of Neora will contact Brand Partners to further verify compliance with the 70% Rule. Brand Partners should maintain records and be prepared to assist Neora representatives in their task.").

17 2021 P&Ps § 9.05.

18 2021 P&Ps § 9.27.

19 2021 P&Ps § 9.06. The Agreement contains a similar prohibition. *See* 2021 Agreement at 3 ("PREFERRED CUSTOMER RULE: A Preferred Customer must personally opt in to the monthly Smart Shop Order Program. Invalid Preferred Customer orders are defined as orders submitted as Preferred Customer orders for qualification purposes without the written authorization from the customer. If a Neora Brand Partner submits a Preferred Customer order without the customer's consent, the Brand Partner will be subject to disciplinary action, including termination. Preferred Customer orders cannot be paid by or shipped to a Neora Brand Partner for any reason, no exceptions.").

20 2021 P&Ps § 9.01.

21 2021 P&Ps § 12 ("AS A BRAND PARTNER, I AGREE THAT: ... 12.06 I will not make any diagnostic, therapeutic, or curative claims for Neora's products. I will not make any claims not contained in official

Neora literature. I will represent only that "each body is unique and responds uniquely to different products," remembering that even my personal experience with the product may be interpreted as an "extension of product labeling claims" if I use those experiences as a sales device. 12.07 I will make no income claims or representations regarding Neora Compensation Plan, remembering that ideal projections of Neora Compensation Plan are unrealistic. No network is grown in a perfect geometric progression and therefore it is impossible to predict incomes. Further, a Brand Partner's success depends on many variables, such as the amount of time committed to his/her business and the degree of organizational ability.").

22 2021 P&Ps §§ 7.05–.06.

23 2021 P&Ps §§ 4.02–.03.

24 2021 P&Ps § 10.06. The P&Ps define "reasonable commercial terms" as meaning "the repurchase of marketable inventory within twelve (12) months from the Brand Partner's date of purchase at not less than 90% of the Brand Partner's original net cost less appropriate setoffs and legal claims, if any." *Id.* In addition, "currently marketable" products do not include opened products, those for which the shelf life has passed, or seasonal, discontinued, or special promotional products not subject to the repurchase obligation. *Id.* The Agreement likewise provides that BPs have the right to terminate or cancel their BP position at any time, and after termination, a BP has "the right to return, for repurchase on commercially reasonable terms, currently marketable inventory—including company-produced promotional materials, sales aids and kits." *See* 2021 Agreement at 3.

25 *See generally* 2021 Comp. Plan; Tr. Vol. 4-B at 47–48.

26 2021 Comp. Plan at 2.

27 2021 Comp. Plan at 16; *see also* Tr. 1-A at 66 ("[W]e often see ... Qualifying Volume, and that is sort of the amount that you need in order to ... qualify for rewards. We can think of that is [sic] approximately dollars, although it isn't always exactly a one-to-one in this case."). Neora's expert, Dr. Vandaele, testified that products are each assigned an associated volume so that, regardless of currencies and currency fluctuations, sales of the product will have the same impact on a BP's compensation under the Compensation Plan regardless of whether the sale occurred. *See, e.g.*, Tr. 4-B (ECF No. 320) at 151 ("[Volume is not] a dollar amount.... [T]he idea was that there was an arbitrary volume number because that's the same volume number worldwide. So that if a product is $92.00 in the United States and $132.00 in Canada, it's 80 volume in both countries, so that when the comp plan is executed it is uniform.").

28 Ex. 1441 at 1. The Price List further provides that "CV for individual items can change based on order discount given at point of sale." *Id.* at 2.

29 2021 Comp. Plan at 4. The Compensation Plan explains that the BPs and PCs, each with associated qualifying volume, must be enrolled within the BP's first 30 days to earn the bonus, but that the bonus can be earned multiple times within the BP's first 60 days. *Id.* In prior versions of the Compensation Plan, the 1-2-3 Bonus was called the "Fast Start Qualify" bonus, and previously required that the BP enroll three new BPs to qualify. *See* Tr. 1-A at 68.

30 The Director Bonus can only be earned within a BP's first three months. 2021 Comp. Plan at 8.

31 *See, e.g.*, Ex. 1441. For each Neora product, the Price List recites five separate prices: the retail price, and a "one time" and "SSO" price depending on whether the purchaser is a BP or a PC. For example, the 2022 Price List states that Neora's Age IQ Night Cream has a retail price of $120 per bottle. *Id.* A PC may make a one-time purchase of the Night Cream for $102, or set up a recurring SmartShop order for the "SSO" price of $92 per bottle. *Id.* Similarly, a BP may purchase the Night Cream for a one-time price of $92 per bottle, or

$82 per bottle if the BP enrolls in a recurring SmartShop order. *Id.* Thus, if a Retail Customer made a one-time purchase of one bottle of the Age IQ Night Cream, the BP would earn the difference between the $120 retail price and the $92 BP one-time price, *i.e.*, a retail profit of $28.

32 2021 Comp. Plan at 5. The P&Ps further state that "[a]lthough Neora provides a suggested retail price as a guideline, [a] Brand Partner may sell Neora products at whatever retail price they and their customers may agree upon, if the price is not below the Preferred Customer price." *See* 2021 P&Ps § 9.14. No additional commissions are paid out on sales that the BP makes from his or her personal inventory. 2021 Comp. Plan at 5.

33 2021 Comp. Plan at 5. The Compensation Plan refers to this type of sales reward as "Personal Sales Commissions," or "PSC." *Id.* BPs may earn 5% in PSC on sales between $300–$1499; 10% commissions on sales between $1500 and $2999, and 15% commissions on all sales exceeding $3000. *Id.* In previous versions of the Compensation Plan, the threshold to be qualified to earn commissions was lower, *i.e.*, 200 units, but the BP was only entitled to earn commissions on the sales that exceeded the threshold. Tr. 1-A at 72–73. Under the current Compensation Plan, once the BP hits the threshold of $300 in sales, the BP is entitled to earn commissions on the entire amount of sales, not simply the amount in excess of $300. *Id.*

34 2021 Comp. Plan at 6. The First Order Bonus is a simplified version of a previous bonus in prior versions of the Compensation Plan, referred to as the "Customer Acquisition" bonus. Tr. 1-A at 73–74.

35 2021 Comp. Plan at 6. For example, a BP who enrolls or maintains 6 PCs with a minimum 55 QV each, and a total of at least 500 PQV from the BP's personal customers' orders will result in a bonus of $50. *Id.*

36 2021 Comp. Plan at 6–7. For example, a BP will earn a $200 bonus if he or she has at least personally enrolled three BPs that become 3UR Free qualified in a monthly period. *Id.* If those three BPs become PPC Bonus earners—*i.e.*, have personally enrolled at least 3 PCs—the BP will earn a $500 reward. *Id.*

37 2021 Comp. Plan at 4; *see also* Tr. 1-A at 68–69. Specifically, the BP must have an active personal SmartShop Order of at least 80 QV, and at least three PCs, each with fully paid SSOs, with a total of 210 QV from all of the BP's customers for that month; if so, the BP will receive a credit equal to one-third of all the BP's PC orders, not to exceed $140 per month. 2021 Comp. Plan at 4. The parties' experts disagree on how to treat the 3UR Free reward for purposes of analyzing the compensation plan; Dr. Bosley characterizes the 3UR Free reward as a reduction in expenses, whereas Dr. Vandaele, in parts of his analysis, treated the credit akin to income, i.e., a cash reward, on the grounds that Neora includes it as income on 1099 forms issued to BPs. *See* Tr. 1-B at 14; Tr. 5-A at 109.

38 2021 Comp. Plan at 8. To qualify for the Neora Gives Back program, new BPs must be active and generate 200 PQV within their first 30 days, or can qualify as being "Paid As a[n] Elite Brand Partner" or higher. *Id.* Information regarding the Neora Gives Back program is also provided to BPs in a program flyer (Ex. 1071) and in the BP Success Planner. *See, e.g.*, Ex. 1084 at 33.

39 *See* 2021 Comp. Plan at 13 (rank qualifications), 15 (definition of "Rank"). BPs begin with the rank of "Brand Partner," and may progress to more advanced ranks once certain volume and team structure benchmarks are met. *Id.* at 13. For instance, an active BP can advance to the rank of "Brand Partner Plus" by having one "Active Leg" in his or her "Enrollment Tree"—*i.e.*, by enrolling one new BP into Neora—without having to increase the BP's personal volume. *Id.* The Compensation Plan explains that a "leg" is a portion of a BP's organization, starting with one of their "first-level" BPs. *Id.* at 15. For example, if a BP enrolls ten BPs into Neora, he or she has ten "first-level" BPs corresponding to ten legs in the BP's enrollment tree. *Id.* If any of those first-level BPs themselves enroll a BP, that newly-enrolled, "second-level" BP will become part of the downline leg of the original enroller, and so on. The Compensation Plan provides that rank advancements

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are partially based on the total volume generated in each leg, and when a BP enrolls a new BP, the enroller may elect to either create a new leg in his or her tree, or place the new BP under an existing leg, to increase the volume in that leg. *See id.* Thus, the Compensation plan distinguishes between a BP's "enrollment tree"—consisting of all first-level BPs that the BP has personally enrolled—and the BP's "placement tree"—where those same BPs may be placed in an existing leg so as to increase the volume of that leg. *Id.* at 14. For ranks beyond Brand Partner Plus, the BP must meet certain thresholds for both Leadership Qualifying Volume (based on the BP's downline enrollment tree) and Group Qualifying Volume (based on the placement tree). *Id.* at 13. Group Qualifying Volume includes the BP's own personal purchases, but no more than 2000 in PQV from personal purchase can count towards Group Qualifying Volume. *Id.*; *see also* Tr. 1-A at 80–81.

40 2021 Comp. Plan at 8. Eligibility is based on rank and whether the enrolling BP is in their enrollment month at the time that they enroll the new BP. *Id.* Previous versions of the Compensation Plan included a "pack bonus," which awarded the enroller a bonus if the newly-enrolled BP purchased a Product Pack. *See* Tr. 1-A at 78.

41 2021 Comp. Plan at 8. Specifically, a BP will earn a $200 bonus if he or she advances to Director within two months, and $100 if he or she advances in the third month. *Id.*

42 2021 Comp. Plan at 9.

43 2021 Comp. Plan at 10.

44 2021 Comp. Plan at 10. Additional information regarding the Luxury Car Bonus is provided to BPs in the Luxury Car Bonus Packet. *See* Ex. 1083.

45 Givens Depo. (ECF No. 311) at 95:10–23; Tr. 5-A at 43, 80–82; Tr. 6-A (ECF No. 323) at 60–61.

46 2021 Comp. Plan at 11.

47 2021 Comp. Plan at 12.

48 Tr. 5-B at 60; Exs. 1038, 1040, 1037.

49 For example, Neora provides BPs with a "Success Planner" (*e.g.* Ex. 1084), a "New Brand Partner Game Plan" (Ex. 1042), a "Social Tracker" for tracking social media engagement (Ex. 1055), and guides and training on using social media to grow their business (*e.g.*, Exs. 678, 1064, 1066).

50 Such marketing materials include social media graphics, reels, video content for social media, marketing videos, and flyers. Tr. 5-B at 54; *see, e.g.*, Ex. 1036.

51 Compliance documents are created as a tool to explain Neora's policies and procedures to BPs. Tr. 4-A at 17–18. Such documents include the *Compliance Corner* newsletter, both the quarterly and monthly email editions. *E.g.*, Tr. 4-A at 16–18; Exs. 1046, 1048, 1059, 1079 (quarterly edition); Ex. 1026, 1028, 1030, 1033, 1044, 1049, 1085, 1347–74 (email edition). In the quarterly *Compliance Corner*, Neora covers compliance topics required under regulations promulgated by the Direct Selling Association, as well as Neora's own guidelines. Tr. 4-A at 16–18. In addition, the Neora compliance department also sends out shorter, monthly *Compliance Corner* updates via email, intended to address hot topics or trends happening in the field. *See id.* ("[I]f we're seeing a lot of certain types of violations, we'll cover that [in the monthly edition]."). Other compliance-related documents include the Field Compliance Guide (Ex. 1462) and the P&Ps. In addition, various selling guides include provisions on compliance; for example, the "Neora Social Selling System," which describes how to use Facebook and Instagram for selling purposes, includes several pages on "Creating Compliance Content." *See* Ex. 1064 at 14–15 ("Any content involving Neora wellness products should not make any medical claims, should not mention any medical conditions, or claim to replace any prescriptions."); *see also* Ex. 1066 at 3 (Neora Social Selling System Quick Guide) ("9. DO. Be compliant. Check the Neora Policies & Procedures in

your Back Office if you are questioning a post, story or video prior to posting. Never make medical or income claims in your post.").

52 *See, e.g.*, Exs. 722–24, 443–44.

53 *E.g.*, Tr. 2 (ECF No. 316) at 129; Tr. 3-B (ECF No. 318) at 13; Tr. 4-A at 76; Tr. 4-B at 23, 34; Tr. 5-B at 42–44. The Back Office is described as a personalized "business account center" for BPs, where they can access marketing and training materials, contact Neora support, and review customer reports. Tr. 5-B at 42–45. The Back Office also contains approximately 100 training videos for BPs to watch. *Id.*

54 *See, e.g.*, Ex. 1385.

55 Tr. 5-B at 46–49; Ex. 1399 (2015 guide); Ex. 1443 (2016 guide); Ex. 1410 (2018 guide); Ex. 1339 (2021 guide).

56 Tr. 5-B at 47–48.

57 *See generally* Ex. 1339. For example, for EHT Brain Formula, the 2021 product training guide lists key ingredients and their associated function, instructions for taking EHT Brain Formula once a day in the morning with food, and describes the purported benefits of the supplement to "help[ ] promote better cognitive function and overall brain health," accompanied by a disclaimer that "[t]hese statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure or prevent any disease." *Id.* at 17. Although the product training guide lists clinical trial results for other Neora products—for example, the guide states that in independently conducted clinical trials, 100% of participants had significantly smoother skin texture after using the Age IQ Night Cream—the guide recites no such results for EHT. *Id.* at 4.

58 Tr. 5-B at 51–52; Ex. 1342 (2016 brochure); Ex. 1343 (2018 brochure); Ex. 1161 (2021 brochure); Ex. 1031 (2022 brochure).

59 Ex. 1462 (2022 Guide).

60 For example, under "Best Business Practices," the Field Compliance Guide instructs BPs to state realistic results about the potential for BPs to earn "modest supplemental income," be clear that any rewards were the result of the BP earning them, set practical expectations, and use proper disclosures. Ex. 1462 at 2. The Guide contains examples of "SAY THIS ... NOT THAT," and screenshots of compliant social media posts. *E.g.*, *id.* at 4–5.

61 *See, e.g.*, Ex. 1463 (2022 Income & Product Disclaimers); Tr. 4-B at 18–20 (testimony of Deborah Heisz) ("If you want to point out an earnings statement, you can point our earnings disclosure which has what we're comfortable sharing about the earnings of Brand Partners in the company."). Both the Field Compliance Guide and the Income & Product Disclaimers document are sent to BPs whenever the Neora Compliance Department reaches out about a violation. Tr. 4-A at 18–19. The record contains previous versions of the Income and Product Disclaimers document. *See* Ex. 24 (2020); Ex. 1024 (2021).

62 Ex. 1463 ("From January 2021–December 2021, 40.1 % of Active US Brand Partners earned cash commissions and 59.9% did not earn any cash commissions. The average annual gross cash earnings of Active US Brand Partners was $1,358.").

63 Ex. 1463 ("Qualifying Brand Partners can choose to earn a Car Bonus in cash or an amount to be applied toward a monthly payment on an approved vehicle. Of our 34,408 Active Brand Partners in 2021, 1.9% earned a Car Bonus for one month or more. Brand Partners must meet eligibility requirements to earn the Car Bonus each month.").

64 Ex. 1463 ("Out of 34,408 Active Brand Partners, 397 earned our incentive trip to Tulum in 2021.").

65 Ex. 1463 ("These statements have not been evaluated by the Food and Drug Administration. This product is not intended to diagnose, treat, cure, or prevent any disease.); *id.* ("When used in conjunction with a calorie-controlled diet and exercise program. Individual results may vary.").

66 *See, e.g.*, Ex. 1462 at 4. For example, the Field Compliance Guide states that BPs should not say "Neora gave me a 5-star, all-expense-paid trip to Tulum!" and instead, a compliant post would say "I worked hard and earned an amazing trip for two to Tulum with Neora!*," accompanied by the Trip Disclosure Statement stating that "Out of 34,408 Active Brand Partners, 397 earned our incentive trip to Tulum in 2021." *Id.* at 4–5. The Guide also contains guidance on where to place the disclosure statement to be compliant, focusing on the prominence of the disclosure, and its placement in proximity to the relevant income or product claim. *Id.* at 4.

67 *See, e.g.*, Ex. 149b (Earnings Information website as of May 28, 2021). The record contains similar earlier Nerium income declarations. *See* Ex. 1428 (2012 Nerium Income Declaration); Ex. 448 (2013 Nerium Income Declaration); Ex. 447 (2017 Nerium Income Declaration).

68 Tr. 3-B at 47–48, 59–60.

69 Tr. 4-A at 71–72, 105–06; 2021 P&Ps §§ 1.05, 9.03.

70 Tr. 3-B at 107–08.

71 Tr. 3-B at 53–55, 92–94. The terms are updated and revisited for new events and depending on current events, such as the COVID-19 Pandemic. Tr. 4-A at 24–25.

72 Tr. 3-B at 54–55.

73 Tr. 3-B at 56; Ex. 1102, 1104, 1121, 1127 (templates for communications sent to BPs by the Compliance Department to address income and product claims). For example, testimony was given indicating that a BP was contacted to stop calling Olson "The Millionaire Maker." Tr. 3-B at 83.

74 Tr. 3-B at 142.

75 Tr. 3-B at 56–61; Tr. 4-A at 21–22; *e.g.*, Exs. 15, 17, 22, 1383–84, 1389–90, 1451–62, 1466–68. Neora's Compliance Officer testified that, for the July to September quarter of 2020, 633 products claims were resolved and 111 income claims were resolved. Tr. 3-B at 61.

76 Tr. 3-B at 64–65; 2021 P&Ps §§ 4.02–.03.

77 *See* Ex. 1463 ("From January 2021 - December 2021, Neora had 34,408 Active US Brand Partners."); Tr. 4-A at 52 ("Q. How many Brand Partners does Neora have in the United States? A. Around 35,000."); Tr. 4-B at 7 ("THE COURT: How many Brand Partners did you have in 2020? THE WITNESS: Approximately 35,000."); Tr. 5-A at 27 ("[T]he number of Brand Partners, for example, 2021, there was 31,000 ... Brand Partners ...."); Demonstrative Ex. 1440F at 4 (In 2021, "Total BPs w/ Product Purchase" is 31,460).

78 *See* Tr. 5-A at 29–30, 85; Tr. 1-B at 64; Demonstrative Ex. 1440F at 4; Ex. 622 at 2. If a BP has no activity in their account for 6 months, *i.e.*, has not bought product or made a sale, Neora will terminate the account in accordance with the P&Ps. Tr. 4-A at 82–83; 2021 P&Ps (Ex. 1423) § 2.02 ("Once a Brand Partner has been enrolled for a complete year, they are subject to termination if there has been no activity on their account within the past six (6) months (180 consecutive-days); .... A Brand Partner that does not renew by the renewal date as provided herein shall be deemed to have voluntarily terminated their Brand Partner position relationship with Neora and will thereby lose their Brand Partner position, ..."). However, Nerium did not begin this practice

until 2017, and thus prior to that time, the total number of BPs was much higher, as it included inactive BPs. *See* Tr. 4-A at 82–83; Tr. 4-B at 7–8 ("[I]n 2015 we had more than 125,000 [BPs], because we had not yet begun the process of purging Brand Partners who had become inactive.").

79 *See* Tr. 5-A at 27; Demonstrative Ex. 1440F at 4 (showing the number of Preferred Customers was 163,451 in 2021, 162,122 in 2020, and 162,938 in 2019).

80 Ex. 1318; Demonstrative Ex. 1440F at 4.

81 Tr. 1-B at 109–10; Ex. 878 ¶ 15. The FTC's data analyst, Ms. Miles, calculated tenure based on the number of months between their first and last order. Ex. 878 ¶ 15. However, there are certain assumptions in Ms. Miles's calculations that the Court determines renders these calculations less reliable with respect to certain individuals, which thus calls into question the reliability of Ms. Miles's calculation of median tenure as a whole. First, despite having enrollment date data available (*e.g.*, Ex. 878 ¶ 10), Ms. Miles used the date of first order to calculate tenure of BPs, even though elsewhere Ms. Miles calculates that at least 13% of BPs do not purchase any Starter Pack when they enroll (Ex. 878 ¶ 14), and thus potentially do not make any purchase until some time after enrolling. Second, and more significantly, many people start as a PC and eventually enroll as a BP to get the more significant discount. *See, e.g.*, Tr. 3-A at 106; Ex. 1323 (excerpt of Dr. Vandaele's report, indicating in 2021, 30% of newly enrolled BPs switched from being PCs). Ms. Miles testified that, for such individuals, her calculations would credit all that time—time spent both as a PC and as BP—as time spent as a BP, provided it was under the same "Customer ID," but Ms. Miles did not have any understanding whether PCs who transition retain the same Customer ID. Tr. 2 at 18–19.

82 Tr. 5-B at 32–33.

83 *E.g.*, Tr. 4-A at 62–63 ("I've talked to people who joined just to get the free product, meaning they joined because they wanted to get 3UR Free because they enjoyed our products and they saw it as an opportunity to potentially not have to pay for the product.").

84 *E.g.*, Tr. 4-A at 63 ("Other Brand Partners join just to get the product, the product at a discount."); Tr. 5-B at 71 (discussing how BPs have access to special sets and discounts only available to BPs); Tr. 3-A at 106–07.

85 *E.g.*, Tr. 4-A at 63 ("Some of them join because they, you know, they like the personal development aspects of our -- of our business or our company.").

86 *E.g.*, Ex. 673 at 33 (2015 BP Experience Baseline Study) ("New BPs look to Nerium to solve income needs.").

87 Ex. 1147 ("LRW Survey") at 1; *see also* Ex. 1142–46 (LRW Survey data). Although the FTC objected to the admissibility of the LRW survey under Federal Rule of Evidence 703 and hearsay grounds, the Court admitted the survey "for what it is worth." Tr. 4-B at 147–49. The survey invited all former and current Neora BPs to participate, with the exception of former Neora BPs who were terminated for cause, and current and former BPs who had not opted in to email communications from Neora. There were 361 total respondents to the 2022 Survey: 235 current BPs and 126 former BPs. LRW Survey at 1.

88 LRW Survey at 2–3.

89 Ex. 673. Only a PowerPoint summary of the 2015 study was available at trial, and the underlying data was not presented; Amber Rourke, Chief Sales & Marketing Officer for Neora, did not recognize the study and was not familiar with who conducted it. Tr. 5-B at 34–35. The 2015 study states it was offered to a stratified random sample of US BPs. *Id.* at 4. There were 2,566 respondents, including 745 "new BPs." *Id.* at 6.

90 Tr. 3-A at 18, 106–07 ("Q. What about people who sign up and just buy product? Is that in that 70 percent [of BPs who do not sell product]? A. Yeah. That's a big part of –It's a really big part of our business. It might

not be in some other companies, but it's called a 'savings seeker.' And when you can join the company for just $20 as a Brand Partner and then get all the discounts that come with being a Brand Partner and get the ability to do 3UR Free because you can't do 3UR Free legally with PCs but with Brand Partners. There's a lot of people who will decide instead of being a PC, they'll become a BP because they get a deeper discount on products."); Tr. 4-A at 70–71 ("[W]e have Brand Partners who've been buying product for years that have never done anything else and, you know, it's presumptive but the only logical conclusion is that those people are savings seekers. And there's other Brand Partners who've flatout said they're not interested in building a business or -- or doing anything other than buying product.").

91 Tr. 4-A at 70–71.

92 *E.g.*, Tr. 3-A at 106–07 ("We have a lot of PCs that, after time, convert to Brand Partners because it's just $20 to get the deeper discount that you can get as a Brand Partner.").

93 *E.g.*, Ex. 1323; Demonstrative Ex. 1440F at 15. The data provided by Dr. Vandaele indicates that the number of PCs switching to BPs as a percentage of total newly enrolled BPs has increased over time, but has consisted of at least 20% of all newly enrolled BPs since 2017. Ex. 1323.

94 Tr. 4-B at 102; Tr. 5-A at 17–18; Ex. 1316; Demonstrative Ex. 1440F at 2. Non-product sales include Enrollment Kits, fees, subscriptions, such as Neora *Edge*, meetings, promotions, donations, and tools purchases. Ex. 1316. In 2021, 95% of Neora's revenues came from product sales; 3% came from enrollment product packs/upgrades, and 2% from non-product sales. *Id.*; Demonstrative Ex. 1440F at 2.

95 *See* Tr. 4-A at 56–57. Neora tracks retail sales made through the Neora website, but has no records of sales made by a BP to a retail customer out of the BP's own personal inventory. *Id.*

96 Tr. 4-A at 83, 94, 124; Tr. 5-A at 12–13 ("[W]e had access to what the Preferred Customers were directly buying. And again, just looking at those data in 2021, that amounted to 75%."); Ex. 1316. The data indicates that, from 2012 to 2021, 59% percentage of all non-enrollment product sales were to PCs.

97 Tr. 1-B at 33–34.

98 Ex. 1316. The data indicates that, from 2017 to 2021, product sales to PCs increased from 66% to 75%; non-enrollment product sales to BPs decreased from 24% to 19%; and enrollment pack and upgrade package purchase decreased from 5% to 3%. *Id.*

99 Ex. 1316 ("Net Sales Dollar Percentages" Table). From 2017 to 2021, product sales to BPs decreased from 24% to 19%. *Id.* The data reflects that, from 2012 to 2021, the total percentage of sales to BPs for non-enrollment products was 21% of all sales, and for enrollment packs and upgrades, 14%. *Id.*

100 Tr. 5-A at 53–57; Ex. 1322. Specifically, Dr. Vandaele assumed that each BP's product purchase for ultimate use, *i.e.* personal consumption, in active months of the year equaled the average of total product purchases per active month (excluding Enrollment Pack/Upgrade purchases), up to the average total purchases per active month for the 50th percentile of PCs in the same year. Ex. 1322. For the 2012 to 2021 time period, Dr. Vandaele estimated that, on average, 75% percent of total product sales—including BPs, PCs, and retail customers—were for personal consumption, and on average, 43% of purchases by BPs were for personal consumption. *Id.*

101 Tr. 3-A at 105–07 ("I think we're 68 or 69, something like that, but pretty much in alignment with the direct sales industry. Of any direct sales company, about 70 percent of the people sign up that don't do anything.... And so we have a lot of our 70 percent, who don't do anything, are still buying our products. They're savings seekers."); Tr. 3-B at 22–23, 24–25; Tr. 4-B at 92–93; Tr. 5-A at 165. Dr. Bosley states in her report that, "[f]or

all Brand Partners who enrolled between 2012 and 2020 ... 74% recruited no Brand Partners, 85% recruited one or fewer Brand Partners, and 89% recruited two or fewer Brand Partners."). Ex. 622 ¶ 52.

102 Ex. 546; Tr. 4-B at 92–94.

103 Ex. 546.

104 Tr. 2 at 58–59.

105 Tr. 2 at 61–62.

106 Tr. 2 at 27.

107 Tr. 2 at 63–64.

108 Tr. 2 at 64; Tr. 3-A at 50.

109 Ex. 164; Tr. 2 at 28–29. As discussed previously, Signum Nutralogix, Inc. and its parent company, Signum Biosciences, Inc., were prior Defendants in this case who settled claims with the FTC and stipulated to a permanent injunction. ECF No. 10.

110 Ex. 825.

111 Exs. 1408, 1418; Tr. 3-B at 3–5; Tr. 5-B at 24–28.

112 Exs. 826, 868.

113 Note, however, that the Fifth Circuit has acknowledged the *Koscot* distributorship model in other contexts, albeit none of which addressed the merits of the *Koscot* formulation of its pyramid scheme test. *See, e.g.*, *F.T.C. v. Turner*, 609 F.2d 743, 744 (5th Cir. 1980); *S.E.C. v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 485 (5th Cir. 1974).

114 Tr. 1-A at 60, 99; Tr. 1-B at 22 ("I find that [Neora] are operating as a pyramid scheme. The rewards are locked behind recruitment thresholds. You can arrive at those rewards without having any customer sales. You can purchase some of those rewards or fuel them with your own purchases. And the -- Again, the rewards for -- for retail and customer sales are incredibly low.").

115 Tr. 1-A at 60–61.

116 Tr. 1-A at 58–59; Ex. 622 ¶ 14.

117 Tr. 1-B at 47 ("I do assume when you are a Brand Partner, you are mainly purchasing product in pursuit of the business opportunity.... It is a uniform assumption, yes."). In reaching this assumption, Dr. Bosley relied on her interpretation of the reward structure and incentives as laid out in the Compensation Plan. *See* Tr. 1-B at 38, 45–48.

118 Tr. 6-A at 62.

119 For instance, as discussed in *BurnLounge*, the Ninth Circuit noted that evidence regarding distributor and non-distributor purchasing patterns was indicative of distributor motivations. 753 F.3d at 884–85.

120 For example, Dr. Bosley applied her "uniform assumption" to the example of a PC converting to a BP, even if the amount of product purchased did not change. Tr. 1-B at 47 (Q. So in your analysis, if in January they're buying product as a Preferred Customer and would be treated as an ultimate end user under your *Koscot*

analysis, then in February, if they convert and become a Brand Partner, under your analysis, none of their purchases count as ultimate end users because now it's all business expense. A. Yes, I do assume when you are a Brand Partner, you are mainly purchasing product in pursuit of the business opportunity. Q. And that's true in your analysis even if the amount of product that they're purchasing doesn't change from their PC days to their BP days. A. It is a uniform assumption, yes.”). Dr. Bosley relied on her interpretation of the Compensation Plan and incentives set forth from the reward structure in making her assumption; she did not interview any Neora BPs or conduct any surveys. Tr. 6-B (ECF No. 324) at 89–90.

121 In concluding thus, the Court is not suggesting that an opposite assumption, i.e., that all BP purchases are end-user purchases, is appropriate; there are clearly instances when a BP enrolls in the business opportunity and purchases product to resell, not for personal consumption. Indeed, the evidence does not support either extreme assumption—i.e., that all BP purchases are end-user purchases, or none. In addition, the Court recognizes that there may be other instances—such as the circumstances presented in *Vemma* or *BurnLounge*—where the assumption adopted by Dr. Bosley would be appropriate and reasonable.

122 Tr. 7 (ECF No. 325) at 22.

123 Moreover, given that the Product Packs available only to newly enrolling BPs include discounts that are otherwise unavailable, savings seekers BPs may also be purchasing Product Packs at enrollment to take advantage of the decreased prices; it would similarly be improper to characterize those purchases in this context as a “business expense.”

124 *See, e.g.*, Tr. 5-A at 21–22, 28–29. In addition, the 2004 FTC Advisory Opinion's discussion distinguishing illegal pyramid schemes from legitimate buyers clubs is also relevant in light of the evidence that some Neora BPs enroll in order to access larger product discounts or earn free product through 3UR Free and qualifying PC purchases. *See* 2004 FTC Advisory Op. at 2 (distinguishing legitimate buyers' clubs from pyramid schemes because “the purchase of goods and services is not merely incidental to the right to participate in a money-making venture, but rather the very reason participants join the program”). The Advisory Opinion further explains that a buyers' club “confers the right to purchase goods and services at a discount,” and if “organized as a multi-level reward system, the purchase of goods and services by one's downline could defray the cost of one's own purchases.” *Id.* So too in Neora; the purchase of goods by a BP's enrolled PCs can defray the costs of the BP's own purchases through the 3UR Free program. Thus, although Neora is clearly not a buyers' club in the formulation described in the Advisory Opinion—which discusses the club apportioning to its members volume-based discounts received from suppliers—the fact that Neora incorporates characteristics of buyers' clubs that the FTC has previously indicated distinguish legitimate organizations from illegal pyramid schemes is instructive to the Court's analysis.

125 Tr. 4-B at 30.

126 Tr. 4-A at 100–01.

127 Tr. 1-B at 78–79; 2021 Comp. Plan at 13. The Compensation Plan explains that, to satisfy the “personal activity” for each rank qualification, “[y]ou must either have SmartShop Volume (SSV) from a SmartShop order you are placing each month or have enough Personal Qualifying Volume (PQV), generated through purchases from your Retail Customers, Preferred Customers or your personal product purchases.” 2021 Comp. Plan at 13.

128 Ex. 1328; Demonstrative Ex. 1440F at 17. Admittedly, this calculation does not include the approximately 70% of BPs who never make a sale, but as discussed, the evidence suggests that group includes BPs whose purchases are ultimate user purchases, and thus are not problematic under *Koscot.*

129 The Court notes the Compensation Plan and other Neora materials at times use the terms “enroll” and “recruit” in the context of signing up new PCs, as well as new BPs. *See, e.g.*, Tr. 1-B at 68–69. Thus, evaluating Neora's publications and trainings for an overemphasis on “recruitment” as a proxy to determining whether Neora is operating as an illegal pyramid scheme is of minimal probative value given that, in this context, “recruitment” can also refer to making customer sales by enrolling new PCs.

130 For example, the *Neora Rhythm: The Slight Edges + Ten Core Commandments* booklet, which is made available to BPs and contains Olson's philosophy for achieving success, includes “Neora's 10 Core Commitments” and “Neora's 10 Core Values.” Ex. 622; Tr. 3-A at 14–18. During trial, the FTC pointed out language in this document stating, “The first step to launching a successful Neora business is to advance in rank to Elite Brand Partner.” Ex. 622 at 20. However, reviewing the entire exhibit reveals that recruitment is not the focus of the publication, or even a significant discussion point. For instance, recruitment or team building does not appear in any of Neora's 10 Core Values or 10 Core Commitments. *E.g.*, *id.* at 12–13 (“1. Be Real... 2. Be Determined.....”); *id.* at 15–16 (“1. Complete New Brand Partner Training.... 2. Two Exposures a Day, Five Days a Week.... 3. Share the Products.....”). Thus, although it is certainly possible to find references to recruitment and building one's team through Neora's various publications, trainings, and materials, including its copious trainings on the Compensation Plan, recruitment is not emphasized to an extent that it dominates, or even features heavily, above all other topics.

131 Tr. 3-A at 107; Tr. 6-A at 54–55.

132 2021 P&Ps (Ex. 1423) § 1.11; Tr. 3-B at 120–21, 128.

133 Tr. 1-A at 25–26; ECF No. 331 at 26–27.

134 For instance, the FTC could have—but did not—argue that only select BPs have apparent authority to act on behalf of Neora, such as the high-ranking BPs who regularly appeared in Neora-produced videos and onstage at Neora's Get Real conferences.

135 As discussed, the FTC has not established that BPs are Defendants' agents, and thus the Court disregards statements or representations by BPs in evaluating whether Defendants have violated § 5 of the FTC Act by making misleading representations regarding BPs' potential income. However, even if BPs are considered Defendants' agents for purposes of the income and product claims, the Court concludes that there is no basis to impose liability on Defendants for statements by BPs in light of a rigorous compliance program and proactive efforts Defendants take to curb problematic statements by BPs through training efforts, approved marketing materials, and enforcement of the relevant policies in the P&Ps. *E.g.*, 2021 P&Ps (Ex. 1423) §§ 3.04, 7.05–.06, 9.24, 12. In its own Endorsement Guide, the FTC recognized that it is “unrealistic” for an organization to be aware of every statement made by individuals participating in a marketing network, and emphasized the significance of a reasonable training, monitoring, and compliance program in addressing those harms. Ex. 1425 at 18. The record is replete with efforts by Defendants to train BPs on appropriate and inappropriate income and product claims, provide compliant marketing materials and guidance, and to institute a proactive compliance program to monitor, find, remediate, and remove non-compliant statements by BPs. The FTC identifies no specific defects and blind spots in Defendants' compliance program, and the Court agrees with the FTC's own guidance that expecting Defendants to have immediate, complete knowledge of every problematic statement made by Neora BPs globally is unrealistic. Accordingly, the Court finds that enjoining Defendants and Neora's BPs from making misleading income and product claims would have no effect beyond that which is already being achieved through Defendants' robust and reasonable compliance program, and thus an injunction is not warranted.

136 *See, e.g.*, Exs. 30 (2016 *Success from Home* Magazine), 186 (2015 *Success from Home* Magazine), 443, 621 (2016 *Nerium Success Report*), 708 (2014), 834 (2016), 835 (2016), 846–47 (2017), 854 (2017), 857

(2015), 865 (2016), 875 (2014); *see also* Tr. 3-A at 44. In addition, the record contains, and the FTC points to, numerous examples of videos featuring former BPs Mark and Tammy Smith, including lifestyle videos showing off cars and homes earned through their business with Nerium, "top earners" celebratory videos, training videos, Nerium University presentations, and weekly calls. *See, e.g.*, Exs. 715, 717–19, 722, 724–25, 730–32, 829, 842 (2013), 843 (2013), 851 (2016), 853 (2014), 856 (2016), 867, 881 (2016), 900. Mark and Tammy Smith left Nerium in early 2018, and thus any materials featuring them necessarily do not reflect Neora's current business practices. Tr. 5-B at 8.

137 *See, e.g.*, Ex. 444 (describing Nerium's Young Entrepreneur Program, through which BPs could earn iPads); Tr. 6-A at 20–21 (explaining that the Young Entrepreneur Program was discontinued by 2016).

138 *See* Exs. 830, 849.

139 Tr. 4-B at 18–20; Tr. 6-A at 36.

140 Tr. 3-A at 32, 83; Tr. 4-B at 15–16, 19–20; Ex. 1462 at 2 (Field Compliance Guide).

141 Tr. 3-A at 82–86; Tr. 4-B at 21.

142 Tr. 3-A at 77–79, 83, 85–86; Tr. 4-B at 15–22.

143 Ex. 629 at 9.

144 Exs. 739–824, 877, 920, 920–41; Tr. 1-B at 85–88.

145 Tr. 2 at 58, 64–66, 68; ECF No. 285 at 6.

146 Tr. 3-A at 116–19.

147 Ex. 544; Tr. 6-A at 31–34.

148 Ex. 544 at 11; Tr. 6-A at 31–34.

149 *E.g.*, Ex. 544 at 23 ("What rank do I want to achieve and when? What income per month do I want to achieve and when? What activities am I going to commit to achieve these goals?").

150 Ex. 544 at 28.

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2014 WL 1660633
Only the Westlaw citation is currently available.
United States District Court,
E.D. Arkansas,
Jonesboro Division.

Jason HATHCOCK, Plaintiff
v.
BNSF RAILWAY COMPANY, Defendant.

No. 3:13–cv–00230 KGB.
|
Signed April 24, 2014.

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AMENDED ORDER

KRISTINE G. BAKER, District Judge.

***1** The Court amends its earlier Order of April 24, 2014, denying BNSF's motion to transfer, by directing the Clerk of Court to transfer this case immediately to the Western District of Missouri, Southern Division.

Before the Court is defendant BNSF Railway's ("BNSF's") motion to transfer venue (Dkt. No. 9) to which plaintiff Jason Hathcock responded in opposition (Dkt. No. 11). This case is currently set for trial in the Jonesboro Division of the Eastern District of Arkansas, and defendant moves to transfer the trial to the Southern Division of the Western District of Missouri. Under 28 U.S.C. § 1404(a), this Court may, "[f]or the convenience of the parties and witnesses, in the interest of justice ... transfer any civil action to any other district or division where it might have been brought...."

"Section 1404(a) reflects an increased desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice." *Van Dusen v. Barrack,* 376 U.S. 612, 616 (1964). The purpose of transfer under § 1404(a) is to "prevent the waste of time, energy and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Id.* (quotations omitted). "Section 1404(a) provides for transfer to a more convenient forum, not a forum likely to prove equally convenient or inconvenient." *Id.* at 645–46. "Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.,* 487 U.S. 22, 29 (1988).

In determining whether venue is proper, the Court does not ask "which district among two or more potential forums is the best venue," but rather the Court asks "whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts." *Pecoraro v. Sky Ranch for Boys, Inc.,* 340 F.3d 558, 563 (8th Cir.2003) (quotations omitted). Stated differently, the Court focuses on the events or omissions in *this* district, not on the events or omissions in some other district.

"In general, federal courts give considerable deference to a plaintiff's choice of forum and thus the party seeking a transfer under section 1404(a) typically bears the burden of proving that a transfer is warranted." *Id.* at 695. However, a plaintiff's choice of forum is due less deference when the plaintiff does not reside there or when the transaction or underlying facts did not occur there. *See, e.g., Nelson v. Soo Line R. Co.,* 58 F.Supp.2d 1023, 1026 (D.Minn.1999); *Abbott v. Schneider Nat'l Carriers, Inc.,* 2008 WL 4279590 at *3 (E.D.Mo. Sept. 12, 2008).

Concerning the convenience of the parties, it is not clear to the Court why Mr. Hathcock chose to file this case in the Eastern District of Arkansas, except that he has hired counsel in this state licensed to practice here. Mr. Hathcock does not live in Arkansas, and none of the alleged events occurred in Arkansas. Mr. Hathcock's attorneys may petition courts outside of Arkansas for admission *pro hac vice* to practice in those courts. BNSF argues that the Western District of Missouri is a more convenient forum because it expects many of its witnesses will be employees and its employee contracts require it to reimburse its employees for lost wages, transportation expenses, and food and lodging for the purpose of attending and testifying at trial. BNSF argues that because it has a passenger service line that runs to Springfield, Missouri, and no passenger rail service to transport these potential fact witnesses to Jonesboro, Arkansas, the Southern Division for the Western District of Missouri is more convenient for BNSF. To evaluate convenience, the Court considers the location of each courthouse and the travel expenses that would be incurred for party "airfare, meals and lodging, and losses in productivity from time spent away from work." *Oien v. Thompson,* 824 F.Supp.2d 898, 903 (D.Minn.2010). The Court finds that the convenience of the parties favors BNSF and its transfer request.

***2** Concerning the convenience of the witnesses, BNSF has made the point that only two of its ten potential fact witnesses are located closer to Springfield, Missouri, than to Jonesboro, Arkansas. Mr. Hathcock responds that BNSF's assertions of the relevance of the witnesses are conclusory, vague, and do not state the importance of any of the witnesses or whether they are necessary. "The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover. If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be, the application for transfer will be denied." *Peacock v. Pace Int'l Union Pension Fund Plan,* 2007 WL 4403689, *10 (M.D.Tenn. Aug. 23, 2007) (quoting *Bacik v. Peek,* 888 F.Supp. 1405, 1415 (N.D.Ohio 1993)). The Court finds that BNSF has met this burden and that the convenience of the witnesses favors BNSF and its transfer request.

Turning to the interests of justice, "the administration of justice is served more efficiently when the action is litigated in the forum that more clearly encompasses the locus of operative facts ." *Thornton Drilling Co. v. Stephens Production Co.,* 2006 WL 2583659, *4 (E.D.Ark. Sept. 6, 2006) (quoting 15 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure,* § 3854, p. 289 (Supp.2006)). As in *Thornton Drilling Co.,* in the present action "[t]here are no allegations or contentions that any matters relevant to the resolution of the present dispute occurred in the Eastern District of Arkansas. Rather, it appears that the Eastern District of Arkansas' only connection to the underlying dispute is that [plaintiff] has elected to bring suit here." *Thornton Drilling Co.,* 2006 WL 2583659 at *4. BNSF notes that, with the exception of the allegation about BNSF doing business in Arkansas, the complaint makes no mention of any connection between this action and this venue. Conversely, the operative facts underlying Mr. Hathcock's claims occurred in or near West Plains, Missouri, in the Southern Division of the Western District of Missouri. This Court agrees with BNSF and finds that the interests of justice factor weighs in favor of BNSF and its transfer request.

Considered together, the Court finds BNSF has met its burden of proving the convenience of the parties, the convenience of the witnesses, and the interests of justice support having this case heard in the Western District of Missouri, Southern Division over the Eastern District of Arkansas, Jonesboro Division. Accordingly, BNSF's motion to transfer venue is granted (Dkt. No. 9). The Clerk of Court is ordered to transfer this case immediately to the Western District of Missouri, Southern Division.

SO ORDERED.

All Citations

Not Reported in F.Supp.3d, 2014 WL 1660633

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2024 WL 4329035
Only the Westlaw citation is currently available.
United States District Court, W.D. Texas, Austin Division.

INSPECTION LEASING INC., et al., Plaintiff,
v.
TAVAS LLC, et al., Defendants.

No. 1:24-cv-00319-DAE
|
Signed August 30, 2024

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ORDER DENYING MOTION TO DISMISS

David Alan Ezra, Senior United States District Judge

***1** On July 7, 2024, Defendants Tavas, LLC ("Tavas"), Warren Scaman ("Scaman"), and Mark Hamill ("Hamill") ("Defendants") filed a motion to dismiss for improper venue. (Dkt. # 15.) On July 19, 2024, Plaintiffs Inspection Leasing, Inc., MBF Inspection Services, Inc., and QSSub MBF Inspection Services, Inc. ("Plaintiffs") filed a response brief. (Dkt. # 16.) The Court finds this matter suitable for disposition without a hearing. After careful consideration of the filings and relevant case law, and for the reasons that follow, the Court **DENIES** Defendants' motion to dismiss.

BACKGROUND

Plaintiffs hired Defendants to prepare and file tax returns on their behalf in forty-three states, including Texas. (Dkt. # 13 at ¶ 14.) Plaintiffs allege that several tax returns, including the returns filed in Texas, were faulty and resulted in Plaintiffs being assessed additional taxes, penalties, and interest due from various state taxing authorities. (Id. at ¶ 4.) Defendants move to dismiss the claims based on lack of personal jurisdiction and venue. (Dkt. # 15.)

LEGAL STANDARD

I. 12(b)(2)

A court must determine whether it has personal jurisdiction over the defendant by "first determin[ing] whether the long arm statute of the forum state permits exercise of jurisdiction[,] ... then determin[ing] whether such exercise comports with due process." Ham v. La Cienega Music Co., 4 F.3d 413, 415 (5th Cir. 1993). "The Texas long-arm statute extends to the limits of the Constitution," and a Texas court's "inquiry is therefore limited to the reach of the Fourteenth Amendment's Due Process Clause." Stroman Realty, Inc. v. Antt, 528 F.3d 382, 385 (5th Cir. 2008). "The Fourteenth Amendment allows a court to assert personal jurisdiction over defendants who have meaningful 'contacts, ties, or relations' with the forum state. Such contacts can give rise to general or specific jurisdiction." Id. (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)). However, the Fourteenth Amendment also "limit[s] the power of a State to assert in personam jurisdiction over a nonresident defendant." Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413–414 (1984) (citing Pennoyer v. Neff, 95 U.S. 714 (1878)).

Where a defendant has " 'continuous and systematic general business contacts' with the forum state," the forum may exercise general personal jurisdiction over the defendant. Stroman, 528 F.3d at 385 (quoting Helicopteros, 466 U.S. at 415 n. 9) (finding the Texas district court improperly exercised general jurisdiction over officials from California and Florida who did not have an office in Texas or sufficient contacts with Texas giving rise to general jurisdiction). If a Defendant's contacts "are less pervasive, courts may exercise 'specific jurisdiction' in 'a suit arising out of or related to the defendant's contact with the forum.' " Id. (quoting Helicopteros, 466 U.S. at 415 n. 9).

The plaintiff bears the burden of proof to demonstrate personal jurisdiction. Nuovo Pignone, PsA v. Storman Asia M/V, 310 F.3d 374, 378 (5th Cir. 2002); Elly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 854 (5th Cir. 2000). Courts in the Fifth Circuit evaluate whether exercise of both general and specific personal jurisdiction is consistent

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with the Due Process Clause by applying a three-part test, considering:

> ***2** (1) [W]hether the defendant has minimum contacts with the forum state, i.e., whether it purposely directed its activities toward the forum state or purposely availed itself of the privileges of conducting activities there; (2) whether the plaintiff's cause of action arises out of or results from the defendant's forum-related contacts; and (3) whether the exercise of personal jurisdiction is fair and reasonable.

Nuovo Pignone, 310 F.3d at 378 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985)). If a defendant's contacts with the forum state are insufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment, the court must dismiss the case for lack of personal jurisdiction. Id.

II. 12(b)(3)

A party moving to dismiss based on improper venue does so pursuant to Federal Rule of Civil Procedure 12(b)(3). "In an action not based on diversity, proper venue lies in either '(1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred ... or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.' " McClintock v. Sch. Bd. E. Feliciana Par., 299 Fed. Appx. 363, 365 (5th Cir. 2008) (citing 28 U.S.C. § 1391(b)).

"On a Rule 12(b)(3) motion to dismiss for improper venue, the court must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff." Braspetro Oil Servs. v. Modec (USA), Inc., 240 F. App'x 612, 615 (5th Cir. 2007). However, the Court may consider evidence in the record beyond the facts alleged in the complaint and its attachments, including affidavits or evidence submitted by the parties as part of the venue motion. Ginter ex rel. Ballard v. Belcher, Prendergast & Laporte, 536 F.3d 439, 449 (5th Cir. 2008). When it is determined a case is filed in a division or district of improper venue, the district court may either dismiss the case or transfer it to any district or division of proper venue. See 28 U.S.C. § 1406(a).

DISCUSSION

I. Personal Jurisdiction

While the motion to dismiss is for improper venue, the motion made several arguments asserting the lack of personal jurisdiction. The Court will read those arguments as a motion to dismiss for lack of personal jurisdiction. Plaintiffs also responded to the motion asserting that personal jurisdiction is proper. Sys. Pipe & Supply, Inc. v. M/V VIKTOR KURNATOVSKIY, 242 F.3d 322, 325 (5th Cir. 2001) (When the district court raises the issue of personal jurisdiction sua sponte, the court should allow the plaintiff a reasonable opportunity to present any available evidence supporting the court's jurisdiction.)

It is undisputed that Defendant TAVAS is a Nevada accounting firm. Similarly, it is undisputed that Defendants Scaman and Hamill are certified public accountants and residents of Illinois. Plaintiffs do not assert that Defendants have any personal or real property in Texas, have a registered agent for the service of process, maintain a place of business in Texas, or are registered to conduct business in Texas. Because there is nothing to suggest that Defendants are "at home" in Texas, the Court does not extend general jurisdiction over "any and all claims" brought against Defendants. Stroman, 528 F.3d at 385.

Specific jurisdiction affords a narrower authority and will apply if a defendant "purposefully avails" itself of the opportunity to do business in the forum State and the suit " 'arise[s] out of or relate[s] to' " the defendant's contacts with the forum State. Helicopteros, 466 U.S. at 415 n.9. The "purposeful availment" requirement ensures that a defendant will not be hauled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts. Burger King, 471 U.S. at 472.

***3** The Court finds Defendants availed themselves to the State of Texas by intentionally filing tax returns in Texas.

A defendant's "minimum contacts" with the forum need not involve any physical presence. Burger King, 471 U.S. at 476 ("Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State.") "Even where a defendant has no physical presence in the forum state, a single purposeful contact may be sufficient to confer personal jurisdiction if the cause of action arises from the contact." Canyon Furn. Co. v. Sanchez, 18-cv-0753, 2018 WL 6265041, *5 (W.D. Tex. Nov. 8, 2018). For intentional tort claims, "foreign communications directed at the forum can create personal jurisdiction '[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action.' " ICI Constr., Inc. v. Hufcor, Inc., 2023 WL 2392738, at *6 (quoting Wien Air Alaska, Inc. v. Brandt, 195 F.3d 208, 213 (5th Cir. 1999)).

Defendants targeted their actions to the State of Texas. The contract between Plaintiffs and Defendants required Defendants to take actions that would be felt in Texas and have an impact in Texas. Consequently, Defendants directed a tax return filing to the State of Texas and thereby conducted business in the State of Texas. Defendants knew the filing would be sent to Texas. It was not accidental that the allegedly deficient filing ended up in Texas.

Defendants argue that the place of injury cannot support jurisdiction, citing Walden v. Fiore 134 S. Ct. 1115 (2014). The problem in Walden was that the defendant had never formed any contact with the forum State. See Ford Motor Co. v. Montana Eighth Jud. Dist. Ct., 141 S. Ct. 1017, 1019 (2021). The Officer in Walden had never traveled to, conducted activities within, or contacted anyone in plaintiff's home state. In this case, Defendants directed a filing to Texas. Defendants allegedly breached a contract by sending a tax return into Texas. See also Wien Air, 195 F.3d 208, 209, 211 (5th Cir. 1999) (Though the defendant argued that "communications directed into a forum standing alone are insufficient to support a finding of minimum contacts," the Fifth Circuit held that "[w]hen the actual content of communications with a forum gives rise to intentional tort causes of action, this alone constitutes purposeful availment.")

Defendants also cite Trois v. Apple Tree Auction Ctr., Inc., 882 F. 3d 485, 488 (5th Cir. 2018), where the court found no personal jurisdiction over a breach-of contract claim because the contract was executed and performed in Ohio. However, those facts only reinforce why jurisdiction is proper in the present case. The facts here demonstrate that the contract was performed in Texas.

Defendants have the minimum contacts necessary for jurisdiction and this finding adheres to the Fifth Circuit's recent decision in Danziger & De Llano, LLP v. Morgan Verkamp, LLC., 24 F.4th 491 (5th Cir. 2022).

In Danziger, the Fifth Circuit held there was no personal jurisdiction in a breach of contract suit between two law firms. The alleged breach of contract stemmed from an unsolicited email sent by Defendants into the forum. Id. at 494. The Fifth Circuit reasoned that personal jurisdiction was lacking because the Ohio firm "did not perform in Texas and was not required to perform in Texas," and because the "alleged contract to split the fees [stemmed] from a non-Texas law firm's legal representation of a non-Texas client in a non-Texas case." Id. at 502. Ultimately, the contract was "centered outside of Texas." Id. at 502. In this case, Defendants had an obligation to file the tax returns in Texas. This required act targeted Texas.

***4** This case is similar to Calder v. Jones, where a journalist wrote a libelous article in Florida, which he knew would be published in and affect Plaintiff's reputation in California. 465 U.S. 783 (1984). Here, Defendants allegedly made an inaccurate tax filing, knowing the impact would be received and felt in Texas. The Fifth Circuit recently made clear that Calder remains good law. Def. Distr. v. Grewal, 971 F.3d 485, 495 (5th Cir. 2020).

Lastly, other district courts have held that performing accounting services can satisfy the purposeful availment jurisdictional requirement. See, e.g., eUnify Inc. v. Anthony M. Serra CPA Inc., 642 F. Supp. 3d 971, 977-78 (D. Ariz. 2022) ("Defendant expressly aimed its intentional acts at Arizona by filing Plaintiffs' state taxes here ... Defendant should have known that the harm from its alleged negligence would be suffered primarily in Arizona.").

In this case, there is a nexus between these contacts and the claims. Defendants allegedly breached a contractual provision that required the tax returns to be completed in accordance with IRS requirements. Due to issues with the tax returns filed in Texas, Plaintiffs filed this lawsuit. Therefore, the Court finds there is personal jurisdiction in this case over Defendants.

II. Venue

Plaintiffs argue venue is proper because a substantial part of the events giving rise to the [Plaintiffs'] claim occurred in Texas. Plaintiffs argue Defendants were hired to, among other things, file Plaintiffs' tax returns in Texas. Moreover,

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the filing of tax returns was the fundamental end-product that Defendants were engaged to perform.

Defendants, on the other hand, argue that the actual negotiation, performance, and breach of contract, took place outside of Texas. Defendants argue that the Court cannot rely solely on the "effect" of such acts to constitute a substantial part of the events giving rise to Plaintiffs' claim.

To begin, an overwhelming number of courts consider the place of injury as a relevant factor in determining whether venue is proper. See, e.g., Myers v. Bennett Law Offices, 238 F.3d 1068, 1076 (9th Cir. 2001); Vine Oil & Gas LP v. Indigo Minerals, LLC, No. 4:19-cv-00346, 2019 WL 4140842, at *5 (E.D. Tex. Aug. 30, 2019) (explaining that a "substantial part" of the events or omissions may potentially occur "where the parties acted or where the injuries occurred."); Williamson v. American Mastiff Breeders Council, 2009 WL 634231, at *7 (D. Nev. Mar. 6, 2009) ("If a harm suffered by a plaintiff is felt in a specific place, then that place is one where the actions giving rise to the claim or occurrence happened.")

Moreover, the Court does not solely rely on the impact of the tax return filing. The act of filing the tax return in Texas is a separate independent and substantial event occurring in Texas that can give rise to proper venue status.

Just because venue may be proper elsewhere does not defeat that venue is proper in this district. See Bigham v. Envirocare of Utah, Inc., 123 F. Supp. 2d 1046, 1048 (S.D. Tex. 2000) ("Often, a lawsuit may allow for proper venue in more than one judicial district.") The test is not whether a majority of the activities pertaining to the action were performed in a particular district, but rather, whether a substantial portion of the activities giving rise to the action occurred in the district. TruServ v. Neff, 6 F.Supp.2d, 790 (N.D. Ill. 1998). The Court finds that a substantial portion of the activities giving rise to the causes of action occurred by virtue of the filing of the returns in the State of Texas. See Life Ins. Co. v. Neaves, 912 F.2d 1062, 1065 (9th Cir. 1990) (holding that an out-of-forum resident could be hauled into a forum on the basis of a fraudulent letter she sent outside the forum to an insurance company, stating that "[t]he critical factor was that in sending the letter, the defendant was 'purposely defrauding' the [plaintiff in the forum.]")

***5** Defendants cite caselaw arguing that the Court should consider where the contract is drafted, not where it is received. Magic Toyota, Inc. v. Southeast Toyota Distributors., Inc., 784 F. Supp. 306, 318 (D.S.C. 1992). While there is no denying the existence of such caselaw, an overwhelming number of other courts come to a different conclusion. Many courts have held that venue is proper in the district to which a document containing the misrepresentation at issue was sent. See, e.g., Mercantile Capital Partners v. Agenzia Sports, Inc., 2005 WL 351926 at *5 (N.D. Ill. 2005); Est. of Moore v. Dixon, 460 F. Supp. 2d 931, 937 (E.D. Wis. 2006) ("venue may be satisfied by a communication transmitted to ... the district in which the cause of action was filed, given a sufficient relationship between the communication and the cause of action."); Print Data Corp. v. Morse Fin., Inc., 2002 WL 1625412, at *6 (D.N.J. 2002) (venue appropriate under section 1391(a)(2) in district where fraudulent statements were sent.) Therefore, the Court finds that Plaintiffs have sufficiently pled that a substantial part of events occurred in Texas, giving rise to proper venue.

CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendants' motion to dismiss. (Dkt. # 15.)

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2024 WL 4329035

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2007 WL 4403689
United States District Court,
M.D. Tennessee,
Nashville Division.

Lewis and Betty PEACOCK, Plaintiffs,
v.
PACE INTERNATIONAL UNION PENSION FUND PLAN, Pace Industry 401(k) Plan and Succession of Alice L. Peacock, Defendants.

No. 3:06–0703.
|
Aug. 23, 2007.

MEMORANDUM

WILLIAM J. HAYNES, JR., District Judge.

***1** Plaintiffs, Lewis and Betty Peacock filed this action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* seeking declaratory judgment and injunctive relief against PACE International Union Pension Fund Plan ("Pension"), PACE Industry 401(k) Plan ("401(k) or collectively "the Funds") and the Succession of Alice L. Peacock ("Succession"), The gravamen of Plaintiffs' complaint is that the Succession should not be entitled to claims against Lewis Peacock's pension and 401(k) plan because such benefits are exempt from consideration as community property under ERISA, and *Boggs v. Boggs,* 529 U.S. 833 (1997). In essence, Plaintiffs initiated this action to clarify their rights to future benefits under ERISA plans and to enjoin the Succession from claiming an interest in these benefits in a pending state court action in Louisiana. The Succession denies Plaintiffs' allegations and assert that Plaintiffs have failed to exhaust their administrative remedies.

Before the Court is Defendant, Earl Luneau's [1] motion to dismiss or alternatively, to transfer this action to Louisiana (Docket Entry No. 16), contending in sum: (1) Plaintiffs have failed to state a claim under ERISA; (2) this action is barred by the Anti–Injunction Act; (3) the Court lacks personal jurisdiction over Luneau; and (4) if a claim exists, this action should be transferred to the Western District of Louisiana.

In response, (Docket Entry No. 25), Plaintiffs contend that: (1) the Anti–Injunction Act does not bar the declaratory and injunctive relief sought here; (2) Plaintiff Betty Peacock, Defendant PACE International Union Pension Fund Plan and Defendant PACE Industry 401(k) Plan are not parties to the Louisiana state action and are not barred by the Anti–Injunction Act; and (3) this Court has personal jurisdiction over Luneau and this action should not be transferred to the Western District of Louisiana.

For the reasons stated below, Court first concludes that this action arises under ERISA and is not barred by the Anti–Injunction Act. Second, the Court concludes that Plaintiffs' claim is properly before this Court because the plans in question are administered within the Middle District of Tennessee. Third, the Court has jurisdiction over the Defendant given ERISA's nationwide jurisdiction provision and his minimum contacts with the United States. Finally, the Court concludes that this action should remain in the Middle District of Tennessee as the plans are administered in this district.

ANALYSIS OF THE RECORD

Lewis Peacock began his employment with PACE International Union on April 29, 1968. (Docket Entry No. 1, Complaint at ¶ 7). As part of his employment, Lewis Peacock received a PACE pension and 401(k) plan. *Id.* at ¶ 11. A little more than three years after beginning his employment with PACE, Peacock married Alice Luneau in Alexandria, Rapides Parish, Louisiana. *Id.* at ¶ 8. On August 16, 2001, after nearly 30 years of marriage, Alice Peacock filed for divorce and on May 6, 2002, a Judgment of Final Divorce was entered. *Id.* In August of that year, Alice Peacock filed a lawsuit in Rapides Parish, Louisiana, seeking to divide the community property she and her husband accumulated during the course of their marriage. *Id.* at ¶ 9. Alice Peacock died on June 7, 2003 before the partition proceedings had completed. *Id.*

***2** In her last will and testament, Alice Peacock left her estate to her brother, Earl Luneau, named as executor and to her daughter, Angela Simpson. *Id.* and (Docket Entry No. 17, Memorandum in Support of Motion to Dismiss or in the Alternative, to Transfer, at p. 2). In early November, 2003, the 9th Judicial District Court of Rapides Parish, Louisiana granted the Succession of Alice L. Peacock's Motion to Substitute Luneau in place of Alice Peacock. *Id.*

On March 13, 2004, Lewis Peacock married Betty Gillam, and the two remain married. *Id.* at ¶ 10. As his wife,

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Betty Peacock is the joint and survivor beneficiary of Lewis Peacock's pension and 401(K) plans. *Id.* at ¶ 11. On October 14, 2005, the Succession filed an Amended and Supplemental Detailed Descriptive List of the Succession of Alice Peacock that claimed an entitlement to Alice Peacock's share of her ex-husband's pension and 401(K). *Id.* at ¶ 12. As his spouse, Alice Peacock would have been covered under her Lewis Peacock's plans, enjoying joint and survivor benefits. *Id.*

The Succession is requesting an accounting against the community property assets, including the actuarial calculated value of Alice Peacock's joint benefits from Lewis Peacock's pension and 401(K). *Id.* at ¶ 13. On November 9, 2005, Lewis Peacock filed a Traverse of Amended and Supplemental Sworn Detailed List of Succession of Alice Luneau Peacock stating that ERISA precludes Lewis Peacock's benefits from consideration as community property. *Id.* at ¶ 14. The action regarding the calculation of and entitlement to Lewis Peacock's pension and 401(K) is still pending in Louisiana. *Id.* Plaintiffs have filed this action to enforce their pension rights under ERISA to obtain injunctive relief from any claims of the Succession of Alice Peacock against Lewis Peacock's pension and 401(K). *Id.* at ¶ 15.

CONCLUSIONS OF LAW

"[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 811 (1993). Consideration of a motion to dismiss requires the court accept the complaint's factual allegations as true and to construe the complaint liberally in favor of the plaintiff. *Perry v. Am. Tobacco Co., Inc.,* 324 F.3d 845, 848 (6th Cir.2003). Despite such liberal construction, a court "need not accept as true legal conclusions or unwarranted factual inferences." *Morgan v. Church's Fried Chicken,* 829 F.2d 10, 12 (6th Cir.1987) (internal quotation omitted). Indeed, "it is not ... proper to assume that the [Plaintiff] can prove facts that it has not alleged or that the defendants have violated the ... laws in ways that have not been alleged." *Assoc. Gen. Contractors v. Cal. State Counsel of Carpenters,* 459 U.S. 519, 526 (1983). Moreover, to survive a motion to dismiss under Rule 12(b)(6), "the complaint must contain 'either direct or inferential allegations respecting all the material elements' " of the claim. *Tahfs v. Proctor,* 316 F.3d 584, 590 (6th Cir.2003) (quoting *Scheid v. Fanny Farmer Candy Shops, Inc.,* 859 F.2d 434, 436 (6th Cir.1988)).

***3** For a majority of civil actions, the complaint is sufficient if it satisfies the "notice" pleading requirements of the Federal Rules of Civil Procedure with a "short and plain statement of the claim showing the pleader is entitled to relief," because generally "[n]o technical forms of pleadings or motions are required." Fed.R.Civ.P. 8(a)(2), (e)(1).

Of the Defendant's contentions, the Court addresses first his assertion that this Court lacks the jurisdiction to entertain this controversy. Thus from the outset, the Court must determine whether it has the power to hear this case.

Subject Matter Jurisdiction

In his memorandum, Defendant Luneau contends that this action does not arise under ERISA and is barred by the Anti–Injunction Act, ("AIA"), 28 U.S.C. § 2283. The Peacocks argue that their action seeks to determine rights to future benefits under the civil enforcement provision of ERISA, 29 U.S.C. § 1132 [2], and thus this Court is empowered to hear the controversy.

Although the Peacocks' complaint does not expressly state that its purpose is to enjoin the state court proceeding, [3] because the relief they seek would have the same effect, it must be analyzed under the AIA. *See Martingale LLC v. City of Louisville,* 361 F.3d 297, 303 (6th Cir.2004) (when the "declaratory relief would have the same practical effect as an injunction, the Anti–Injunction Act precludes the court from granting a declaratory judgment").

For his argument that this action does not arise under ERISA, Luneau cites *NGS American, Inc. v. Jefferson,* 218 F.3d 519 (6th Cir.2000). The Plaintiffs respond that Luneau's analysis of *NGS* is overly broad. The Court agrees.

NGS arose when Jefferson, a beneficiary, filed a notice of intent to sue in Florida state court for medical malpractice to recover damages against a third-party administrator of an ERISA governed plan. [4] *Id.* at p. 521. Upon receipt of the notice of intent, and before Jefferson could legally file his state court action, NGS filed a federal action in Michigan seeking a declaration that 29 U.S.C. § 1144, ERISA's preemption provision, would preempt state law claims. *Id.* NGS relied on ERISA's nationwide service of process provision to establish personal jurisdiction over

Jefferson, a Florida resident. *Id.* at p. 524. The Sixth Circuit interpreted NGS's actions to be "seek[ing] a federal forum for determination of the ERISA preemption issue in the underlying state-court case." *Id.* at p. 522. The Sixth Circuit ultimately held that seeking injunctive and declaratory relief against a state court tort action does not enforce ERISA's preemption provision. *Id.* at p. 525.

This action is distinguishable from *NGS.* To be sure, the *NGS* action involved a fiduciary suing a beneficiary, whereas the present action involves a beneficiary suing a potential claimant and ERISA plans. Further, the *NGS* plaintiff relied on the preemptive effect of § 1144 in its contention that federal jurisdiction was proper, not § 1132(a), as is the case here. As the Sixth Circuit stated:

> ***4** NGS asserts that personal jurisdiction exists by way of a nationwide service of process provision in the statute under which it brings its action. However, the action NGS has brought purports to enforce the preemption provision of that same statute. The § 1144 preemption provision itself does not create a federal cause of action.

Id. at 531. Thus, NGS tried to obtain personal jurisdiction under § 1144 that does not create a federal claim. Here, the Peacocks' § 1132(a) complaint states a cognizable federal claim.

The Peacocks action under § 1132(a) asks the Court to determine whether the Succession is entitled to any of Lewis Peacock's, and by extension, Betty Peacock's ERISA benefits. In *NGS,* the underlying action was one for medical malpractice, in which the defendant happened to be an administrator of an ERISA plan. In this instance, the underlying action directly affects the potential division of Lewis Peacock's assets, including his ERISA benefits. Thus, the holding in *NGS* simply is inapplicable here and the Court concludes that the Peacocks' action arises under ERISA.

To support his contention that the AIA bars this action, Luneau relies upon language in *NGS* stating: "we do not read ERISA's authorization of injunctive relief as expressly authorizing injunctions of state court proceedings", *id.* at 523 n..4, to mean that "ERISA's authorization of injunctive relief is not recognized as fitting within one of the narrow exceptions to the Anti–Injunction Act's otherwise blanket prohibition of injunctions of state court proceedings." (Docket Entry No. 17 at p. 5). Yet, in its totality, the footnote reads differently, as the same footnote states: "[t]o proceed, this action requesting injunctive and declaratory relief would have to fall under exceptions to both the Anti–Injunction Act and *Younger v. Harris,* 401 U.S. 37 (1971)." *NGS,* 218 F.3d at 523, n. 4. The Court finds that the clear meaning of this language is that there may be instances in which an action arising under ERISA can enjoin pending state court proceedings so long as the factual circumstances fall within the exceptions to the application of the AIA and to *Younger* abstention. This conclusion requires an analysis of the AIA and *Younger* abstention.

Anti–Injunction Act

The AIA provides: "[a] court of the United States may not grant an injunction to stay proceedings in a State court except: (1) as expressly authorized by Act of Congress; or (2) where necessary in aid of its jurisdiction; or (3) to protect or effectuate its judgments." 28U.S.C. § 2283. "On its face the [AIA] is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of the three specifically defined exceptions." *Mitchum v. Foster,* 407 U.S. 225, 229 (1972) (quoting *Atlantic Coast Line R. Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281, 286 (1970)). "[A]ny injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to § 2283 if it is to be upheld ..." *Id* . (quoting *Atlantic Coast Line R. CO.,* 398 U.S. at 287).

***5** The AIA's purpose is to avoid potential discord between the state and federal courts.

> In adopting the Act, Congress sought to avoid "the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court." *Vendo Co. v. Lektro–Vend Corp.,* 433 U.S. 623, 630, 97 S.Ct. 2881, 53 L.Ed.2d 1009 (1977). By its own language, however, the Act does not entirely bar federal courts from enjoining state court proceedings. Rather, the Act enumerates three narrow exceptions to its otherwise blanket prohibition. The exceptions were designed to "ensure the effectiveness and supremacy of

> federal law," *Chick Kam Choo v. Exxon Corp.,* 486 U.S. 140, 146, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), but are narrow in their application and "should not be enlarged by loose statutory construction." *Atlantic Coast Line R. Co.,* 398 U.S. at 287.

Hatcher v. Avis Rent–A–Car System. Inc., 152 F.3d 540, 542 (6th Cir.1998).

First, Plaintiffs contend that the AIA is inapplicable because their cause is "expressly authorized by Act of Congress." In *Mitchum v. Foster,* 407 U.S. 225 (1972) the Supreme Court formulated the test to determine whether the "expressly authorized by Congress" exception to the AIA applies to a particular situation. *Mitchum* noted that the statute in question need not explicitly refer to injunctions of state court proceedings, but stated: "[t]he test, rather, is whether an Act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding." 407 U.S. at 238.

The *Mitchum* analysis is two-fold: first, whether an Act of Congress creates a federal right or remedy enforceable in federal court, and second, whether that Act could be given its intended scope only by a stay of state court proceeding. *See General Motors Corp. v. Buha,* 623 F.2d 455 (6th Cir.1980). Through the express preemption language in §§ 1144 [5] and 1132(e) [6], and the Sixth Circuit precedent in *General Motors,* the Court concludes that ERISA meets the first prong of the *Mitchum* test in that it does create a federal right or remedy enforceable in federal court.

In *General Motors* the Sixth Circuit applied the *Mitchum* test to ERISA and concluded that ERISA falls within the "expressly authorized by Congress" exception. In *General Motors* the plaintiff attempted to collect on a judgment by garnishing the debtor's General Motors pension plan. *Id.* at p. 457. A writ of garnishment was served on the trustee of the General Motors pension fund, upon which the trustee filed a disclosure of non liability to the debtor. *Id.* General Motors filed an action in the district court to prevent enforcement of the writ of garnishment. Ultimately, a permanent injunction was issued predicated upon irreparable injury due to the prevention of the fiduciary of carrying out its duties. *Id.* The creditor appealed the permanent injunction to the Sixth Circuit. *Id.* at p. 455. The Sixth Circuit held:

> ***6** We conclude that ERISA meets both prongs of the *Mitchum* test. When a district court finds that an action in a state court will have the effect of making it impossible for a fiduciary of a pension plan to carry out its responsibilities under ERISA, the anti-injunction provisions of § 2283 do not prohibit it from enjoining the state court proceedings.

623 F.2d at 459. (citations omitted).

In so concluding, *General Motors* cited to the legislative intent of ERISA as described by Representative Dent, Chairman of the Subcommittee on Labor of the House Committee on Education and Labor:

> [T]he crowning achievement of this legislation, [is] the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out the protection afforded participants by eliminating the threat of conflicting and inconsistent state and local regulation. 120 Cong.Rec. 29197 (1974).

Id.

After giving appropriate weight to considerations of federalism and comity, the Sixth Circuit upheld the district court's injunction, *id.* at 459. The court distinguished cases requiring abstention and also considered that the state court could not have heard the fiduciary's claims.

> However, the state court proceedings which were enjoined in the present case were not criminal (*Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)) or akin to

> criminal (*Huffman v. Pursue, Ltd.,* 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975)) and did not involve the integrity of the state's judicial processes (*Juidice v. Vail,* 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed .2d 376 (1977)). Further, GM was not a party to the state court proceedings and could not have initiated an action in state court in its fiduciary capacity because of the preemption provision of 29 U.S .C. s 1132(e), supra. Thus abstention would not have been required on the ground that GM could have tendered its federal claim in a single state court proceeding. See *Trainor v. Hernandez,* 431 U.S. 434, 97 S.Ct. 1911,52 L.Ed.2d 486 (1977); *Moore v. Sims,* 442 U.S. 415, 99 S.Ct. 2371, 60 L.Ed.2d 994 (1979).

Id.

Here, as in *General Motors,* the parties in this action are not identical to the parties in the state court action. The Pension and the 401(K) plans are not parties in the Louisiana state court and thus, cannot ensure that their positions are represented in that proceeding. As the Pension and 401(K) stated: "[T]he Funds are not a party to the case currently pending in Louisiana state court, and therefore cannot protect their interest in seeing that the facts and law are correctly applied to them." (Docket Entry No. 23 at p. 1). In addition, the Pension and 401(K) contend that they could be put into a situation where they have to "comply with two potentially conflicting court orders with respect to entitlements to the subject benefits" *id.* at pp. 1–2, rendering it impossible for the fiduciaries to perform their duties responsibly.

***7** As in *General Motors,* the funds cannot initiate an action in state court because of ERISA's preemption. Based on the *General Motors* case and ERISA's legislative intent, the Court concludes that in this action, ERISA falls within the "expressly authorized by Act of Congress" exception to the AIA. [7]

Younger Abstention

Under certain circumstances, a district court must consider abstention from determining a controversy that has a related state court action. As stated in *NGS,* "[t]o proceed, [a federal] action requesting injunctive and declaratory relief [of a state court action] would have to fall under exceptions to both the Anti–Injunction Act and *Younger v. Harris,* 401 U.S. 37 (1971)." *NGS,* 218 F.3d at 523, n. 4 (emphasis added).

In *Younger,* the Supreme Court held that absent a showing of "bad faith, harassment or any other unusual circumstance," a federal court should abstain from enjoining a state criminal proceeding. *Younger,* 401 U.S. at 53–54. Later, the Supreme Court explained: "[t]he policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved." *Middlesex County Ethics Committee v. Garden,* 457 U.S. 423, 432 (1982) (citing *Moore v. Sims,* 442 U.S. 415, 423 (1979); *Huffman v. Pursue, Ltd.,* 420 U.S. 592, 604–605(1975)).

The three requirements to invoke *Younger* abstention are: "(1) there must be on-going state judicial proceedings; (2) those proceedings must implicate important state interests; and (3) there must be an adequate opportunity in the state proceedings to raise constitutional challenges." *Squire v. Coughlan,* 469 F.3d 551, (6th Cir.2006) (citing *Sun Ref. & Mktg. Co. v. Brennan,* 921 F.2d 635, 639 (6th Cir.1990)). The first prong is easily met by the on-going state proceedings in Louisiana. The second prong is met also, as domestic relations and division of community property are important state interests as reflected in the Louisiana Civil Code. In Louisiana, community property has been in existence since that state's colonial days and the notion of community property has not been seriously questioned in modern times. 16 Katherine S. Spaht & Richard D. Moreno, LOUISIANA CIVIL LAW TREATISE § 1.1 (3d ed.2007). Therefore, the analysis turns on whether the parties to this action would have an adequate opportunity to raise their challenges in the state court proceeding.

Betty Peacock is not a party to the state court action in Louisiana and as such, any constitutional challenges she might have to the state court proceeding cannot be presented. As the spouse of a plan participant, Betty Peacock is entitled to joint and survivor benefits. Ostensibly, any entitlement the Succession may be awarded could divide the potential benefits of Betty Peacock, to which she has a statutory entitlement. Yet, with ERISA, Lewis Peacock cannot deprive Betty Peacock of her statutory right to a portion of his benefits without her consent. *See* 29 U.S.C. §§ 1055(a) and

(2)(A)(i), stating that a joint and survivor annuity is required of ERISA governed plans and that such benefits cannot be waived unless "the spouse of the participant consents in writing ..." The Louisiana court cannot determine Betty Peacock's entitlements to her husband's pension and 401(K). There is not any evidence to suggest that Betty Peacock consented to any deprivation of her rights to her husband's ERISA plans. Thus, because Betty Peacock is the appropriate person to assert her rights to her husband's benefits, she must be a party to any action that affects her rights.

***8** Moreover, as discussed *supra,* the ERISA plans are not parties to the state lawsuit and cannot effectively protect their interests in ensuring that their fiduciary duties to the Peacocks are properly discharged. The state court action for Betty Peacock and the ERISA plans does not afford an adequate opportunity to raise any constitutional challenges.

The Court concludes that the third factor in the *Younger* analysis has not been satisfied to justify *Younger* abstention. The Court therefore concludes that this action falls under the exceptions to the AIA and *Younger* abstention, and under Sixth Circuit precedent, this Court is not required to abstain from hearing this controversy.

Personal Jurisdiction Over Luneau

Here, the parties dispute whether the Court can exercise personal jurisdiction over Luneau, and whether that jurisdiction is necessary to entertain the action in this Court. The Peacocks assert that personal jurisdiction is a nonissue because the Court can exercise *in rem* jurisdiction because the funds in question are located in Nashville. The Peacocks further assert that if this Court does not find *in rem* jurisdiction proper in this case, then the existence of personal jurisdiction over Luneau is warranted under 28 U.S.C. § 1391(b)(2).

Luneau contends that this Court lacks personal jurisdiction over him because he is a lifelong resident and domiciliary of Louisiana; does not own property in Tennessee; and lacks significant business contacts with Tennessee. Luneau notes that Alice Peacock was a lifelong resident and domiciliary of Louisiana; that she lived in Louisiana during her marriage to Lewis Peacock; that she was residing in Louisiana at the time of her death; and that she lacks any significant contacts with Tennessee.

The Plaintiffs bear the burden of making a *prima facie* showing that the Court possesses jurisdiction over Luneau. *Interna Corp. v. Henderson,* 428 F.3d 60S, 615 (6th Cir.2005). As to the Plaintiffs' contention of *in rem* jurisdiction under ERISA; *"[i]n rem* proceedings are usually broadly defined as those actions in which the court must possess or control the property in order to make effective the relief it grants." *Commissioner of Ins. of Michigan v. DMB Kyoto Plaza Shopping Center, LLC. et al.,* 42 F.Supp.2d 726, 731 (W.D.Mich.1998) (*citing Penn General Casualty Co. v. Commonwealth of Pennsylvania ex rel. Schnader,* 294 U.S. 189, 195 (1935)).

Here, the Plaintiffs are seeking "to obtain injunctive relief from claims against Lewis Peacock's pension and 401(K) plans by the Succession of Alice L. Peacock.." (Docket Entry No. 1, Complaint at ¶ 15). When the judgment seeks an injunction, personal jurisdiction over the defendant is required. "The prayer for an injunction ... is *in personam* and not *in rem." Redditt v. Hale,* 184 F.2d 443, 447 (8th Cir.1950). As the Fourth Circuit explained:

> [I]njunctive relief ordered in an *in rem* action would be meaningless because things or property cannot be enjoined to do anything. Likewise, personal jurisdiction need not be exercised in a pure *in rem* proceeding because, in the simplest of terms, a piece of property and not a person serves as the defendant." See *The Moses Taylor,* 71 U.S. at 431 ("The distinguishing and characteristic feature of ... [an *in rem*] suit is that the ... thing proceeded against is itself seized and impleaded as the defendant, and is judged and sentenced accordingly"). *In rem* actions only require that a party seeking an interest in a res bring the res into the custody of the court and provide reasonable, public notice of its intention to enable others to appear in the action to claim an interest in the res. See *Roller v. Holly,* 176 U.S. 398, 403–06, 20 S.Ct. 410, 44 L.Ed. 520 (1900).

***9** *R.M.S. Titanic v. Haver,* 171 F.3d 943, 957 (4th Cir.1999). The Court concludes that this action requires *in personam* jurisdiction as the relief requested is unavailable in *in rem* actions.

The Sixth Circuit has held that 29 U.S.C. § 1132(e)(2) [8] can confer nationwide personal jurisdiction. *Medical Mut. of Ohio v. deSoto,* 245 F.3d 561. 567 (6th Cir.2001). The Sixth Circuited reaffirmed its holding that under § 1132, Congress has the power to confer nationwide personal jurisdiction over anyone with minimum contacts to the United States in the district in which the plan is administered. The Sixth Circuit reasoned:

> In *United Liberty,* we held that the national service of process provision contained in § 78aa of the Securities Exchange Act of 1934 "confer[red] personal jurisdiction in any federal district court over any defendant with minimum contacts to the United States." *United Liberty,* 985 F.2d at 1330. We based that holding on our rationale in *Haile.* In *Haile* we observed that the minimum contacts with the forum state analysis controls states' extra-territorial exercise of jurisdiction in order to protect the defendant's due process rights. Because of the national service of process provision, the district court's exercise of jurisdiction was not "extra-territorial but rather nationwide," and therefore, the "minimum contacts analysis, as a limitation on state extra-territorial power, [was] simply inapposite." *Haile* 657 F.2d at 826. Instead, in such cases we would apply a minimum contacts with the United States analysis.
>
> *deSoto,* 245 F.3d at 567. (footnotes omitted).

The threshold question is whether Luneau has minimum contacts with the United States. The answer here is clearly yes, as Luneau is a life long resident of the United States. Thus, the Court possesses jurisdiction over Luneau, and jurisdiction is proper in this Court because the plans are administered within this district.

Venue

The parties disagree as to whether this action should remain in the Middle District of Tennessee or should be transferred to the Western District of Louisiana. Under the venue statute, a civil action not solely based on diversity may be brought in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b).

First, Luneau is a resident of Avoyelles Parish, a parish within the Western District of Louisiana. (Docket Entry No. 18–2, Luneau Affidavit at ¶ 2). Second, the marriage, divorce and will execution, giving rise to any potential entitlements to ERISA funds occurred in that judicial district. (Docket Entry No. 1. at ¶¶ 8, 9). Thus, this action could have originally been brought in the Western District of Louisiana.

***10** A district court possesses discretion to transfer a civil matter to any other appropriate district: "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404. "The burden rests with the moving party to establish that venue should be transferred." *Winnett v. Caterpillar, Inc.,* 3:06–cv–00235, 2006 WL 1722434, *2 (M.D. Tenn. June 20, 2006). To meet that burden, Luneau must show that the factors supporting transfer weigh heavily in favor of transfer. *Id.* (citing *Van Dusen v. Barrack,* 376 U.S. 612, 645–46 (1964)).

> Therefore, in ruling on a motion to transfer under § 1404(a), a district court should consider the private interests of the parties, including their convenience and the convenience of potential witnesses, as well as other public-interest concerns, such as systemic integrity and fairness, which come under the rubric of "interests of justice." *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22, 30 (1988).

Moses v. Business Card Exp., Inc., 929 F.2d 1131, 1137 (6th Cir.1991).

> More specifically, the Court will balance (1) the plaintiffs choice of forum; (2) the accessibility of witnesses and other sources of proof, including the availability

of compulsory process to insure attendance of witnesses; (3) relative advantages and obstacles to a fair trial; (4) the possibility of the existence of questions arising n the area of conflict of laws; (5) the advantage of having a local court determine questions of local law; and (6) all other considerations of a practical nature that make a trial easy, expeditious, and economical. *Chrysler Credit Corp. v. Country Chrysler, Inc.,* 928 F.2d 1509, 1516 (10 Cir.1991); *Texas Gulf Sulphur Co. v. Ritter,* 371 F.2d 145, 147 (10 Cir.1967).

Southern Elec. Health Fund v. Bedrock Services, No. 3:02–CV–00309, 2003 WL 24272405 at *5 (M.D.Tenn. July 23, 2003).

Here, clearly venue is proper in this District, and the only issue is whether Luneau has shown that the Western District of Louisiana is a more convenient forum. First, a plaintiff's choice of forum is given deference. "Unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed." *Blane v. American Investors, Corp.,* 934 F.Supp. 903, 907 (M.D.Tenn.1996) (*quoting Gulf Oil Corp. v. Gilbert,* 330 U.S. 501, 508 (1947)). Luneau contends that the Plaintiffs' choice should not be entitled to such deference because he alleges the Plaintiffs engaged in forum shopping. The Court however, did not find that the Plaintiffs engaged in forum shopping given that the plans with authority over the benefits at issue are in this District.

Second, because the funds are located in this District, a reasonable inference is that witnesses related to the funds, and proof about the plans are also in this District. Other than himself, Luneau does not name any other potential "Louisiana witness" who would be burdened by a trip to Nashville, Tennessee. "The party seeking the transfer must clearly specify the key witnesses to be called and must make a general statement of what their testimony will cover ... If a party has merely made a general allegation that witnesses will be necessary, without identifying them and indicating what their testimony will be, the application for transfer will be denied." *Bacik v. Peek,* 888F.Supp. 1405, 1415 (N.D.Ohio 1993); *see also Roberts v. Norfolk Southern Railway Co.,* No. 05–CV–74484, 2006 WL 1452502 (E.D.Mich. May 24, 2006).

***11** Third, as to the choice of law issue, an ERISA case requires primarily application of federal law. To be sure, Luneau asserts that community property and Louisiana law issues were presented as well as *Boggs,* the Supreme Court case originating in Louisiana, upon which Plaintiffs rely, tend to favor a transfer. Yet, on questions of law, a district court in a given state is not entitled to deference on that state's laws. *Salve Regina College v. Russell,* 499 U.S. 225, 233–34(1991).

Finally, Luneau cites to the added expense of traveling to Tennessee to defend this action given that this issue has been joined in the Louisiana state court. Specifically, Luneau states "as plaintiffs are already defending the state court action in Louisiana, it will pose no additional burden on them to pursue this matter in a Louisiana federal court, rather than one in Tennessee." (Docket Entry No. 17 at p. 12). The Court finds this argument unpersuasive for several reasons. First, any discovery in state court action can be used in this action. The Court will be sensitive to schedule conflicts. Except for trial, there is not any need for the parties to travel to this district. Upon a transfer, the Peacocks would have to travel to Louisiana. Luneau cites to PACE's vast resources as an International Union, but until trial, Luneau would not have to travel this district. Any discovery deposition could be taken by telephone. As mentioned earlier, the Funds and the Peacocks are located in Tennessee and a showing of an individual party's convenience does not warrant a transfer. *See Bacik,* 888 F.Supp at 1415. "The venue transfer provisions of Section 1404(a) is not meant to merely shift the inconvenience to the plaintiff." *Id.*

The Court concludes that Luneau has not met his burden to justify the transfer of this action to the Western District of Louisiana or to alter the Plaintiffs' choice of forum.

CONCLUSION

The Court concludes that the Peacocks' action arises under ERISA, and therefore states a claim upon which relief can be granted. The Court also concludes that the present action is not barred under the Anti–Injunction Act nor subject to abstention under Sixth Circuit precedent. This Court possesses personal jurisdiction over Luneau under ERISA's provision for nationwide service of process and Luneau's status as an American citizen. Finally, the Court concludes that the Defendant has not met his burden to warrant a transfer to the Western District of Louisiana. Accordingly, Defendant's motion to dismiss or to transfer (Docket Entry No. 16) should be denied.

An appropriate Order is filed herewith.

All Citations

Not Reported in F.Supp.2d, 2007 WL 4403689, 42 Employee Benefits Cas. 1696

Footnotes

1 Earl Luneau is acting on behalf of the Succession of Alice L. Peacock.

2 (a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan ...

3 Plaintiffs seek: (1) a declaratory judgment enforcing Plaintiffs' rights under the employee pension and 401(K) plans governed by ERISA ...; (2) a declaratory judgment of equitable relief under 29 U.S.C. § 1132(a)(3) that enjoins Defendants PACE International Union Pension Fund Plan and PACE Industry 401(K) Plan from reducing Plaintiffs' ERISA-covered employee pension and 401(K) benefits; (3) a declaratory judgment that enjoins Defendant, Succession, from claiming a share of Plaintiffs' ERISA-covered employee pension and 401(K) benefits ... (Docket Entry No. 1, Complaint at p. 4).

4 Florida law requires a prospective plaintiff to notify the prospective defendant of his/her intention to initiate a medical malpractice suit. Fla. Stat. Ann. § 766.106(2)(a).

5 (a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a).

6 (e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the ... beneficiary ... State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.

29 U.S.C. § 1132(e)(1)

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7 Plaintiffs' also argue that the second exception to the AIA applies here, but the Court need not analyze that contention because it found the first exception applies.

8 Section 1132(e)(2) states:

> Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

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2018 WL 3659067
Only the Westlaw citation is currently available.
United States District Court, N.D. Texas, Dallas Division.

SNELLING EMPLOYMENT, LLC, Plaintiff,
v.
DOC JOHNSON ENTERPRISES, Defendant.

CIVIL ACTION NO. 3:18-CV-0521-B
|
Signed 08/02/2018

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

JANE J. BOYLE, UNITED STATES DISTRICT JUDGE

***1** Before the Court is Defendant Doc Johnson Enterprises' (DJE) Motion to Dismiss, Doc. 8. For the reasons that follow, the Court **DENIES** DJE's motion.

I.

BACKGROUND [1]

This is a breach of contract case. On August 8, 2017, Plaintiff Snelling Employment LLC (Snelling) and DJE entered into an agreement whereby Snelling would "furnish [DJE] with Field Employees and [DJE] agreed to pay Snelling the contract rates for each such individual." Doc. 1, Compl., ¶ 8. Snelling is headquartered in Dallas, Texas but it provided field employees to DJE in California. *Id.* ¶¶ 1–2, 9. Snelling contends that while it has "furnished ... [the] Employees ... and ... promptly presented [DJE] with invoices for these services, [DJE] has refused to make payment to Snelling as required by the contract." *Id.* ¶ 10.

So Snelling filed suit for breach of contract. *See* Doc. 1, Compl. On April 24 2018, DJE filed a motion to dismiss for improper venue or, in the alternative, to transfer venue, Doc. 8. DJE's motion is ripe for review.

II.

LEGAL STANDARDS

A. Rule 12(b)(3) Improper Venue

A defendant may move to dismiss or transfer a case for improper venue under Federal Rule of Civil Procedure 12(b)(3). Once a defendant has objected to venue, the burden shifts to the plaintiff to establish that venue is proper. *Wolf Network, LLC, v. AML Diagnostics, Inc.,* No. 3:15-cv-3797-B, 2016 WL 1357742, at *1 (N.D. Tex. Apr. 5, 2016). [2] 28 U.S.C. § 1391 sets out three categories of proper venue

> (1) a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated; and (3) if there is no district in which an action may otherwise be brought as provided in this section, any judicial district in which any defendant is subject to the court's personal jurisdiction with respect to such action.

28 U.S.C. § 1391(b)(1)–(3). "When venue is challenged, the court must determine whether the case falls within one of the[se] three categories." *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Court for the W. Dist. of Tex.*, 571 U.S. 49, 56(2013). In making this decision, the court must accept as true all of Plaintiff's factual allegations "and resolve all factual conflicts in Plaintiff's favor." *Nuttall*, 984 F. Supp. 2d at 642. "[T]he court is permitted to look at evidence in the record beyond simply those facts alleged in the complaint and its proper attachments." *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009). If the plaintiff's choice of forum falls within one of the above categories, then venue is proper. But if it does not, then "venue is improper, and the case must be

dismissed or transferred under [28 U.S.C.] § 1406(a)." *Atl. Marine*, 571 U.S. at 56.

B. 28 U.S.C. § 1404 Transfer

***2** Even when venue is proper, a district court may transfer a civil action to another district or division if the plaintiff could have brought that action there originally and the transfer would be for "the convenience of parties and witnesses, and in the interest of justice...." 28 U.S.C. § 1404(a). The movant bears the burden of proving both elements. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314 n.10 (5th Cir. 2008) (en banc); *Calloway v. Triad Fin. Corp.*, No. 3:07-CV-1291-B, 2007 WL 4548085, at *2 (N.D. Tex. Dec. 27, 2007).

A plaintiff could have brought an action in a district or division initially if, at the time he filed the action, (i) either he or defendant resided in that district or division and (ii) both resided within the state. 28 U.S.C. § 1391(b)(1).

To demonstrate that transfer would be for "the convenience of parties and witnesses, and in the interest of justice," a movant must show good cause. *In re Volkswagen*, 545 F.3d at 315. To determine whether a movant has shown good cause, courts examine a number of private and public factors. *Id.* "The private-interest factors are: '(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive.' " *Id.* (quoting *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004)). "The public-interest factors are: '(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law.' " *Id.* No one factor is dispositive, although the most significant factor is the cost of attendance to witnesses. *Davis v. City of Fort Worth*, No. 3:14-CV-1698-D, 2014 WL 2915881, at *3 (N.D. Tex. June 25, 2014). In total, however, the balance of these factors must clearly weigh in favor of transferring to the new venue. *In re Volkswagen*, 545 F.3d at 315. "[If] the transferee forum is no more convenient than the chosen forum, the plaintiff's choice should not be disturbed." *Thomas v. City of Fort Worth*, No. 3:07-CV-1689-O, 2008 WL 4225556, at * 2 (N.D. Tex. Sept. 15, 2008); *see also In re Volkswagen*, 545 F.3d at 315.

Public and private factors aside, a court must also consider how much weight to assign a plaintiff's choice of forum. *Davis*, 2014 WL 2915881, at *2. That amount changes depending on whether a plaintiff has filed suit within its home forum. *Id.* "A plaintiff's choice is normally entitled to deference" when it files suit within its home forum. *Id.*

III.

ANALYSIS

A. Rule 12(b)(3) Improper Venue

In its complaint, Snelling claimed that venue was proper in the Northern District of Texas because "a substantial part of the events giving rise to [its] claims occurred" in this district, Doc. 1, Compl., ¶ 5, thus making venue proper under § 1391(b)(2).[3] DJE argues that none of the substantial parts of the events leading to this suit took place in this district because "the agreement between the parties was executed in California, performance took place in California, and the alleged breach involves payment owed for work performed in California." Doc. 9, Br. in Supp. of Mot. to Dismiss, 5 (hereafter "Br. in Supp."). Snelling claims that it performed its duties under the agreement in this district by paying the employees it furnished to DJE, remitting payroll taxes, and invoicing DJE from Dallas, and that the breach occurred in this district because DJE was obligated to send payment to Snelling at its Dallas headquarters. Doc. 11, Resp., 7; *id.*, Quezada Decl., ¶¶ 13–15. Snelling also claims that the agreement was negotiated in this district. *Id.*; *id.* ¶¶ 9–10. DJE contends that Snelling's performance in this district was ancillary to the underlying reason for the agreement and that the substantial part of Snelling's performance under the agreement—"locating, interviewing, documenting, and hiring of workers"—took place in California. Doc. 12, Reply, 4.

***3** "[V]enue is proper in [a] district [where a substantial part of the events took place] ... even if there are other venues where more, or even the most, substantial activities took place...." *Flu Shots of Tex., Ltd. v. Lopez*, No. 3:13-CV-144-O, 2013 WL 2449175, at *2 (N.D. Tex. June 5, 2013). To determine where a substantial part of the events in a breach-of-contract case took place, courts consider where the contract was negotiated, performed, and breached. *Wolf Network, LLC*, 2016 WL 1357742, at *2.

The Court finds that venue is proper in this district. First, the contract was negotiated in Dallas. *See* Doc. 11, Resp., 7; *id*., Quezada Decl., 9–10 (alleging that "negotiations took the form of telephone and email communications originating from Snelling's corporate office in Dallas"). Although DJE claims the agreement was negotiated in California, Doc. 12, Reply, 4, the Court must resolve all factual conflicts in Snelling's favor. *Nuttall*, 984 F. Supp. 2d at 642. Second, Snelling claims it at least partially performed the contract in Dallas. Doc. 11, Resp., 7; *id*., Quezada Decl., ¶¶ 13–15. DJE claims these actions are ancillary to performance of the contract, but courts have found similar actions sufficient to render venue proper where they were performed. *See e.g., Flu Shots of Tex., Ltd.*, 2013 WL 2449175, at *3(finding venue proper in the Northern District of Texas when "Plaintiff, who is located in the Dallas/Fort Worth area, paid for all of Defendants' supplies ... and sent invoices to Defendants from the Dallas area"). DJE provides the Court with no caselaw to contradict this finding.

The Court declines to decide whether the breach occurred in Dallas. The cases Snelling cites for the proposition that breach occurs where payment was to be sent support its position. *See Am. Gen. Life Ins. Co. v. Rasche*, 273 F.R.D. 391, 396–97 (S.D. Tex. 2011)(finding that a substantial part of the plaintiff's breach of contract claim occurred in Houston where the plaintiff claimed defendant was required but failed to send payment); *TruServ v. Neff*, 6 F. Supp. 2d 790, 792 (N.D. Ill. 1998)(holding that venue was proper in Illinois because the defendant was required to pay the plaintiff there). But other cases contradict its position and instead hold that breach occurs where the payment decision was made. *See Wolf Network, LLC*, 2016 WL 1357742, at *3 (finding that the place of breach was where the defendant refused to pay the plaintiff); *Holdridge*, 2013 WL 3213318, at *5 (finding venue improper in the Northern District of Texas where the plaintiff received payments because the decisions regarding payment were made at the defendant's offices in the Eastern District of Texas); *see also Sysinformation, Inc. v. Prof'l Healthcare Billing Servs.*, A-09-CA-619-SS, 2009 WL 4640272, at *4 (W.D. Tex. Nov. 30, 2009) (finding that although "SysInformation could argue the failure of PHBS to send payment into Texas was the omission giving rise to this claim ... mere mailing of payments is not sufficient to establish ... proper venue").

But the Court need not decide where breach occurred in this case because negotiation and at least partial performance occurred in this district, making venue proper here. *See Wolf Network*, 2016 WL 1357742, at *3 (finding venue proper in Florida where two out of three factors favored venue in Florida). So because venue is proper in this district, the Court **DENIES** DJE's 12(b)(3) motion to dismiss.

B. 28 U.S.C. § 1404 Transfer

***4** Alternatively, DJE argues the Central District of California is a more convenient forum for the resolution of this dispute and moves the Court to transfer the case to that district. *See* Doc. 8, Def.'s Mot. Dismiss 3. First, the Court will determine whether Snelling could have filed suit in the Central District of California and will then undertake the private/public factor analysis to determine whether DJE has established good cause for transfer.

1. Could Snelling Have Filed Suit In California?

Snelling could have filed suit in the Central District of California because venue is proper there under § 1391(b)(1). DJE has its principal place of business there and is therefore a resident of that district and subject to general personal jurisdiction. *See* 28 U.S.C. § 1391(b)(1), (c)(2); *Daimler AG v. Bauman*, 571 U.S. 117, 120 (2014); *Monkton Ins. Servs. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014). But Snelling chose to file suit in the Northern District of Texas instead, and because that district is Snelling's home forum, Snelling's choice is entitled to deference. *Davis*, 2014 WL 2915881, at *1.

2. The Private Interest Factors

i. Relative ease of access to sources of proof

DJE claims that "[a]ll of the records and documents (other than Plaintiff's own records) are located in California." Doc. 9, Br. in Supp., 11. Specifically, it claims that records of non-party Fairway Staffing, with whom Snelling allegedly had a sub-contractor relationship, are located in California and will be relevant to DJE's defense. Doc. 12, Reply, 6. These allegations are insufficient to persuade the Court that this factor weighs in favor of transfer. Most documents are produced in electronic format, which diminishes the importance of this factor. *Acumen Enters., Inc. v. Morgan*, No. 3:11-cv-619-L, 2011 WL 5822252, at *6 (N.D. Tex. Nov. 15, 2011). And even if DJE's proposed sources of proof are not stored electronically, it has not "presented evidence ... to demonstrate that the records are so voluminous that their production would be unduly burdensome, expensive, or inconvenient." *Id.*

ii. Availability of compulsory process to secure witnesses

DJE argues that several Snelling employees and Fairway Staffing employees are potential witnesses located in California who are not subject to this Court's subpoena power. Doc. 9, Br. in Supp., 10. Snelling contends that its potential witnesses, its former vice president of sales and operations and its former chief financial officer, are located in Dallas and not subject to the California court's subpoena power. Doc. 11, Resp., 11. Thus, neither forum would have complete subpoena power over all witnesses and "granting [the] motion would [only] serve to transfer the inconvenience from Defendants' witnesses to Plaintiff's witnesses." *Yoo v. Im*, No. 4:17-CV-00446, 2018 WL 549957, at *8 (E.D. Tex. Jan. 24, 2018). "That is insufficient to shift this factor in favor of the transferee venue." *Id.* Thus, this factor is neutral.

iii. Cost of attendance for witnesses

DJE argues that it will be significantly more expensive for it to "send a plane full of [its] witnesses to testify in Texas" than it would be for Snelling's corporate witnesses to travel to California. Doc. 9, Br. in Supp., 11. But "the party seeking transfer must specify clearly the key witnesses to be called and their location and must make a general statement of what their testimony will cover." *Magana v. Toyota Motor Corp.*, No. 3:10-cv-1451-B, 2010 WL 5108850, at *2 (N.D. Tex. Dec. 6, 2010) (internal alternations omitted). DJE claims its key witnesses are Fairway Staffing employees but does not provide "the name, address, or proposed testimony" of any Fairway Staffing employee. *See id.* Thus, this factor does not weigh in favor of transfer.

iv. All other practical problems

***5** DJE claims that its arguments regarding the location of records and potential witnesses indicate that transfer of the case will make trial "easy, expeditious, and inexpensive." Doc. 12, Reply, 7. But the Court found that the neither the location of records nor potential witnesses weighed in favor of transfer and DJE has not identified any additional practical problems. Thus, this factor does not weigh in favor of transfer.

3. The Public Interest Factors

The parties agree that because New York law applies to this case, both forums have equal familiarity with governing law and there are no conflict-of-law issues. Doc. 11, Resp., 15; Doc. 12, Reply, 8. Thus, those public-interest factors are neutral and the parties dispute only the "administrative difficulties" and "local interest" factors.

i. Administrative Difficulties

DJE claims this factor favors transfer because cases are resolved more quickly in the Central District of California than the Northern District of Texas. Doc. 9, Br. in Supp., 11–12. The most recent statistics obtained by this Court show the median time from filing to trial was 22.7 months in the Northern District of Texas and 19.2 in the Central District of California; the median time from filing to disposition is 6.7 months and 5 months, respectively.[4] Because the resolution speeds in both districts are similar, this factor is neutral. *See, e.g.*, *Smith v. Real Page, Inc.*, No. 4:18-cv-00025, 2018 WL 3105758, at *7 (E.D. Tex. June 25, 2018) (holding a 7.8 month difference as similar); *Yoo*, 2018 WL 549957, at *6 (holding a 4.1 month difference as similar).

ii. Local interest

DJE argues the local interest lies in the Central District of California because it is the "location of the operative facts and the parties involved," Doc. 9, Br. in Supp., 12, and because California has an interest in interpretation of its worker's compensation statute, which DJE asserts is central to its defense. Doc. 12, Reply, 8. Snelling contends that this district has a localized interest because Snelling is headquartered here and "operative facts of this lawsuit bear a substantial connection to this District." Doc. 11, Resp., 15.

The local interest "factor generally favors the venue where the acts giving rise to the lawsuit occurred." *Metromedia Steakhouses Co. v. BMJ Foods P.R., Inc.*, No. 3:07-CV-2024-D, 2008 WL 794533, at *3 (N.D. Tex. Mar. 26, 2008). The Court has already determined that at least some of the events giving rise to this suit occurred in Dallas. Thus, even if other acts giving rise to this suit occurred in California, this factor would be no more than neutral and would not weigh in favor of transfer.

IV.

CONCLUSION

For the reasons stated above, DJE's motion to dismiss, Doc. 8, is **DENIED**.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2018 WL 3659067

Footnotes

1 This factual history is drawn from the parties' pleadings and the parties' briefing on DJE's motion. Any disputed fact is noted as the contention of a particular party.

2 Although some courts in this circuit have held that the burden for establishing venue lies with the defendant, *see e.g.*, *Holdridge v. TricorBraun, Inc.*, No. 3:13-cv-1202-L, 2013 WL 3213318, at *3 (N.D. Tex. June 26, 3013), other courts, including this one, have consistently held that the plaintiff bears the burden, *see Nuttall v. Juarez*, 894 F. Supp. 2d 637, 642 n. 3 (N.D. Tex. 2013); *Inst. for Creation Research Graduate Sch. v. Paredes*, No. 3:09-cv-0693-B, 2009 WL 4333366, at *2 (N.D. Tex. Dec. 1, 2009).

3 The parties do not argue that venue is proper under either § 1391(b)(1) or (b)(3).

4 *See* Federal Courts Management Statistics, http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0331.2018.pdf, accessed July 6, 2018.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, *Plaintiff*, *v.* FEDERAL TRADE COMMISSION; ANDREW N. FERGUSON, in his official capacity as Chairman of the Federal Trade Commission; MARK R. MEADOR, in his official capacity as Commissioner of the Federal Trade Commission; and JOHN DOES 1–3, in their official capacities as Commissioners of the Federal Trade Commission, *Defendants*.	Case No. 26-cv-00532-JEB

PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND ANTISUIT INJUNCTION

Pursuant to Fed. R. Civ. P. 65 and Local Civil Rule 65.1, Plaintiff the World Professional Association for Transgender Health ("WPATH") respectfully moves for a temporary restraining order and an antisuit injunction barring Defendant the Federal Trade Commission ("FTC"), and others in active concert or participation therewith, from litigating the claims asserted in *FTC v. WPATH*, 4:26-cv-748-O (N.D. Tex.), except as mandatory counterclaims brought before this Court. For the reasons set forth in the accompanying memorandum of law, the Court should grant this motion for a temporary restraining order and, after hearing from both parties, further grant the motion for an antisuit injunction. A proposed order is attached hereto. WPATH respectfully requests that the Court schedule a hearing no later than July 13, 2026.

Date: June 30, 2026
Washington, D.C.

<u>/s/ Caleb Hayes-Deats</u>
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH, **Plaintiff,** **v.** **FEDERAL TRADE COMMISSION, *et al.*,** **Defendants.**	**Civil Action No. 26-532 (JEB)**

MEMORANDUM OPINION AND ORDER

When parties seek an extraordinary remedy, they must make an extraordinary showing. After expedited briefing and a hearing yesterday, the Court finds that Plaintiff World Professional Association for Transgender Health has not made that showing in its request for a Temporary Restraining Order to block the Federal Trade Commission's enforcement action in a different forum. It therefore will deny WPATH's Motion for Temporary Restraining Order.

To obtain a TRO under Federal Rule of Civil Procedure 65(b), a movant must show that (1) it "is likely to succeed on the merits"; (2) it "is likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [the movant's] favor"; and (4) such order "is in the public interest." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (standard for preliminary injunction); see also Sterling Comm. Credit — Mich., LLC v. Phoenix Indus. I, LLC, 762 F. Supp. 2d 8, 13 (D.D.C. 2011) ("same substantive standard [for preliminary injunction] . . . applies" to TRO).

Earlier this year, WPATH sued the FTC in this Court alleging that the Commission's investigative efforts violated its First Amendment rights. See ECF No. 1 (Compl.). In that challenge, this Court in May partially granted WPATH's Motion for a Preliminary Injunction halting the "implement[ation] or enforc[ement of]" the "issued CID" that the FTC had served on WPATH seeking a broad range of internal records. See ECF No. 41 (Mem. Op.) at 11. The Court held that WPATH had shown that it was likely to succeed on the merits of its claim that the FTC issued the CID in retaliation for WPATH's constitutionally protected speech and that Plaintiff faced irreparable harm without preliminary relief. Id. at 5–6, 9–10. The Court declined, however, to grant WPATH broader relief, confining its holding to the facts that gave rise to the specific CID before it. Id. at 11.

The FTC and several states then brought a separate enforcement action against WPATH in the Northern District of Texas. FTC v. WPATH, No. 26-748, ECF No. 1 (FTC Compl.) (N.D. Tex. June 17, 2026). They allege that WPATH violated the FTC Act's prohibitions on unfair or deceptive trade practices and false advertising. Id. at 111. WPATH returned to this Court and sought a TRO enjoining the FTC from pursuing its Texas litigation. See ECF No. 45 (Mot. TRO). Plaintiff contends that the FTC's suit concerns the exact same subject matter as its previously filed pre-enforcement challenge in this Court and would frustrate the pre-existing preliminary injunction. See ECF No. 45-1 (Mem. TRO) at 13, 21. It asserts that the FTC should proceed in this Court, not the Northern District of Texas, and it seeks an anti-suit injunction to that effect. Id. at 2.

One of WPATH's grounds for emergency relief is its contention that halting the FTC's progress in the Northern District of Texas is necessary to protect this Court's jurisdiction over its prior injunction. Id. at 21. The D.C. Circuit has held that anti-suit injunctions that "protect the ordering court's own jurisdiction" are more readily justified than ones whose "only purpose is to destroy" another court's jurisdiction. NextEra Energy Glob. Holdings B.V. v. Kingdom of Spain, 112 F.4th 1088, 1105 (D.C. Cir. 2024) (quotation marks omitted). Where a movant can demonstrate that an anti-suit injunction is required to preserve the court's jurisdiction, then, emergency relief might well be warranted. Id. at 1106 (such injunction warranted to prevent "interfere[nce] with the district court's jurisdiction") (quotation marks omitted).

WPATH has not demonstrated such a threat. The Court sees no potential for "frustration of the preliminary injunction [it] has already issued" from the separate Texas litigation. See Mem. TRO at 13 (quotation marks omitted). However the parties characterize the ongoing action in the Northern District of Texas, it is not an attempt to enforce the CID, which the FTC has withdrawn. See also ECF No. 43 (Not. Withdrawal). And, as discussed above, this Court's only decision was confined to the CID. WPATH points out that the FTC's Texas suit attacks certain of its statements that bear a striking resemblance to the "Covered Statements" that the CID targeted, which could open it up to discovery in Texas of the very same information. See Mem. TRO at 11–13. But the Court's injunction did not protect WPATH from complying with all information-seeking processes — only the CID that the Court held was likely retaliatory. This Court retains its ability to consider future matters raised by any party. There is thus no threat to this Court's jurisdiction from different proceedings in a different court.

WPATH's remaining justification for emergency relief halting the Texas proceedings — that the FTC's suit is duplicative of litigation in this Court, id. at 13, 15 — seeks an anti-suit injunction where no jurisdictional issues are implicated. A truly compelling showing would thus be needed to warrant this Court's disrupting proceedings in a coordinate district and doing so on an emergency basis with truncated briefing and consideration.

WPATH has not made such a showing. The Court is skeptical that either Federal Rule of Civil Procedure 13(a) — which requires that parties bring related claims as compulsory counterclaims in an initial suit — or the rationale for avoiding duplicative litigation applies to actions by the Government to enforce the law. Several courts have reasoned that a plaintiff who files a pre-enforcement challenge to stop the FTC from obtaining information cannot then force the Commission to bring later enforcement actions as compulsory counterclaims in plaintiff's chosen forum. See, e.g., FTC v. Carter, 464 F. Supp. 633, 639 (D.D.C. 1979) (FTC not required to seek to enforce subpoena "as a counterclaim to respondents' pre[-]enforcement injunctive action brought in New York"); In re FTC Corp. Patterns Rep. Litig., 432 F. Supp. 274, 283–84 (D.D.C. 1977) (expressing "hesitancy" at "treat[ing] an enforcement action as a compulsory counterclaim"); A. O. Smith v. FTC, 417 F. Supp. 1068, 1088 (D. Del. 1976) (similar); Audubon Life Ins. Co. v. FTC, 543 F. Supp. 1362, 1370 (M.D. La. 1982) (FTC Act establishes "statutory scheme" that plaintiff cannot circumvent by compelling counterclaim).

As the Court mentioned during yesterday's hearing, linking a suit by the FTC to pre-enforcement-investigation challenges risks allowing plaintiffs "to choose the forum and pace of the litigation simply by bringing pre[-]enforcement actions." In re FTC, 432 F. Supp. at 284. Courts have been hesitant to force government agencies to comply with a counterclaim requirement that would compress their investigative timelines and force hasty litigation decisions. Cf. Caleshu v. United States, 570 F.2d 711, 713–14 (8th Cir. 1978) (requiring tax-"collection action to be asserted as a compulsory counterclaim in a [taxpayer's] refund suit . . . .would drastically reduce the government's collection time period"). This Court is thus not prepared to conclude that an action that "involve[s] assertion of rights under a Congressionally mandated enforcement scheme" is akin to a private dispute between parties that should reasonably be consolidated in one forum and time. See In re FTC, 432 F. Supp. at 284. And before one court acts to terminate another's jurisdiction, it must be on sure footing indeed.

The Court's conclusion that immediate action is unwarranted is bolstered by WPATH's inability to show that it currently faces irreparable harm. A temporary restraining order "is an emergency procedure that is appropriate only when an applicant is in need [of] immediate relief." 11A Wright & Miller's Federal Practice & Procedure § 2951 (3d ed. Apr. 2026 update). The harm must be "great" in its impact and "certain" in its arrival to warrant preemptive action before a court can fully ascertain the merits of the parties' positions. Wis. Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). WPATH cites two sources of harm: violation of its First Amendment rights by the Texas litigation and monetary harm incurred by "litigating two separate cases." Mem. TRO at 23. To find the existence of the first harm, however, this Court must hold that being subject to a suit in the Northern District of Texas is itself a violation of WPATH's First Amendment rights — else no harm would flow. While WPATH hinges its argument on the Court's May decision, that holding extended only to the facts before it: the lack of justification for the sweeping CID the FTC issued to WPATH. See Mem. Op. at 7, 11. The Court was not prepared in May to prejudge every permutation of the FTC's future actions as unconstitutionally retaliatory, and its role is not to do so now. Without such a holding, WPATH is subject only to an entity's standard obligation to litigate once a government agency brings a claim against it — that is, no harm at all.

Nor does the cost of maintaining two suits warrant emergency relief. The dual litigation is undoubtedly onerous to WPATH. Preliminary relief, however, requires significant monetary loss. Clevinger v. Advoc. Holdings, Inc., 134 F.4th 1230, 1234 (D.C. Cir. 2025) ("Mere injuries . . . in terms of money, time and energy . . . are not enough.") (quotation marks omitted). "[T]he expense and disruption of defending oneself in protracted adjudicatory proceedings is not an irreparable harm." John Doe Co. v. CFPB, 849 F.3d 1129, 1135 (D.C. Cir. 2017) (quotation marks and alterations omitted) (company required to defend itself in separate enforcement action not irreparably injured). Nor has litigation in this Court progressed to the point where proceedings in Texas would constitute "a vexatious attempt to relitigate issues already decided." Am. Horse Protection Ass'n v. Lyng, 690 F. Supp. 40, 44 (D.D.C. 1988); cf. Rich v. Butowsky, 2020 WL 7016436, at *2 (D.D.C. Mar. 31, 2020) (irreparable harm where counsel is "forced to devote resources to litigating" second suit and parties had already "invested significant time and resources in advancing fact discovery" in first suit). As the Court noted during yesterday's hearing, WPATH is free to cite this Court's prior Opinion in any attempt to stave off discovery in the Texas action.

Without a showing that Plaintiff is likely to succeed on its Motion or faces irreparable harm, the Court ORDERS that WPATH's Motion for Temporary Restraining Order is DENIED.

/s/ *James E. Boasberg*
JAMES E. BOASBERG
Chief Judge

Date: July 10, 2026