UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

PROPERTIES OF THE VILLAGES, INC.,

Plaintiff,

v. Case No. 5:24-cv-316-TJC-PRL

FEDERAL TRADE COMMISSION,

Defendant.

PRELIMINARY INJUNCTION

Before the Court is Plaintiff's Motion for Stay of Effective Date and Preliminary Injunction. The Court conducted a hearing on August 13, 2024, the record of which is incorporated by reference. At the conclusion of the hearing, the Court announced its reasoning and decision on the record. The transcript of the Court's findings is attached to this Order. For the reasons stated therein,

It is hereby **ORDERED** that Plaintiff's Motion for Stay of Effective Date and Preliminary Injunction (Doc. 25) is **GRANTED** to the extent stated below.

It is further **ORDERED** that as of the date of this order, the Federal Trade Commission and its agents are **ENJOINED** from implementing or enforcing the Final Rule entitled "Non-Compete Clause Rule," 89 Fed. Reg.

38342 (May 7, 2024) against Plaintiff, Properties of the Villages, Inc., until further order of the Court. No bond is required.

DONE AND ORDERED in Jacksonville, Florida this 15th day of August, 2024.

Timothy J. Corrigan
TIMOTHY J. CORRIGAN
United States District Judge

Attachment

s.
Copies:
Counsel of record

IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

PROPERTIES OF THE VILLAGES, INC.,

Plaintiff,

vs.

FEDERAL TRADE COMMISSION,

Defendant.

Jacksonville, Florida

Case No. 5:24-cv-316-TJC-PRL

August 14, 2024

2:02 p.m.

Courtroom No. 10D

EXCERPT OF MOTION HEARING
BEFORE THE HONORABLE TIMOTHY J. CORRIGAN
UNITED STATES DISTRICT JUDGE

COURT REPORTER:

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P R O C E E D I N G S

August 14, 2024 2:02 p.m.

* * * * *

(Recess from 3:55 p.m. to 4:05 p.m.; all parties present.)

COURT SECURITY OFFICER: All rise. This Honorable Court is now in session.

Please be seated.

THE COURT: So today I've heard argument on the plaintiff Properties of the Villages, Inc.'s motion for stay of effective date and preliminary injunction.

And in the interest of time, meaning that the rule that is the subject of the motion is scheduled to take effective three weeks, I think, from today, and in the interest of giving the parties a quick answer, as opposed to waiting for a written opinion, which as you all know takes substantially longer, and given the compressed time frames that the Court was dealing with in this case, I've decided to read my decision from the bench.

What that means, of course, is that my decision, which will be captured in the transcript, will not be as polished or scholarly or complete as a published decision, but it will give my reasoning and my decision so the parties can make whatever further decisions are necessary before the final rule is scheduled to take effect.

And I'll direct the parties to the transcript of the

hearing afterwards, and the court reporter can make those arrangements, because they will capture the Court's ruling, and also can be used for any appellate purposes.

And I will try to be deliberate in my reading. I know there are some members of the press that are listening and maybe trying to capture the ruling, and so I'll try to be as deliberate as I can be.

On May 7th of 2024, the Federal Trade Commission issued a rule banning nearly all existing and future non-compete clauses, finding that non-competes are an unfair method of competition.

And, of course, that's published at 89 Federal Register 38342.

That rule is slated to take effect on September 4th of 2024, three weeks from today.

The plaintiff, Properties of the Villages, Inc., a real estate broker in The Villages whose agents are all subject to non-compete clauses, filed their complaint on June 21st, 2024 bringing four counts under the Administrative Procedure Act, 5, U.S.C., Section 706(2); the latter two counts also allege violations of the federal Constitution.

In Count I, plaintiff alleges the FTC does not have substantive rulemaking authority over unfair methods of competition.

In Count II, plaintiff alleges that even if the FTC

has substantive rulemaking authority, the new non-compete rule exceeds that authority.

In Count III, plaintiff alleges that even if the FTC has authority to make this rule, it is impermissibly retroactive.

In Count IV, plaintiff alleges the non-compete rule violates the commerce clause.

I note that the complaint does not allege that the final rule is arbitrary and capricious, as is frequently litigated in APA cases.

The Court has federal question jurisdiction, venue is proper in the Ocala Division, and plaintiff, who is subject to the ruling it is challenging, has standing to bring these claims.

On July 2nd, 2024, plaintiff filed a motion seeking to preliminarily enjoin enforcement of the new rule against it, and seeking a stay of the September 4 effective date. The FTC responded, plaintiff replied, and I allowed numerous interested parties to file amicus briefs.

In preparation for this hearing, I've read the complaint, the parties' briefs on the motion for preliminary injunction's and stay, all of the amicus briefs, the *Ryan* case out of Texas, the *ATS* case out of Pennsylvania, pertinent portions of the Federal Trade Commission Act, the FTC final rule, parts of the record of the FTC's decision-making process,

the dissents authored by two of the five commissioners, and more judicial decisions than I can count, particularly decisions from the Eleventh Circuit and the United States Supreme Court. And I've now heard helpful argument from skilled lawyers.

The questions presented are important and close. In the compressed time I've had, I've given this my best effort. I'm somewhat comforted in knowing that my decision today is likely not to be the end of it.

I'd like to start with the lens through which we're focused today. Plaintiff is seeking a preliminary injunction asking the Court to enjoin the FTC from enforcing its new non-compete rule against it. The motion also seeks a stay of the rule, set to go into effect on September 4th, 2024. The standards for both the preliminary injunction and the stay are essentially the same.

There's a Supreme Court case that says that.

I'm going to now announce the standard for preliminary injunction in the Eleventh Circuit. It's black-letter law in the Eleventh Circuit, so I'm not going to bother to cite the cases, because it will just take too long. But this is all, I think, black-letter law that can't really be disputed.

In the Eleventh Circuit a preliminary injunction is an "extraordinary remedy never awarded as of right."

"Its purpose is merely to preserve the relative positions of the parties until a trial on the merits can be held."

"A district court may grant a preliminary injunction only if the moving party establishes that, No. 1, it has a substantial likelihood of success on the merits; No. 2, it will suffer irreparable injury unless the injunction is granted; No. 3, the harm from the threatened injury outweighs the harm the injunction would cause the opposing party; and the injunction would not be adverse to the public interest."

When, as here, "the government is the opposing party," "the third and fourth factors merge."

"The district court exercises substantial discretion in weighing the four relevant factors to determine whether preliminary injunctive relief is warranted." And a "failure to show any of the four factors is fatal" to the request for a preliminary injunction.

In the Eleventh Circuit, "a preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly establishes the 'burden of persuasion' as to each of the four prerequisites. The first factor, substantial likelihood of success on the merits, is 'generally the most important of the four factors.'"

To demonstrate a "substantial likelihood of success," a party need not show "certain" success, but it must be "likely

or probable." A party must do more than show that "its theory of the case is substantial and not frivolous;" rather, it must "convince the court that its theory is likely meritorious."

Relevant to this *APA* case, the Supreme Court in the recent case of *Loper Bright Enterprises versus Raimondo*, 144 Supreme Court 2244, a 2024 case, very recent, the Supreme Court has stated in overruling *Chevron* that "courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority, as the APA requires. Careful attention to the judgment of the Executive Branch may help inform that inquiry.

And while the court "may not defer to an agency interpretation of the law simply because a statute is ambiguous," "when a particular statute delegates authority to an agency consistent with constitutional limits, courts must respect the delegation, while ensuring that the agency acts within it."

As to substantial likelihood of success on the merits, plaintiff raises issues as to each of the four counts of its complaint on its motion for preliminary injunction, but I'll discuss the issues as a whole, as opposed to going by each count.

Issue 1: Plaintiff contends that the FTC does not have substantive rulemaking authority over methods of unfair competition.

The FTC's rulemaking authority derives from 15, U.S.C., Section 45, known as Section 5, and 15, U.S.C., Section 46, known as Section 6.

In Section 5, Congress "empowered and directed" the FTC "to prevent" for-profit businesses "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

That's 15, U.S.C., Section 45(a)(2).

And in my recitation I may not always cite the specific case page number or citation, but I'm going to do the best I can, but I don't want to unduly lengthen the presentation. I think it will be obvious to the reader where I'm -- what I'm referencing.

Section 5 also include mechanisms for enforcement actions brought by the FTC to stop a violation of this rule.

And that's 15, U.S.C., Section 45(b) through (m).

Section 6, titled "Additional powers of the Commission," provides authority for the FTC to undertake various investigations, require reports of various entities, publish periodic information and reports, assist with international investigations, and, in subsection (g), Congress gave the FTC authority for "classification of corporations; regulations" -- that's the title of it -- described as the authority to "from time to time classify corporations and except as provided in section 57a(a)(2) of this title," which

addresses rulemaking with respect to unfair or deceptive acts or practices, "to make rules and regulations for the purpose of carrying out this subchapter."

And that's 46(g) or Section 6(g). And the operative language there, of course, is to make rules and regulations for the purpose of carrying out the subchapter.

The FTC's position is that given its mission in Section 5 to prevent businesses from using unfair methods of competition, combined with its authority in Section 6(g) to make rules and regulations, the FTC has the authority it needed to pass the non-compete final rule.

Plaintiff raises several points as to why the text, structure, and history of the statute fail to support this authority, and without addressing -- and without addressing every single one, I'll touch on the most significant.

Plaintiff argues that the placement of Rule 6 authority within a list of otherwise ministerial acts such as recordkeeping and publications makes it implausible to believe that Congress was granting the FTC the authority to make substantive rules as opposed to procedural rules. This is the argument about "hiding an elephant in a mousehole."

Plaintiff also contends that it defies logic to believe Congress would convey such broad authority in the single sentence of Section 6 while devoting 14 separate subsections to the FTC's rulemaking authority with regard to

unfair or deceptive acts or practices.

Plaintiff argues that Section 6(g) does not have the other indicia of being a substantive rule because it lacks procedural requirements and penalty provisions such as those that accompany the unfair or deceptive acts or practices rulemaking.

It argues that if Section 6 granted the FTC such broad rulemaking authority, Congress would not have needed to pass the 1975 Amendments, which are known as the Magnuson Moss Warranty-Federal Trade Commission Improvement Act amendments. That sets out the rulemaking procedure for unfair or deceptive acts or practices.

Plaintiff contends that the 1975 Amendment's statement that it is not disturbing "any" other authority to prescribe rules with regard to unfair methods of competition did not convey substantive rulemaking authority in Section 6(g).

Plaintiff argues that aside from FTC rulemaking in the 1960s and '70s, the FTC only has previously exercised its authority on a case-by-case basis under Section 5, and that it "strains credulity that the FTC had this immense power but declined to exercise it for 50 years."

That's a quote from the plaintiff's motion.

All of these arguments have some force, but I do not find that plaintiff presents a substantial likelihood of

success on the merits with any of them. Nothing in Section 6 says it is limiting the FTC's rulemaking to "procedural" rules.

The 1975 Amendment specifically says the FTC's rulemaking with regard to unfair methods of competition is undisturbed. And the 1980 Amendments recognize that amendments to Commission rules could have annual effects on the national economy in excess of $100,000,000.

Read together, the various components of the statute show Congress conferred at least some form of substantive rulemaking authority to the FTC with regard to unfair methods of competition.

Two circuit courts have looked at the FTC's substantive rulemaking authority and have found it resides in Section 6 as well.

In *National Petroleum v. FTC*, which I won't cite, the D.C. Circuit held that "the plain language of Section 6(g) . . . gives the Commission the authority to make rules and regulations for the purpose of carrying out the provisions Section 5" and that the Commission "is authorized to promulgate rules defining the meaning of statutory standards of illegality the Commission is empowered to prevent."

So too in the follow-on Seventh Circuit case *United States versus JS&A,* the Seventh Circuit incorporated by reference the *National Petroleum*'s decision -- the *National Petroleum*'s "lengthy discussion of the Commission's rulemaking

authority under section 6(g)," and agreed with it with approval.

And, as Judge Kelley Hodge stated in her recent *ATS* decision, Congress gave the FTC authority to "prevent" unfair methods of competition, not just go after someone who already engaged in it, and that that authority resides in Section 6(g).

Issue 2: Plaintiff argues that the new non-compete rule violates the commerce clause.

Plaintiff raises a few constitutional arguments, claiming there's no interstate commerce connection, a separation of powers concern, and the non-delegation doctrine. While again these positions are arguable, I don't find that plaintiff has demonstrated a substantial likelihood of success as to any of them as stand-alone arguments.

Issue 3: Plaintiff argues the new non-compete rule exceeds the FTC's authority.

Plaintiff also argues that not all non-competes are unfair competition, pointing to the Sherman Act; that non-competes are in the core domain of state regulation; and challenges the rule as being improperly retroactive. I'm not persuaded that the plaintiff can show a substantial likelihood of success as to any of these arguments.

That leaves us with the plaintiff's position that this new rule cannot stand because it is subject to the major questions doctrine.

If I were to stop at this point, I would conclude that the plaintiff, though making a plausible case, has not shown a substantial likelihood of success on the merits. But recent jurisprudence from the Supreme Court, in combination with the breadth and the scope of the FTC's final rule, requires me to consider the FTC's authority to issue the final rule in the context of the major questions doctrine.

In discussing these issues, I have considered, among other, these key cases: From the Supreme Court, *Biden v. Nebraska*, 143 S.Ct. 2355, a 2023 case; *West Virginia v. EPA*, 597 U.S. 697, a 2022 case; *National Federation of Independent Business v. Department of Labor*, 595 U.S. 109, a 2022 case; *Alabama Association of Realtors v. Department of Health and Human Services*, 594 U.S. 758, a 2021 case; *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, a 2014 case; *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, a 2000 case.

I've also considered some circuit authority from the Tenth Circuit, *Bradford v. Department of Labor*, 101 F.4th 707, 10th Circuit, 2024; and from the Fourth Circuit, *North Carolina Coastal Fisheries Reform Group v. Captain Gaston LLC,* 76 F.4th 291, a 4th Circuit 2023 case; and from my own circuit, the Eleventh Circuit case of *West Virginia v. U.S. Department of Treasury*, 59 F.4th 1124, 11th Circuit 2023, also touches on the major questions doctrine.

I have also considered the rule itself and the

dissenting decisions of FTC Commissioners Ferguson and Holyoak, who discuss the major questions implication of the final rule. The amicus brief of the administrative law professors also discusses the major questions doctrine, as do the parties in their brief. So I've had a lot of exposure to the rule through that reading.

Under the major questions doctrine, the Court assumes that Section 6(g) of the FTC Act grants some type of substantive rulemaking authority and that there's a plausible textual basis for it. But the question is: Does it grant the FTC the authority to issue this particular rule? Does the rule implicate a major question?

The major questions doctrine is the name recently given to a long-standing principle governing the interpretation of statutes conferring power on administrative agencies. The principle is this: When an agency claims to have the power to issue rules of "extraordinary . . . economic and political significance," it must "point to 'clear congressional authorization' for the power it claims."

The doctrine assumes, as is true here, that the FTC's reading of its authority under Section 6(g) is plausible, but requires more, given the significant consequences of the rule.

As the cases discuss, as, for example, in the *North Carolina Coastal Fisheries* case from the Fourth Circuit, the major questions doctrine may be understood in either of two

ways; first, as a clear-statement rule enforcing the constitutional prohibition on the delegation of legislative authority, thereby protecting the separation of powers.

This rule does not forbid Congress from conferring on agencies the power to make rules of vast economic and political significance; rather, to protect the separation of powers, the rule requires Congress to state its intention to confer that power clearly and unambiguously.

Second, the doctrine may be understood as the "context" against which a statutory delegation is enacted, and therefore "a tool for discerning, not departing from, the text's most natural interpretation."

And in talking about this I am borrowing language from the cases that I told you that I had read. I'm not trying to match them up particularly and cite them precisely in my reading, but I am relying on language from the Supreme Court cases.

Thus -- and so let me go back.

The doctrine may be understood as the "context" against which a statutory delegation is enacted, and therefore "a tool for discerning, not departing from, the text's most natural interpretation. Thus, common sense, informed by constitutional structure, tells us that Congress normally intends to make major policy decisions itself, not leave those decisions to agencies."

It tells us we "should 'typically greet' an agency's claim to 'extravagant statutory power' with at least some 'measure of skepticism,'" or, as the cases say, to "hesitate" before finding the agency action lawful.

To determine whether a major question is implicated, the Supreme Court looks at a number of non-exhaustive factors; first is whether the rule affects "a significant portion of the American economy."

Here, the Commission estimates that one-fifth of American workers, or approximately 30 million employees, are subject to a non-compete that would be affected by this rule.

While the FTC has tried to estimate the economic costs and benefits of the final rule, they are hard to measure with precision.

But, by one metric, the FTC estimates that employers will pay from 400 to 488 billion dollars more in wages over ten years under the rule, which, of course, might be a good thing for wage earners, but is a significant economic impact by anyone's measure.

The Commission lists other multi-billion dollar financial impacts as well.

And that is in a chart found as part of the rule at 89 Federal Register at 38470. And you heard in reference to argument today some other numbers, potentially 2.7 percent impact on business revenue. Also, the FTC has acknowledged

that the cost of compliance in the aggregate will be in the billions of dollars.

So suffice it to say that the transfer of value from employers to employees, from some competitors to other competitors, from existing companies to new companies, and other ancillary effects, will have a huge economic impact. And there is likely other economic activity attributable to the rule that the FTC has not even attempted to account for. Thus, the final rule does affect a significant portion of the American economy.

The Supreme Court also considers the political significance of the rule and whether it regulates in an area that has previously been the domain of state law, or implicates federalism concerns. Neither the FTC nor any other federal agency has previously tried to regulate non-competes in a meaningful way. However, non-competes have been the subject of substantial debate and regulation in the states, including some states which have banned them altogether.

The final rule would preempt state laws regarding non-competes to the extent that those state laws permitted them in certain circumstances.

There is a long history of both common law of contracts and increasingly a statutory overlay that regulates non-competes at the state level. Non-competes have also been the subject of political debate at the federal level with, as

we heard today, unsuccessful legislative efforts over the years to regulate non-competes.

I even read one of the FTC's commissioners who was in the majority on the final rule -- said that she was still hopeful of and working toward a legislative enactment to address non-competes.

The Tenth Circuit also observes that the major question doctrine is more likely to be implicated when the agency rule constitutes "an enormous and transformative expansion of regulatory authority," as opposed to the government's procurement authority. Of course, the final rule here is a hugely consequential expansion of regulatory authority.

Another major question factor which does favor the FTC is that, to the extent that non-competes can be categorized as "unfair method of competition," the final rule can be considered as in the "wheelhouse" of the FTC under Section 5. And the FTC Act does contemplate that large sums of money can be implicated by FTC rulemaking, as I previously adverted to.

However, on balance, given the sweep and the breadth of the final rule, including its application to existing contracts, I find it substantially likely -- and the plaintiffs have shown me this -- that it presents a major question as defined by the Supreme Court.

The next issue then is has Congress, in Section 5 and

6(g), rendered a sufficiently clear expression of legislative intent to authorize the final rule.

Section 5 is admittedly a broad grant of authority to "prevent unfair methods of competition." It does not address rulemaking at all, just case-by-case adjudication authority, however.

Section 6(g) is part of a section that deals primarily with reports and investigative powers. And even the "rules and regulations" portion of Section 6(g) has to share space with "classifying corporations," which is a more ministerial function.

That 6(g) may not be the behemoth that the Commission says it is is evidenced by the fact that the Commission has never tried substantive rulemaking of this magnitude before this and had never even brought non-compete enforcement actions until it announced some consent decrees literally the day before it announced its Notice of Proposed Rulemaking.

I think there was one back in 1963 that had something to do with non-competes, so I want to add that caveat, but I believe that was overturned by the Seventh Circuit. That's the *Snap-on* case.

So while these eleventh-hour non-compete consent decrees that the FTC talks about allows the Commission to say that "non-competes have already been subject of FTC scrutiny and enforcement actions, so subjecting them to rulemaking is a

more incremental, and thus less significant, step than it would be for an agency to wade into an area not currently subject to its enforcement authority," as the FTC says at page 38353 of the rule, given the timing of these consent decrees a day before the announcement of the proposed rulemaking, and the lack of previous enforcement efforts, this argument by the FTC carries little weight.

Indeed, "this lack of historical precedent, coupled with the breath of authority the Commission now claims, is a telling indication that the final rule extends beyond the Commission's legitimate reach," citing the *National Federation of Independent Business* cases -- case, 595 U.S., at 119-20.

Indeed, the FTC's new assertion of this expansive authority in the long-standing but relatively dormant Section 6(g) is further evidence that the final rule is not authorized.

I have considered the *National Petroleum* case, as I have said earlier, but wonder whether faced with the sweeping nature of the final rule and the Supreme Court's recent major questions jurisprudence, it would have ruled in the FTC's favor in today's case.

I've also considered the *ATS* court's view that the major questions doctrine "is not applicable."

I agree with the *ATS* court that the doctrine -- the major questions doctrine is reserved for "extraordinary" cases "in which the history and the breadth of the authority that the

agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority."

So it has to be extraordinary. You can't -- you can't have a major questions inquiry in every agency rulemaking case or every agency action. And I recognize that. It does have to be extraordinary.

And I further don't take issue with the *ATS* court's finding that the non-compete rule deals with an issue of unfair methods of competition so it operates within the FTC's "core mandate." But I disagree with the *ATS* court that the Commission has ever exercised its Section 6(g) rulemaking power in the scope and the manner that it seeks to do with the final rule.

Borrowing from Justice Barrett's concurring opinion in *Biden v. Nebraska*, if a parent gives a babysitter a credit card and says "make sure the kids have fun while we're out," the parent might expect that the babysitter would take the kids out for ice cream, but would not expect the babysitter to take the kids on an overnight trip to Las Vegas. Likewise here: Without clear Congressional permission, the final rule, the FTC's equivalent of a trip to Las Vegas, is unauthorized.

An administrative agency's power to regulate must always be grounded in a valid grant of authority from Congress.

With a rule as sweeping and consequential as this one, the Section 6 language, both by its text, placement, context, and history, falls short.

I find that the plaintiff has shown a substantial likelihood of prevailing on its claim that the final rule exceeds the FTC's authority under its organic act, as stated and alleged in Count II of plaintiff's complaint.

Of course, my ruling here is based on the law, not on the policy questions of the proper role of non-competes in the American economy, a question decidedly outside of my purview, nor does my decision on this specific rule require me to determine the parameters of the FTC's substantive rulemaking authority generally or in a different case.

For example, it's not before me as to whether a rulemaking that would bar non-competes as to hourly workers or as to a specific industry would pass muster. That's not before me. I'm only dealing with the final rule that I have in front of me.

So I now turn to the other factors to secure a preliminary injunction. First, irreparable harm.

To demonstrate irreparable harm, a party must show it will suffer injuries that are "neither remote nor speculative, but actual and imminent."

And, again, this is black-letter Eleventh Circuit law.

"An injury is irreparable only if it cannot be undone through monetary remedies."

"The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm."

The Court rejects the FTC's argument that by not filing suit and its motion immediately after the rule was passed, POV sat on its rights and forfeited any argument that the harm is irreparable. Unlike cases in which that might be true, the rule has not yet gone into effect, so POV has not allowed that to have consequence before it filed its suit and motion.

Also, the compressed period from when the final rule issued on May 7th, 2024, and its effective date of September 4th, 2024, made this timing all but inevitable.

POV has demonstrated that if the rule goes into effect against it, it will incur costs to review its existing contracts for compliance with the rule, and to strategize on how best to change their existing agreements and business models.

And I understand the objection to the affidavit that's attached to the reply. I would typically allow additional affidavit practice, because injunctions are done on affidavit and not -- we don't have evidence, so we don't have somebody able to testify and to meet other arguments.

But even if I disregard that affidavit, it just makes common sense that there are going to be costs -- and, in fact, the Commission recognized those costs in its own rulemaking. There are going to be compliance costs to change contracts, to enter into decisions on how to go forward from here, to figure out how to deal with existing contracts.

There's obviously going to be a compliance cost that are more than de minimis. And there is no readily available way to recover those monetary damages from the government should the ultimate decision be made that the rule is invalid.

There's also the business disruptions caused by having to comply with the rule while its efficacy is being litigated, which I think also feeds into a finding of irreparable harm.

So I'm going to find if the FTC is not enjoined from enforcing the new rule against POV it will suffer actual and imminent harm that cannot be undone through money damages.

And, of course, the Eleventh Circuit case that recognizes that unrecoverable monetary loss is an irreparable harm is *Georgia v. President of the United States*, 46 F.4th 1283, at 1302. That's a 2022, 11th Circuit case.

As to the final two factors needed to secure an injunction, the balance of equities and the public interest, they too favor entry of a preliminary injunction. While it is true as the FTC says that the public interest is often of

concern when the government "is enjoined by a court from effectuating statutes enacted by representatives of its people," here plaintiff has demonstrated a substantial likelihood that the government may in fact not be operating within the bounds of the statute enacted by those representatives. Also, the FTC will not be substantially harmed by the maintenance of the status quo until a final decision on the validity of the final rule is reached. These two factors -- final factors favor entry of an injunction.

Plaintiff's motion for a preliminary injunction is granted. The Court will enter a preliminary injunction prohibiting enforcement of the final rule as to the Properties of the Villages, Inc. The injunction only applies to the Properties of the Villages; the Court is not -- repeat not -- entering a stay of the final rule generally, nor is the Court entering an injunction of nationwide application. It is strictly limited to the party that's before the Court that brought the suit.

* * * * *

CERTIFICATE

UNITED STATES DISTRICT COURT)
)
MIDDLE DISTRICT OF FLORIDA)

I hereby certify that the foregoing transcript is a true and correct computer-aided transcription of my stenotype notes taken at the time and place indicated herein.

DATED this 15th day of August, 2024.

s/Shannon M. Bishop
Shannon M. Bishop, RDR, CRR, CRC

General Information

Case Name	Properties of the Villages, Inc. v. Federal Trade Commission
Court	U.S. District Court for the Middle District of Florida
Date Filed	Fri Jun 21 00:00:00 EDT 2024
Judge(s)	Timothy J. Corrigan
Federal Nature of Suit	Other Statutes - Administrative Procedure Act/Review or Appeal of Agency Decision [899]
Docket Number	5:24-cv-00316
Parties	Properties of the Villages, Inc.; The Restaurant Law Center; The National Federation of Independent Business Small Business Legal Center, Inc.; Small Business Majority; Securities Industry and Financial Markets Association; Futures Industry Association; The American Hotel & Lodging Association; National Association of Wholesaler-Distributors; Managed Funds Association; Public Citizen; United States Council for International Business; Consumer Technology Association; Federal Trade Commission; William Araiza; Jeffrey Lubbers; The International Franchise Association; Evan Starr; Associated Builders and Contractors, Inc.; Peter M. Shane; The Home Care Association of America; The National Retail Federation; Independent Electrical Contractors; American Investment Council; National Employment Law Project; Florida Employment Lawyers Association (Florida Chapter), Inc.

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