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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH

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FEDERAL TRADE COMMISSION and  
UTAH DIVISION OF CONSUMER  
PROTECTION,

Plaintiffs,

v.

ZURIXX, LLC, *et al.*

Defendants.

**STIPULATED MOTION FOR  
INITIAL SCHEDULING CONFERENCE**

Case No. 2:19-cv-00713-DAK-EJF

District Judge Dale A. Kimball  
Magistrate Judge Evelyn J. Furse

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Plaintiffs the Federal Trade Commission (“FTC”) and the Utah Division of Consumer Protection (“Division”) and the Zurixx defendants have agreed on all but one item called for by the Attorney Planning Meeting Report. The sole item on which the parties disagree is whether discovery should be stayed until the Court rules on the defendants’ Partial Motion to Dismiss

Stipulated Motion for a Scheduling Conference  
FTC v. Zurixx, LLC

(“MTD”) (ECF 62). Defendants will be filing a motion with the Court requesting that discovery be stayed pending the Court’s decision on their MTD. The plaintiffs object to postponing discovery. However, if the Court denies the forthcoming motion to stay, the parties agree to the discovery and litigation deadlines as proposed by the plaintiffs and set forth in the Stipulated Attorney Planning Meeting Report.

The respective positions of the parties on the sole discovery issue are as follows:<sup>1</sup>

Defendants’ Position: On November 1, 2019, this Court entered a Stipulated Preliminary Injunction (ECF No. 54) that shut down Zurixx and significantly restricted the conduct of the individual defendants in this case. More specifically, within hours of the Court’s entry of the Stipulated Preliminary Injunction, the Court-appointed receiver assumed exclusive control of defendant Zurixx. The receiver, in turn, ceased providing any further real estate or other education to existing Zurixx students, and ceased receiving any orders from new customers. In fact, since November 1, the receiver has been actively working to wind down the affairs of Zurixx.

Similarly, in the Stipulated Preliminary Injunction, the individual defendants in this action agreed to cease all conduct that is at issue in the Plaintiffs’ Complaint, as well as conduct that is not at issue in the Plaintiffs’ Complaint, and have been complying with those restrictions since the Stipulated Preliminary Injunction was entered. Put simply, there is no ongoing conduct warranting an accelerated resolution of this case.

Moreover, Plaintiffs in this case have already obtained, or have access to, all documents and data in Zurixx’s care, custody or control through the immediate access the Court granted in the October 1, 2019 *ex parte* Temporary Restraining Order (“TRO”) (ECF 24). Thus, there is no

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<sup>1</sup> The positions discussed below relate to discovery between the parties. The Court’s November 1, 2019 Stipulated Preliminary Injunction provides that “the parties may engage in any third party discovery authorized by the Federal Rules of Civil Procedure and the Local Rules of this District immediately . . . .” ECF No. 54 at 28.

pressing need for the parties to proceed with discovery given the volume of information that is already accessible to Plaintiffs.

Further, the individual defendants in this case agreed to the Stipulated Preliminary Injunction with the understanding that the Plaintiffs were interested in expeditiously resolving this case through settlement. Defendants made a monetary offer to the Plaintiffs on October 29, 2019. And while Plaintiffs represented that they would provide Defendants a counteroffer by Tuesday, November 26, 2019 – nine (9) days ago – no such counteroffer has been provided to the Defendants (despite Defendants’ counsel’s repeated requests for it). In all likelihood, the term of the settlement that will be in material dispute between the parties is the amount of money the individual defendants should pay. Defendants’ MTD goes directly to this issue, as it is Defendants’ position, as explained in their MTD, that the FTC lacks any authority to seek monetary relief in this case under the statutes it has invoked and the recovery available to the Division is limited. Thus, a ruling on the MTD in Defendants’ favor would likely quickly resolve the case because, again, the monetary amount of the settlement is the provision that will likely be in dispute during the settlement negotiations.

In light of the fact that a ruling in Defendants’ favor on the MTD could do away with the need for much or all discovery in this case, Defendants respectfully submit that discovery should be stayed pending a ruling on the MTD. In all events, in light of the fact that the company is shut down, the individual defendants are already significantly restricted by the Stipulated Preliminary Injunction, and the Plaintiffs have access to all of Zurixx’s documents and data, moving forward with discovery at this time would be wasteful of the parties’ and the Court’s resources. Defendants will be more fully addressing the need for a stay in this case in their forthcoming motion to stay.

Plaintiffs’ Position: It is the Plaintiffs’ position that discovery between the parties should commence without delay. First, Defendants do not attack the FTC’s authority to obtain

injunctive relief under Section 5(a) of the FTC Act or under the Consumer Review Fairness Act. The authority to seek injunctive relief is not at issue in the MTD. Yet Defendants seek to postpone all discovery between the parties until the MTD is ruled upon. As the authority of the FTC to seek injunctive relief is not at issue and discovery would be substantially the same whether or not Defendants' MTD were granted, there is no basis for postponing discovery with respect to the counts I-IV (the FTC counts). Second, the partial MTD argues, contrary to Tenth Circuit precedent, that the FTC lacks authority to obtain equitable monetary relief under Section 13(b) of the FTC Act. The Tenth Circuit has rejected this argument<sup>2</sup> and District Courts are bound to follow Tenth Circuit precedent.<sup>3</sup> As the Tenth Circuit has already held that the FTC has authority to seek equitable monetary relief, Defendants' argument on this point is without any merit and certainly is no basis for a blanket stay on all discovery between the parties. Third, there is no reason to postpone discovery under the BODA and USCPA counts (Counts V-IX) as Defendants' recognize that the Division may seek injunctive and monetary relief for Utah consumers. Fourth, while the Plaintiffs' did download some of Defendants' servers and copied some of Defendants' paper documents, as authorized by the Court's Temporary Restraining Order (ECF 24), that is not a basis for postponing all written and deposition discovery of Defendants and their employees. Fifth, even if the Court granted all the relief sought in

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<sup>2</sup> *FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202 n. 6 (10<sup>th</sup> Cir. 2005) ("Although § 13(b) does not expressly authorize a court to grant consumer redress (i.e. refund, restitution, rescission, or other equitable monetary relief), § 13(b)'s grant of authority to provide injunctive relief carries with it the full range of equitable remedies, including the power to grant consumer redress."); *FTC v. Loanpoint, LLC*, 525 F. App'x 696, 699 (10<sup>th</sup> Cir. 2013) (unpublished) ("... a district court's authority to award disgorgement under § 13(b) falls within its general equitable jurisdiction to 'decide all relevant matters in dispute and to award complete relief.').

<sup>3</sup> *United States v. Spedalieri*, 910 F.2d 707, 709 & n.2 (10<sup>th</sup> Cir. 1990) ("A district court must follow the precedent of this circuit, regardless of its views concerning the advantages of the precedent of our sister circuits.").

Defendants' MTD, discovery would then commence on the injunctive issues and issues related to Utah consumers.

Respectfully submitted,

Collot Guerard

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Amanda Grier

Attorneys for the Plaintiff

Federal Trade Commission

Date: December 5, 2019

Robert Wing

*(with permission)*

Robert Wing

Thomas Melton

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Utah Division of Consumer Protection

Date: December 5, 2019

Leonard L. Gordon

*(with permission)*

Leonard Gordon

Attorney for the Defendants

Zurixx, LLC et al.

Date: December 5, 2019

Benjamin Hathaway

*(with permission)*

Benjamin Hathaway

Attorney for the Defendants

Zurixx, LLC et al.

Date: December 5, 2019

**CERTIFICATE OF SERVICE**

I hereby certify that on December 5, 2019, I electronically filed the foregoing **STIPULATED MOTION FOR INITIAL SCHEDULING CONFERENCE** with the Clerk of Court using CM/ECF, which will send a notice of electronic filing to counsel of record.

/s/ Collot Guerard

Collot Guerard

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FOR THE DISTRICT OF UTAH

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FEDERAL TRADE COMMISSION and  
UTAH DIVISION OF CONSUMER  
PROTECTION,

Plaintiffs,

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ZURIXX, LLC, *et al.*

Defendants.

**[PROPOSED] ORDER FOR A  
SCHEDULING CONFERENCE**

Case No. 2:19-cv-00713-DAK-EJF

District Judge Dale A. Kimball  
Magistrate Judge Evelyn J. Furse

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Plaintiffs the Federal Trade Commission (“FTC”) and the Utah Division of Consumer Protection (“Division”) and the Zurixx defendants have jointly filed a Stipulated Motion for a Scheduling Conference.

IT IS HEREBY ORDERED that an initial scheduling conference is set for \_\_\_\_\_, 2019, at \_\_\_\_\_. The parties may appear by telephone.

**SO ORDERED** this \_\_\_\_ day of 2019.

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Honorable Evelyn J. Furse  
United States Magistrate Judge