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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.

**PLAINTIFFS' MOTION FOR  
CLARIFICATION OF MAGISTRATE  
JUDGE'S ORAL RULING ON THIRD  
PARTY DISCOVERY**

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

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

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Plaintiffs Federal Trade Commission ("FTC") and Utah Division of Consumer Protection  
("Division") respectfully move for clarification of Magistrate Judge Furse's January 9, 2020 oral

ruling limiting third party discovery to document discovery until she rules on Defendants' Motion to Stay Discovery [ECF 70]. Plaintiffs ask for clarification that Magistrate Judge Furse did not intend to rule in a manner that is inconsistent with Judge Kimball's November 1, 2019 Preliminary Injunction, which allows all forms of third party discovery to commence immediately [ECF 54 at 28].<sup>1</sup>

1. On January 9, 2020, the parties appeared before Magistrate Judge Furse to argue defendants' Motion to Stay Discovery pending the outcome of the defendants' Partial Motion to Dismiss. [ECF 70].<sup>2</sup> Defendants' reply brief in support of the stay motion [ECF 90] argued, for the first time, that a case that is to be argued in March before the Supreme Court, involving Security and Exchange Commission law, was further grounds for a stay of discovery.<sup>3</sup> Defendants also argued that several FTC cases in which petitions for certiorari were pending also supported a stay.<sup>4</sup>

2. Defendants argued that the Supreme Court's ruling in the SEC case and action on the pending petitions for certiorari in two FTC cases would likely dispose of the legal issue in defendants' Partial Motion to Dismiss. The legal issue in defendants' Partial Motion to Dismiss is whether Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes the FTC to seek,

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<sup>1</sup> Consistent with Judge Kimball's order, the parties agreed, in the Attorney Planning Report, that third party discovery should commence immediately. [ECF 66, n. 1].

<sup>2</sup> Defendants' Partial Motion to Dismiss and related briefs are at ECF 72, 84, and 86. The Court has set a hearing on defendants' motion for February 12. [ECF 88].

<sup>3</sup> The case is *SEC v. Liu*, 754 F. App'x 505 (9<sup>th</sup> Cir. 2018), *cert. granted*, 205 L. Ed. 2d 265 (U.S. Nov. 1, 2019) (No. 18-1501).

<sup>4</sup> Defendants' reply refers to two cases where petitions for certiorari are pending: 1) *AMG Capital Management v. FTC*, No. 19-508, *petition for cert. filed* (U.S. Oct. 18, 2019) in which defendants seek review of an opinion from the 9<sup>th</sup> Circuit, and 2) *FTC v. Credit Bureau Center, LLC, petition for cert filed* (U.S. Dec. 19, 2019) (No. 19-825) in which the FTC seeks a review of an opinion from the 7<sup>th</sup> Circuit.

and the Court to order, injunctive relief encompasses the authority for the FTC to seek, and the Court to order, equitable monetary relief. Numerous courts, including the Tenth Circuit, have so held.<sup>5</sup>

3. Magistrate Judge Furse stated that she would not rule from the bench on the Motion to Stay. The FTC asked for leave to file a supplemental brief in support of its opposition to defendants' stay motion in order to show why the ruling in the SEC case and speculative action in the two FTC cases were unlikely to effect the need for factual discovery in this case. The Court granted the request.<sup>6</sup>

4. The FTC sought to confirm that notwithstanding the additional briefing, third party discovery could continue as previously agreed to by all parties. After asking for defendants' position, Magistrate Judge Furse ruled from the bench that only third party document discovery could proceed until a ruling on Defendants' stay motion.

5. Plaintiffs are concerned that Magistrate Judge Furse may not have been aware of the provision in the Stipulated Preliminary Injunction signed by Judge Kimball that allows third party discovery to proceed immediately.

6. Defendants' pending stay motion and Magistrate Judge Furse's oral ruling allowing only third party document discovery to proceed is prejudicing plaintiffs and creating undue delay in this case. Among other things, it inhibits plaintiffs' ability to: conduct discovery of individuals and entities that participated in, or received funds stemming from, the unlawful

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<sup>5</sup> *FTC v. Freecom Commc'ns*, 401, F.3d 1192, n. 6 (10<sup>th</sup> Cir. 2005); *FTC v. LoanPointe, LLC*, 525 F. App'x 696, 699 (10<sup>th</sup> Cir. 2013) (unpublished).

<sup>6</sup> The plaintiffs' brief in further support of their opposition to defendants' Partial Motion to Stay is due January 23 and defendants' response is due February 3. ECF 95.

conduct at issue in this case; monitor compliance with the Stipulated Preliminary Injunction; and obtain testimony that will inform plaintiffs' counsel's recommendation to the Commission and the Division regarding amending the Complaint in this matter.

7. Plaintiffs sought, via email to defense counsel, defendants' position on this Motion for Clarification. Defense counsel stated that Defendants do not consent to the relief sought herein.

In view of the above and the applicable language in the Stipulated Preliminary Injunction entered by the Judge Kimball, plaintiffs respectfully request clarification that the parties are permitted to engage in third party discovery, including depositions and document requests.

Date: January 16, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 16, 2020, I electronically filed the foregoing **PLAINTIFFS' MOTION FOR CLARIFICATION OF MAGISTRATE'S ORAL RULING ON THIRD PARTY DISCOVERY THAT IS INCONSISTENT WITH STIPUTLED PRELMINARY INJUNCTION SIGNED BY THE COURT** 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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FEDERAL TRADE COMMISSION and  
UTAH DIVISION OF CONSUMER  
PROTECTION,

Plaintiffs,

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ZURIXX, LLC, *et al.*,

Defendants.

**[PROPOSED] ORDER GRANTING  
PLAINTIFFS' MOTION FOR  
CLARIFICATION REGARDING  
THIRD PARTY DISCOVERY**

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

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

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Plaintiffs Federal Trade Commission ("FTC") and Utah Division of Consumer Protection  
("Division") have moved the Court to clarify that they may take third party discovery both by

document requests and by deposition. [ECF 96]. The Zurixx defendants oppose the motion. Having considered the parties' positions, and good cause appearing, the Court GRANTS the Motion. Accordingly, the parties may engage in third party discovery by document requests and by deposition.

DATED this \_\_\_\_ day of \_\_\_\_\_, 2020

BY THE COURT

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The Honorable Evelyn J. Furse  
U.S. Magistrate Judge