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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FEDERAL TRADE COMMISSION and
UTAH DIVISION OF CONSUMER
PROTECTION,

Plaintiffs,

v.

ZURIXX, LLC, *et al.*,

Defendants.

**PLAINTIFFS' SUPPLEMENTAL BRIEF
IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANTS'
MOTION TO STAY DISCOVERY**

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

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

The Court has before it defendants' Motion to Stay Discovery Pending Outcome of Motion to Dismiss ("Stay Motion").¹ In their reply brief, defendants shifted their request from "stay discovery pending the outcome of their Motion to Dismiss" (ECF 70 at 1), to stay discovery pending the Supreme Court's determination of whether Section 13(b) of the Federal Trade Commission ("FTC") Act authorizes the FTC to seek equitable monetary relief (ECF 90 at 2).² Defendants argued for the first time on reply that *SEC v. Liu*, 754 F. App'x 505 (9th Cir. 2018), *cert. granted*, 205 L. Ed. 2d 265 (U.S. Nov. 1, 2019) (No. 18-1501), which involves a challenge to the SEC's ability to seek disgorgement under SEC law, might provide guidance on this issue. They also argued that a stay of discovery is supported by two FTC cases in which petitions for *certiorari* are pending, *FTC v. AMG Capital Mgmt., LLC*, 910 F.3d 417 (9th Cir. 2018) (S.Ct. No. 19-508) and *FTC v. Credit Bureau Center, LLC*, 937 F.3d 764 (7th Cir. 2019) (S.Ct. No. 19-825). At the motion hearing, the Court allowed the parties additional briefing to address defendants' new argument.

While the parties can only speculate whether and when the Supreme Court might modify the FTC's ability to obtain equitable monetary relief, it is undisputed that even a decision about the SEC's disgorgement power, which may or may not be relevant, is many months away. This litigation commenced almost four months ago, but discovery is still on hold. Plaintiffs seek to

¹ The relevant briefs include: Defendants' Motion to Stay Discovery Pending Outcome of Motion to Dismiss (ECF 70), Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Stay Discovery (ECF 84), Defendants' Reply in Further Support of Their Motion to Stay Pending Outcome of Motion to Dismiss (ECF 90).

² Defendants' Partial Motion to Dismiss and related briefs are at ECF 72, 84, 86, and 89. The Court has set a hearing on defendants' motion for February 12. ECF 88.

conduct discovery to advance a just and efficient resolution, and to mitigate the risk of loss of memory, evidence, and assets. Defendants seek to delay. For the reasons stated in plaintiffs' opposition brief and here, defendants' request should be denied.

I. SPECULATIONS ARE NOT PROPER GROUNDS FOR A STAY.

Defendants seek a stay because the Supreme Court might grant *certiorari* in *FTC v. AMG Capital Mgmt* and *FTC v. Credit Bureau Center*. Such speculations cannot properly support a stay of discovery. A court in the District of Maryland recently denied a motion for a stay that presented the same arguments that defendants advance in their reply brief. *See In re Sanctuary Belize Litigation*, No. 18-cv-03309-PJM (D. Md. Nov. 21, 2019) (ECF No. 709). The Maryland court declined to engage in “speculation whether the Supreme Court will grant a writ of *certiorari* and eventually overturn years of precedent, including currently binding precedent in the Fourth Circuit, with respect to the legality of a remedy not yet ordered....” *Id.* at 2.³

Defendants' argument involving *SEC v. Liu* is also improperly speculative. The sole question in *Liu* is whether noncompensatory disgorgement is a remedy available under SEC law. The FTC's authority to seek equitable consumer redress, the monetary remedy sought in this case, is not at issue in *Liu*. Thus, the ruling in *Liu* may not have any impact on the FTC's ability

³ Binding Tenth Circuit law conforms with Fourth Circuit law on this issue. *See FTC v. Freecom Communications, Inc.*, 401 F.3d 1192, 1202, n. 6 (10th Cir. 2005), a position reaffirmed in *FTC v. LoanPointe, LLC*, 525 F. App'x 696 (10th Cir. 2013) (unpublished). In addition, Judge Shelby recently denied a motion to dismiss based on a similar argument regarding Section 13(b) in a similar real estate investment case. *FTC v. Nudge, LLC, et al.*, --- F. Supp.3d ---, 2019 WL 7398678 at * 4-6, No. 2:19-CV-00867 (December 31, 2019).

to pursue consumer redress, even if the Supreme Court decides against the SEC.⁴

II. DISCOVERY IS NECESSARY IRRESPECTIVE OF ANY SPECULATIVE SUPREME COURT RULING ON MONETARY RELIEF.

Even if the Supreme Court at some point rules in a manner that affects the FTC's ability to pursue consumer redress, such a ruling will likely have minimal effect on discovery in this case. Plaintiffs will still need to conduct virtually the same factual discovery at that future point, as they need to pursue now in order to prove their case and obtain an appropriate injunction.

Plaintiffs set forth the factual issues on which they seek discovery in the Attorney Planning Report (ECF 66 at pp. 6-7). Those include, among others, the role of the individual and corporate defendants in the Zurixx business, the role of potential individual and corporate defendants, the nature and extent of compliance efforts, the extent and nature of defendants' business operations and activities, the extent to which defendants collected or otherwise obtained information about consumer financial success, and defendants' efforts to make disclosures to prospective or actual purchasers. Other factual issues regarding law violations on which plaintiffs seek discovery include:

- evidence relevant to defendants' violations of the Telemarketing Sales Act and Telemarketing Sales Rule;
- the guidelines Zurixx provided to the presenters at the free events and workshops, and to its telemarketers, regarding the representations they could not make; and

⁴ The reasons why *Liu* raises issues that are "distinct" from those in the FTC Act cases in which petitions for *certiorari* have been filed are discussed in the FTC's petition for *certiorari* in the *Credit Bureau* case. The FTC petition is an attachment to Zurixx's Reply in Further Support of Their Motion to Stay Pending Outcome of Motion to Dismiss, ECF 90 -2 at 22-24 (Petition for a Writ of *Certiorari*, *FTC v. Credit Bureau Center, LLC*, No. 19-825 (Dec. 19, 2019)).

- the monitoring, if any, Zurixx did of the presenters at the free events and workshops and of its telemarketers.

In addition to the discovery plaintiffs need to prove law violations, plaintiffs need discovery of defendants' defenses. Defendants contest plaintiffs' factual allegations, and advance their own claims in the Attorney Planning Report. (ECF 66, pp. 3-5). For instance, defendants claim there is no evidence of widespread deception; they claim the surveys show consumers are happy with the training; they claim they vet the instructors, coaches, and trainers; they claim they participate in a self-regulatory group; and they claim that the FTC's expert opinion is based on the wrong data.

And even assuming the Supreme Court, at some point, rules that Section 13(b) does not authorize the FTC to obtain equitable monetary relief, there still needs to be discovery on the extent of consumer injury for two reasons. First, the Division seeks fines against defendants for violations of the UCSPA, Utah Code §§ 13-11-1 *et seq.* Complaint, ECF No. 1 at p. 36 at ¶ D. The extent of consumer injury is also a relevant statutory factor in determining fine amounts for UCSPA violations. *See* Utah Code §§ 13-11-17(6). The UCSPA lists several factors to determine fines, including "(a) the seriousness, nature, circumstances, extent, and persistence of the conduct constituting the violation; [and] (b) the harm to other persons resulting either directly or indirectly from the violation." Utah Code §§ 13-11-17(6)(a) & (b).

In addition, the UCSPA provides for restitution for victims. Utah Code § 13-11-17(c). The Division's discovery and proof under the UCSPA related to restitution would overlap completely with the FTC's discovery related to restitution. Defendants have not argued that the Division's UCSPA claim might be affected by the Supreme Court's decision in *Liu*. Because the

Division undoubtedly should be allowed to proceed with its discovery and proof on restitution, it would be inefficient to stay the FTC's discovery on this point.

Second, the scope and extent of consumer injury are relevant to plaintiffs' claims: the scale and severity of consumer injury is a factor that Courts may consider in assessing the proper breadth of an injunction. *See Telebrands Corp. v. FTC*, 457 F.3d 354, 358-359 (4th Cir. 2006) (noting that courts consider "the seriousness and deliberateness of the violation" in assessing the appropriateness of "fencing in" provisions designed to prevent illegal conduct); *FTC v. John Beck Amazing Profits, LLC*, 888 F. Supp. 2d 1006, 1015 (C.D. Cal. 2012), *aff'd*, 644 Fed. App. 709 (9th Cir. 2016) (unpublished) (finding the scope of a permanent injunction that banned sellers of real estate investment products from telemarketing and making infomercials justified, in part, because the "amount of consumer injury is massive, involving an estimated loss of nearly \$500 million dollars and almost one million customers.").

Thus, defendants' suggestion that a stay may obviate the need for substantial discovery and make the case more efficient is incorrect. A stay will simply delay the time when the Court resolves defendants' liability for law violations. *White Knuckle*, 2015 WL 5022579, at *3 (D. Utah Aug. 24, 2015) (internal quotes omitted) ("staying discovery ... may only serve to slow down litigation and delay the case's resolution.").

Courts have denied stays in cases where further litigation was necessary, despite the potential impact of a pending appellate case. In *Southern Utah Wilderness Alliance v. Schneider*, for instance, Judge Kimball denied a stay even though a pending Tenth Circuit appeal "will provide guidance" on the issues but "will not resolve" them. No. 12-cv-257, 2016 WL 323624, at *1 (D. Utah Jan. 26, 2016). *Cf. Alzheimer's Inst. v. Comentis, Inc.*, No. 99-cv-1366, 2010 WL

11508734, at *2 (W.D. Okla. Dec. 17, 2010) (denying stay where movant failed to show that “most or all” of the claims would be dismissed as a result of a pending Federal Circuit appeal). Likewise, in *Klaver Construction Co. v. Kansas Dept. of Transp.*, the Supreme Court had granted *certiorari* in a case that could impact some of the plaintiffs’ claims. The district court denied the defendants’ motion for a stay, noting that some of the issues “would remain unresolved even after a Supreme Court decision” and that the decision “will not eliminate the need for discovery.” No. 99-cv-2510, 2001 WL 1000679, at *3 (D. Kan. Aug. 23, 2001).

III. A STAY OF DISCOVERY IS NOT IN THE PUBLIC INTEREST; IT PREJUDICES PLAINTIFFS AND THE PUBLIC BY DELAYING THE ULTIMATE RESOLUTION OF THIS CASE AND INCREASING THE COSTS OF THE RECEIVERSHIP.

A stay of discovery is against the public interest and will prejudice plaintiffs by further delaying depositions of witnesses, including defendants and their employees, thereby allowing memories to fade and persons who have moved more difficult to locate. Moreover, the longer discovery is postponed, the longer this case will drag on, and thus the greater the costs to the receivership, diminishing the Court’s ability to issue an permanent injunction to protect consumer and redress consumer victims.

IV. CONCLUSION

Because defendants’ Stay Motion improperly relies on speculations that, even if they materialize at some point, are unlikely to effect the scope of discovery in this matter, plaintiffs respectfully request the Court to deny the motion.

Respectfully submitted,

Date: January 23, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 23, 2020, I electronically filed the foregoing **PLAINTIFFS' SUPPLEMENTAL BRIEF IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY DISCOVERY** with the Clerk of Court using CM/ECF, which will send a notice of electronic filing to counsel of record.

/s/ Collot Guerard
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